

Issues: Group II Written Notice (failure to follow instructions), Group III Written Notice (gross mismanagement), Termination, Retaliation and Discrimination; Hearing Date: 03/17/11; Decision Issued: 06/15/11; Agency: SBE; AHO: Carl Wilson Schmidt, Esq.; Case No. 9518, 9519; Outcome: Partial Relief; **Administrative Review:** **AHO Reconsideration Request received 06/30/11; Reconsideration Decision issued 08/08/11; Outcome: Original decision affirmed; Administrative Review:** **EDR Ruling Request received 06/30/11; EDR Ruling No. 2011-3027, 2012-3061 issued 08/29/11; Outcome: AHO's decision affirmed; Administrative Review:** **DHRM Ruling Request received 06/30/11; DHRM Ruling issued 09/06/11; Outcome: AHO's decision affirmed; Judicial Review: Appeal to the Richmond City Circuit Court in October 2011 [CL11-4437]; Circuit Court Ruling issued 11/03/11. Outcome: Hearing Officer's decision affirmed.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9518 / 9519

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| Hearing Dates: | March 17, 2011 March 29, 2011 April 4, 2011 |
| Decision Issued: | June 15, 2011 |

PROCEDURAL HISTORY

On August 11, 2010, Grievant was issued a Group II Written Notice of disciplinary action with removal for neglecting to remove the security access rights of a former employee. Also on August 11, 2010, Grievant was issued a Group III Written Notice of disciplinary action with removal for failing to ensure the timely and proper filing of financial status reports required for the retention of federal grant monies.

On September 10, 2010, Grievant timely filed grievances to challenge the Agency's actions. The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and he requested a hearing. On January 28, 2011, the EDR Director issued Ruling No. 2011-2886, 2011-2887 consolidating the two grievances for a single hearing. On February 8, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the timeframe for issuing a decision in this case due to the unavailability of a party. On March 17, 2011, the first day of the hearing was held at the Agency's office. On March 29, 2011, the second day of the hearing was held. On April 4, 2011, the parties submitted written closing arguments.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee

ISSUES

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

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. The burden of proof is on Grievant to show by a preponderance of the evidence that the Agency retaliated and discriminated against him. 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 State Board of Elections employed Grievant as the Business Manager. He had been employed by the Agency for approximately 24 years and served as business manager for the Agency for approximately 15 years prior to his removal effective August 11, 2010.

Grievant had prior active disciplinary action. On July 28, 2009, Grievant received a Group II Written Notice for neglect of duty. On November 20, 2009, Grievant received an annual performance evaluation with an overall rating of "Marginal Contributor". His performance in prior years was otherwise satisfactory to the Agency.

In September 2007, the Secretary began working as the Agency Head. She had approximately 28 people under her supervision. She left the Agency on January 31, 2011.

In 2006, Grievant reported to be Director for Administration who reported to the Former Secretary. Ms. ML¹ and Ms. M reported to Grievant. In 2008, Grievant reported directly to the Secretary. She considered Grievant to be her Chief Financial Officer. Ms. W was in charge of Procurement and reported to Grievant. Ms. J was hired in 2008² to be the Fiscal Officer and reported to Grievant. Ms. M was the Fiscal Tech and reported to Grievant.

In 2002, the purpose of Grievant's position was:

The business manager is the primary administrator for fiscal, accounting, and business management support to the agency's service area activities and administrative activities in delivery of effective, efficient, and quality customer service to agency's clients, customers, and constituents. This position also leads in establishing agency's strategic planning and performance objectives and metrics. Serves as a lead in analyzing operating methods with a focus on improving efficiencies and agency operations by reviewing, evaluating, and analyzing business processes. Provides essential financial and budget related information useful in the agency's decision-making process. Prepares operations and procedures manuals to assist management in operating more efficiently and effectively. Perform, evaluate, and manage financial activities involving public assets and resources in accordance with professional standards and State and federal standards. Employee performs the full range of fiscal or evaluation duties associated with specialized areas such as accounting, budgeting, grants administration and auditing. Typical duties may include, but are not limited to, strategic planning; risk evaluation and financial analysis; forecasting; accounts reconciliation and cash management.³

Reportline

The Department of Accounts has a database entitled Reportline. Information in this database includes employee home addresses, home phone numbers, payroll data, leave used data, and other confidential information. Each participating agency has a Reportline security officer who is responsible for adding and removing Agency Reportline users.

¹ Ms. ML was a Certified Public Accountant.

² The Fiscal Officer position remained open for over a year due to an Agency hiring freeze.

³ Agency Exhibit 20.

On September 9, 2004, Grievant submitted a request form to the Department of Accounts to become the Agency Security Officer. The level of security he requested was "All reports for system".⁴ On September 13, 2004, the Electronic Publishing Manager of the Department of Accounts sent Grievant a memo stating, "You are activated in Reportline as the Agency Security Officer for Agency 132."⁵

On September 14, 2004, Grievant submitted a Reportline Request Form to the Department of Accounts asking that a new account for Ms. W⁶ be created as an Agency User with the level of security of "All reports for system".⁷

On April 27, 2005, Grievant submitted a report to the Department of Accounts as the CIPPS Security Officer.

The April 25, 2007 version of the Reportline Security Officer Manual states, "Each agency is required to identify one or more Reportline Security Officers. The Reportline Security Officer is responsible for adding, deleting, and modifying Individual User security profiles."

The Agency has an Information Security Officer.⁸ This position is different from the Agency's Security Officer for Reportline.

On March 23, 2010, Grievant completed security awareness training and received a Certification of Information Security Awareness Training. Grievant signed the certificate acknowledging:

I acknowledge that the State Board of Elections has sensitive information resources and that it is my responsibility to help protect those resources. I have completed the FY 2010 Security Awareness Training requirement as instructed by the agency's Information Security Officer.⁹

Ms. W worked for the Agency until April 22, 2010 when she was placed on pre-layoff leave and then laid off on May 7, 2010. Ms. W had a Reportline account. Under her access privileges, she had the authority to not only access her own personal information but also the benefits, payroll, healthcare, leave, and retirement information for all Agency employees.

On May 17, 2010, Grievant accessed his Reportline account.

⁴ Agency Exhibit 6.

⁵ Agency Exhibit 6.

⁶ At that time, Ms. W was known by her former name, Ms. A.

⁷ Agency Exhibit 7.

⁸ The Information Security Officer began working for the Agency in January 2010.

⁹ Agency Exhibit 10.

In July 2010, Ms. M was on leave from the Agency. On July 6, 2010, the Information Services Manager sent Ms. M a leave slip form to enable her to submit requests for leave. To complete the form, Ms. M had to write her employee identification number. Ms. M. did not know her employee identification number so she accessed the Reportline account of Ms. W to obtain that information. On July 7, 2010, Ms. W's Reportline account was accessed by Ms. M. The Secretary asked Mr. D to determine how the account was accessed. He determined that the source of the breach was from a computer located on the same block where Ms. M lived. The Department of Accounts could not determine which reports were accessed by Ms. M.

On July 29, 2010, the Fiscal Officer informed the Secretary that Ms. W's Reportline account had been accessed on July 7, 2010. When the Secretary learned of the security breach, she notified Mr. R, the Electronic Publishing Manager of the Department of Accounts to remove immediately Ms. W's access to the system. On July 30, 2010, the Secretary learned that Ms. W had a second Reportline account under a previous name. Ms. W last accessed that second account on February 22, 2004. That account was also closed.

On August 4, 2010, the Secretary sent employees an email with the subject "Required Notification of Security Breach Affecting Your Personal Information." The Secretary wrote, "a former employee's account was used to access a SBE physical database containing sensitive personal information." Ms. M received the Secretary's email and replied to all recipients of that email and stated:

A Security Breach was not affected. After reviewing the e-mail message below from [Information Services Manager] on July 6, 2010 the account was access to retrieve my employee's identification number so that I could included on the Leave Activity Form that was delivered on July 9, 2010. The database is simply a report and no Social Security numbers were listed. ***¹⁰

The Agency took no disciplinary action against Ms. M for accessing the Reportline using another employee's account.

Election Assistance for Individuals with Disabilities Grant

One of Grievant's Core Responsibilities in his Employee Work Profile was Grant Administration. Grievant was expected to serve:

as lead in grant administration to include but not limited to ensuring compliance with federal grant administrative requirements; compliance with federal cost principles; compliance with federal program requirements. Interpret and implement federal grant administrative procedures as outlined in applicable OMB circulars.

¹⁰ Grievant Exhibit 23.

On July 7, 2003, the Former Secretary of the Agency submitted an Application for Federal Assistance to obtain \$297,522 of federal funding under the Election Assistance for Individuals with Disabilities (EAID or VAID) project. The start date of the proposed project was September 1, 2003. The ending date for the proposed project was August 31, 2006.

The grant was from the Department of Health and Human Services (DHHS) through the Administration of Children and Families (ACF). In order to receive the grant, the Agency had to comply with several reporting requirements. One of those requirements was to submit on a quarterly basis a PSC-272 report to the Division of Payment Management of DHHS. The PSC-272 report was also known as the Federal Cash Transaction Report.

The grant awarded from the Administration of Children and Families dated September 1, 2003 stated:

With the acceptance of this award, you agree to be responsible for limiting the draw of funds to the actual time of disbursement and to submitting timely reports as required. Further, you agree that when these funds are advanced to secondary recipients, you will be responsible for effectively controlling their use of cash in compliance with Federal requirements. Federal funds to meet current disbursing needs may be drawn through Smartlink. Withdrawals of funds are not to exceed the total grant award shown above under provisions of Treasury Circular No. 1075. Failure to adhere to these requirements may cause the suspension of grant funds. Payments under this award will be made available to grantees through HHS Payment Management System. PMS is administered by the Division of Payment Management.¹¹

One of the grant terms and conditions was "Failure to submit reports (i.e., financial, program, or other required reports) on time may be basis for withholding financial payments, suspension or termination." Another term and condition was, "Drawdown of funds from Payment Management system – In accordance with Public Law 101 – 510, grant funds must be drawn down within 5 years from the year in which the funds were awarded".

The Chief of the Governmental & Tribal Payment Branch sent Grievant a letter dated March 11, 2005 regarding a Division of Payment Management and explaining the PSC-272 reporting process. The letter states:

Grant recipients access the PMS through the Smartlink system for requesting funds and through the Electronic 272 system for reporting disbursements. To continue to receive cash advances, grant recipients ... are required to report quarterly the amount of expense paid out and charged to their Federal grant. As a user of the PMS, you will be able to

¹¹ Agency Exhibit 19.

access the Electronic 272 to report disbursements through DPM Home Page.

Grievant received an email with a letter attached from the Division of Payment Management on March 11, 2005 informing him of his user name and temporary password so he could use the Smartlink system. He also received a PIN and password for the Federal Cash Transaction Report PSC 272.

On April 5, 2005, Grievant notified the Division of Payment Management to change their contact information from Grievant to Ms. ML. Grievant wrote¹²:

This memo is to request that [Ms. ML] be added as one of the individuals responsible for drawing down funds associated with the Election Assistance for Individuals with Disabilities (EAID) grant program for the Virginia State Board of Elections [Ms. ML] was recently hired as our agency's fiscal officer. As fiscal officer, she will be primarily responsible for the draw-downs as well as reporting requirements. *** As business manager of SBE, I, [Grievant] will serve as a backup for [Ms. ML].¹³

The Agency drew down the entire award in two Payment Management System advances made on April 15, 2005 and June 8, 2006.

Ms. ML was responsible for filing the Cash Transaction Report for 2005 and 2006 but she did not do so. Prior to leaving the Agency in June 2006, Ms. ML informed Grievant that the EAID Grant had been fully extended and closed out.¹⁴

On September 30, 2008, the five-year grant period and the deadline for the Agency to submit the PSC-272 report ended.

On April 13, 2009, Grievant learned that the Agency had not timely submitted reports for the EAID grant.

On July 9, 2009, Mr. L, an employee of the granting agency, the Administration for Children and Families notified the Fiscal Officer that the Agency needed to repay the funds to the Division of Payment Management, the payment office.

On July 21, 2009, the Fiscal Officer repaid DHHS \$234,119 for the EAID grant. Grievant instructed the Fiscal Officer to repay the funds. Grievant did not inform or seek approval from the Secretary prior to having the Fiscal Officer repay the funds. Because the grant money had already been spent, the Agency had to reimburse the federal government using other State dollars.

¹² Grievant denied writing the document, but the weight of the evidence supports the conclusion that Grievant was the document's author.

¹³ Agency Exhibit 24.

¹⁴ On June 5, 2006, the Former Secretary made and Agency Hiring Request to fill the position of Physical Officer vacated by Ms. ML on June 18, 2006.

On July 23, 2009, the Agency filed a PSC-272 report with DHHS.

Grievant made several requests to have the money restored. On August 28, 2009, Mr. L of the Administration for Children and Families informed Grievant "I am sorry but I cannot restore these funds to the state."

In September 2009, Agency managers received a budget report for August 2009. The report showed that the Agency expended \$234,119 for "Out of State Political Entities." On September 3, 2009, the Deputy Secretary asked Grievant "a few questions regarding dramatic changes in the budget". Grievant replied "This is a non-recurring refund to the fed government for monies received in 2003 for disabled voters."¹⁵ The Secretary testified that she called Grievant regarding the expenditure and based on that conversation believed that the monies were being paid from another federal grant. She did not realize the money was being paid from the Agency's general fund.

On October 13, 2009, the Secretary sent Grievant an email stating:

I was just told that SBE recently returned nearly \$300,000 of ADA funds because we did not fill out financial reports in time. Is this true?¹⁶

On November 5, 2009, the Secretary was notified by the Division of State Internal Audit that the Division was investigating the refund of EAID funds to the federal government. She initiated an internal investigation.

On November 17, 2009, the Secretary received a memorandum from the State Internal Auditor indicating there had been an anonymous complaint to the State Employee Fraud, Waste, and Abuse Hotline alleging that Grievant did not ensure that financial status reports for the EAID were timely submitted and consequently the Agency had to refund the federal government over \$200,000.

On November 17, 2009, the State Internal Auditor sent the Secretary a memorandum stating:

We recently conducted a special review, based on a call to the State Employee Fraud, Waste, and Abuse Hotline, of an allegation involving the State Board of Elections (SBE). The caller alleged that Business Manager [Grievant] did not ensure that financial status reports for a federal grant were submitted timely, which led to the SBE having to refund to the federal government over \$200,000.

¹⁵ Grievant Exhibit 11.

¹⁶ Grievant Exhibit 14.

[Grievant] told us that financial status reports (FSRs) were not submitted timely for the 2003 US Department of Health and Human Services (DHHS) grant titled Voting Access for Individuals with Disabilities (VAID)¹⁷, with a grant period of September 1, 2003 – September 30, 2008. FSRs are required to be submitted to the granting agency within 90 days of the date of each annual reporting period. He stated that the SBE did not have a Fiscal Officer and did not have an Accessibility Coordinator for a portion of the five years of the grant period, and the administrative requirements of the grant were neglected. After a new Fiscal Officer was hired, she reported prior years' expenditures but the reporting occurred after the grant period ended. We reviewed the Commonwealth Accounting and Reporting System (CARS) and found that of the grant total of \$297,522, the SBE repaid the DHHS \$234,119.49 on July 21, 2009. In addition, for our review of e-mail correspondence on September 2, 2009 between [Grievant] and [Mr. L], DHHS, the SBE may need to repay the remaining \$63,402.51.

We reviewed e-mail correspondence, from July 22, 2009 through September 2, 2009, between [Grievant] and the DHHS and found that he was seeking to get the federal government to return the 2003 grant funds to the SBE. We also found that he was aware that the SBE had not been reporting the FSRs timely since April 13, 2009.

Conclusion

The allegation is partly substantiated. The SBE repaid the DHHS \$234,119.49 because the agency had not reported the grant expenditures to the DHHS within 90 days of the end of the final reporting period (September 30, 2008) for the 2003 VAID Grant, although required to do so. In addition, the SBE may be responsible for paying back the remaining amount (\$63,402.51) of the 2003 grant monies.

It appears that the agency complied with the reporting requirements for the period of September 1, 2004 – August 31, 2005 and should not have had to return the \$124,169. Furthermore, although the FSR for the period of September 1, 2003 – August 31, 2004 was filed late, the \$450 was properly accounted for prior to the 5 year grant expiration date and should not have had to be returned either.¹⁸

In response to the November 17, 2009 Memorandum from the State Internal Water, the Secretary sent a memorandum dated December 18, 2009 stating,

¹⁷ VAID is also referred to as EAID.

¹⁸ Agency Exhibit 15.

As a result of SBE's internal investigation, we believe that the factual situation is different from what is described in your November 17 memorandum. I will explain the factual situation as we see it and then, in that light, address the finding of fact contained in your memorandum and the actions we have taken, plan to take, and are contemplating taking in light of your report and in your investigation.

SBE Internal Investigation

Your memorandum bases the finding of fact on financial status reports (referred to as FSRs in the memorandum) that were not the reports in question. The memorandum states, "[Grievant] told us that financial status reports (FSRs) were not submitted timely" The memorandum then goes on to document certain FSRs submitted for the 2003 VA EAID grants and bases conclusions and recommendations on this documentation. I believe that there was confusion as to which reports were involved in this issue and the required reports that were missed which triggered the reduction in our funding for this grant.

There are two types of financial reports that must be filed for these grants. The first of these are Financial Status Reports or SF269 reports. As I understand it, Financial Status Reports or reports due to the granting agency, Administration for Children and Families (AFC), an agency of the Department of Health and Human Services. Simply put, SF269 reports document to the granting agency that the grant recipient is spending money in accordance with the specifications of the award.

The second of the two financial reports are PSC 272 reports. These reports are used to report disbursements of funds from the Department of Payment Management (DPM). As documented by e-mails, phone conversations, and additional grant documents, it was the untimely filing of the PSC 272 reports that triggered the problem. SBE drew down the funds but did not file any of the required PSC 272 reports in the required time frame. Because of this inaction, SBE had already drawn down the funds we had to pay back DPM to bring our ledger back in balance to account for the decrease in funding. It is this funding that SBE has been trying to restore.

These PSC 272 reports were never filed for any grant award until several months after the 03 VA EAID PSC 272 deadline of September 30, 2008. It is the PSC 272 reports, not the FSRs, that were filed late and triggered the subsequent fiscal problems. This is an important distinction as I address your memorandum. Because the November 17 memorandum is based on FSRs and not PSC 272 reports, it is difficult to address the audit report in the usual manner. In its place I submit the following based on the objectives of our investigation:

Objective 1: Determine what happened and to ensure no other money is in danger

Beginning with Federal FY03, SBE has been awarded grant money through the Help America Vote Act (HAVA) program known as Election Assistants to Individuals with Disabilities (EAID). Each yearly grant has been approximately between \$200,000 and \$300,000. Each grant has a five year limitation on the funds. So, for example, the FY03 grant must be spent by the close of FY08. The funds were drawn down from federal payment management system (PMS) within the allowed timeframe and spent appropriately, as evidenced by the FRS reports that are documented in the November 17 memorandum. However, the PSC 272 reports that are mentioned above were not submitted to the Federal Government by the September 30, 2008 deadline.

When [Fiscal Officer], a new hire, attempted to draw down EAID money from PMS in April 2009, she was not able due to a restriction on the SBE account. Upon investigation, the SBE Fiscal Office learned that the SBE ledger had been debited \$234,119.49 in October 2008, because no PSC 272 reports had been filed within five years of receiving the FY03 EAID funds. Because of the laws governing federal grants, PMS is programmed to assume that SBE had not drawn down the funds because no PSC 272 report had been filed. However, because SBE had drawn down the funds, the SBE ledger balance in PMS was now incorrect. Before SBE could continue to draw down EAID funds, we had to make the ledger balance in PMS correct by submitting payment to the federal government in the amount of \$234,119.49 out of our General Fund and did so in August 2009.

Since becoming aware of the problem, I have emphasized with staff the importance of finding a way to have the funds returned to SBE. From the same email correspondence referenced in the November 17 memorandum we have found that [Grievant] has been attempting to have the funds restored. However, some of his actions have troubled me. In July 2009, when [Fiscal Officer] informed him that SBE needed to repay the funds before being allowed to draw down any additional EAID money, [Grievant] told her to process the payment from the HAVA account to avoid having to use general funds. [Fiscal Officer] was uncomfortable with repaying Federal funds with other federal funds and expressed her discomfort with [Grievant]. When [Grievant] insisted, [Fiscal Officer] approached the Department of Accounts and DOA explained to her and to [Grievant] that his action was not allowed. [Grievant] has told me that he still believes that DOA is wrong. I am concerned because this is an example of [Grievant's] ignorance of federal grants laws and guidelines.¹⁹

¹⁹ Agency Exhibit 17.

On January 26, 2010, the State Internal Auditor²⁰ issued a report indicating that

The reason the SBE was required to reimburse the DHHS was because of the PSE 272 form (Federal Cash Transaction Report) was submitted to the Department of Payment Management after the required deadline of September 30, 2008. We verified that the PSC 272 form was not submitted until July 23, 2009 and that it in fact was the report that caused the SBE to have to repay the \$234,119.49.

The allegation is substantiated. The SBE repaid the DHHS \$234,119.49 because the agency had not filed the required paperwork for the grant expenditures from the 2003 VAID Grant before the end of the reporting period on September 30, 2008, although required to do so. As the Business Manager, [Grievant] was ultimately responsible for ensuring that the required paperwork for the 2003 VAID Grant was submitted timely.

Furthermore, management should consider taking disciplinary action in accordance with the DHRM Standards of Conduct against [Grievant] for not ensuring that the required paperwork for the 2003 VAID Grant was timely submitted.²¹

Retaliation and Discrimination Claims.

On December 17, 2009, several employees within the Agency organized a luncheon on the same day of the Agency's holiday breakfast. Nearly all of the employees invited to attend the luncheon were African American. The Secretary received a complaint from an African American employee regarding the appearance created by the luncheon. The Secretary became concerned that by excluding non-African Americans, the employees attending the luncheon could be perceived as creating a hostile work environment for non-African Americans. She began asking employees who attended the luncheon about the details regarding who was invited to attend. At least one non-African American had been invited to attend the luncheon and had actually attended it.

On November 2, 2009, the Secretary signed a contract with Mr. S authorizing his company to provide and perform certain services for the Agency, primarily involving the VERIS database²². Prior to that time, Vendor Q perform those services as optional services within a contract that Vendor Q had already entered into with the Agency. In

²⁰ Staff of the State Internal Auditor did not re-interview Grievant prior to issuing the second report.

²¹ Agency Exhibit 18.

²² VERIS is a voter registration database.

addition, because the Agency had not yet hired an IT Director, the Agency amended the November 2, contract on November 15, 2009 so that Mr. S would provide technical research, troubleshooting, and repair services for the Agency's entire network and server equipment and other duties normally assigned to an IT Director. Under the contract, Mr. S was to be paid \$85 per hour for up to 40 hours per week with a total compensation up to \$176,800 in one year. The term of the contract was from November 1, 2009 through November 3, 2010 unless terminated by either party in writing following 30 days notice. The contract was not solicited to other vendors and was not approved as a sole source purchased by the VITA.

On November 15, 2009, Ms. W called the State Employee Fraud, Waste, and Abuse Hotline and alleged that the Agency had not properly solicited a vendor. Grievant sent emails to staff of the State Internal Auditor as part of the investigation. On March 8, 2010, the State Internal Auditor sent a memorandum to the Secretary of Administration concluding that the allegation regarding the contract with Mr. S was substantiated. The State Internal Auditor concluded that the Secretary likely violated the Virginia Public Procurement Act and that it was unlikely that the contract would have qualified as a sole source procurement. The Agency disputed the State Internal Auditor's conclusion.

On April 22, 2010, the Agency placed Ms. W on layoff status and transferred her duties to the Department of General Services. In May 2009, the Secretary began discussions with staff at the Department of General Services regarding the benefits of transferring Ms. W's duties to DGS rather than having them performed within the Agency.

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."²³ 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."

Group II Written Notice - Reportline

Grievant became the Agency Security Officer for the Agency's Reportline database on September 13, 2004. He was not relieved of that responsibility prior to his removal. As Reportline Security Officer, Grievant was responsible for removing Ms. W's excess to Reportline shortly after she left the Agency on April 22, 2010. Grievant failed to remove Mr. W's account which enabled another employee to gain access to confidential Agency information. Grievant's failure to do so constituted inadequate or unsatisfactory job performance, a Group I offense.

²³ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

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...”²⁴ 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.

The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice of disciplinary action for inadequate or unsatisfactory work performance, but has not presented sufficient evidence to support the issuance of a Group II Written Notice. Mitigating circumstances exist to reduce further the disciplinary action. The Agency took disciplinary action against Grievant for failing to remove Ms. W’s account from Reportline but took no action against Ms. M who actually created the security breach. The Agency has inconsistently applied disciplinary action by taking action against Grievant but not taking disciplinary action against Ms. M. It is unreasonable for the Agency to take disciplinary action against an employee whose inattentiveness caused a security breach while forgoing disciplinary action against an employee who actively caused the breach. The Group II Written Notice must be reversed.

The Secretary testified that Ms. M did not admit to accessing Ms. W’s account. It is not difficult for one to infer from Ms. M’s response to the Secretary’s email regarding a security breach, that Ms. M was the person who caused the breach. Even if that email was not sufficient for the Agency to conclude that Ms. M caused the breach, it was more than sufficient to justify an Agency investigation to ask Ms. M whether she was the one who caused a security breach. Instead, the Agency took no action.

Group III Written Notice - EAID

The Agency contends that Grievant engaged in misconduct because he failed to submit PSC 272 reports on a timely basis under the federal grant. The Agency drew down its entire EAID grant into advances made on April 15, 2005 and June 8, 2006 while Ms. ML was employed by the Agency. Ms. ML was the individual responsible for submitting these forms on a quarterly basis until she left the agency in 2006. Grievant was unaware that she had failed to submit the appropriate forms to the federal government as required by the grant.²⁵ Ms. ML’s position remained vacant for more

²⁴ Va. Code § 2.2-3005.

²⁵ Ms. ML informed Grievant that the monies had been spent and the grant closeout before she left the Agency. No credible evidence was presented to show that Grievant should have doubted her assertion.

than approximately a year. No additional monies were expended under the grant after Ms. ML left the agency. The Agency did not notify Grievant that he was obligated to perform all of the duties of Ms. ML until a replacement was selected and that he was obligated to verify that Ms. ML performed all over duties during her tenure with the Agency.

Ms. ML was the person responsible for filing the required PSC 272 forms, not Grievant. Although Grievant supervised Ms. ML, his status as a supervisor does not mean that he may be disciplined automatically for her failures. The Agency's failure to file PSC 272 forms is not a basis to take disciplinary action against Grievant.

On April 13, 2009, Grievant knew that the Agency was obligated to restore \$234,119.49 of EAID funds to the federal government. He subsequently learned that the federal government would not return the money. Grievant knew that the Agency would have to remove money from its General Fund to repay the federal government. \$234,119.49 is a significant amount of money that Grievant knew or should have known to report to the Secretary who was ultimately responsible for Agency budgetary decisions. When the Deputy Secretary questioned Grievant about the expenditure and other expenditures, Grievant responded but did not fully disclose the nature of the transaction. The Secretary learned of the matter in October 2009, more than five months after Grievant first learned of the problem. By failing to timely inform the Secretary, Grievant denied her the opportunity to make decisions regarding which planned or actual Agency expenditures would be reduced in order to pay the money to the federal government.

Grievant's failure to timely and fully inform the Secretary that the Agency was obligated to restore over \$234,000 to the federal government constitutes inadequate or unsatisfactory job performance, a Group I offense. Attachment A of the Standards of Conduct provides, "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." In this case, there exists a basis to elevate the Group I offense to a Group II offense. The Agency is a relatively small agency with only 28 employees. Losing \$234,000 from its General Fund budget was a materially adverse impact. The Secretary was denied the opportunity to properly manage the Agency's finances. In essence, Grievant usurped part of the Secretary's role as Agency Head.

The Group III Written Notice of disciplinary action must be reduced to a Group II Written Notice of disciplinary action. Under the standards set forth in the *Rules*, Grievant has not presented sufficient evidence to support a further reduction of the disciplinary action to a level below that of a Group II Written Notice.

Upon the accumulation of a second active Group II Written Notice, an agency may remove an employee. Grievant had a prior active Group II Written Notice. With the Group II Written Notice arising as part of this grievance, Grievant has two active Group II Written Notices. Accordingly, the Agency's decision to remove Grievant must be upheld.

Grievant argued that the Group III Written Notice should be dismissed because the Agency failed to timely issue disciplinary action. Grievant argued that the events giving rise to the disciplinary action occurred approximately seven years before the disciplinary action was taken.²⁶

The Standards of Conduct encourages agencies to take disciplinary action as soon as possible; however, it does not establish a specific time period in which agencies must act in order to have their discipline upheld. Although it appears that the Agency took disciplinary action within a reasonable time after learning of Grievant's behavior, if the Hearing Officer assumes for the sake of argument that the Agency was slow to take disciplinary action, the outcome of this case does not change. There is no basis to reverse disciplinary action simply because an agency was slow to take disciplinary action.

Grievant argued that the Agency denied him procedural due process by relying on the second report of the State Internal Auditor even though Grievant had not been re-interviewed prior to the issuance of that report. Grievant's argument fails. To the extent Grievant was unable to explain facts supporting his decision-making to the State Internal Auditor, Grievant was able to present those facts to the Hearing Officer during the hearing.

Retaliation

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;²⁷ (2) suffered a materially adverse action²⁸; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a

²⁶ It is not clear that Grievant's argument remains relevant. The Hearing Officer agrees with Grievant that it was Ms. ML who should have filed the PSC 272 forms. The Hearing Officer is upholding the Agency's discipline based on Grievant's behavior in April 2009, not several years earlier.

²⁷ See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

²⁸ On July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, the EDR Director adopted the "materially adverse" standard for qualification decisions based on retaliation. A materially adverse action is an action which well might have dissuaded a reasonable worker from engaging in a protected activity.

causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.²⁹

Grievant engaged in protective activity. He filed a grievance against the Agency in 2003. He sent emails to and spoke with staff of the State Internal Auditor in response to the Auditor's investigation of several hotline calls. Grievant suffered a materially adverse action because he received disciplinary action. Grievant has not established a connection between his protective activity and the materially adverse action he suffered. The evidence showed that the Agency was motivated to take disciplinary action against Grievant because it believed he had engaged in inappropriate behavior. In particular, the Agency responded to the recommendation of the State Internal Auditor who recommended that disciplinary action be taken against Grievant with respect to the EAID refund. The Secretary denied taking action against Grievant in order to retaliate against him. Her testimony was credible.

Grievant argued that the Secretary retaliated against him because he opposed a contract she caused the Agency to enter into with Mr. S without following a competitive procurement process. Ms. W told the Secretary that the contract with Mr. S was improper and that the Agency should not enter into the contract. When the Secretary insisted that she would enter into the contract with Mr. S, Ms. W told the Secretary that Ms. W would file a Hotline complaint with the State Internal Auditor. Although Ms. W was in Grievant's office when she called the Hotline, Grievant did not call the Hotline. Grievant did not tell the Secretary that he had called the Hotline. The State Internal Auditor concluded that the Agency violated State procurement regulations. In essence, the State Internal Auditor affirmed Ms. W's and Grievant's opinions of the inappropriateness of the contract.³⁰ Based on the evidence presented, the most logical conclusion is that the Secretary believed that Ms. W reported her to the Hotline and not that Grievant had done so.³¹ Although Grievant expressed his opinion regarding the contract, the Secretary was only aware that Ms. W filed a complaint.

Racial Discrimination

Grievant argued that the Agency discriminated against him based on his race, as an African American. Grievant argued that since 2006, the Agency has removed four African American managers because of their race. The evidence showed that one of

²⁹ This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

³⁰ The Agency disputes the finding of the State Internal Auditor. Whether the Agency violated procurement laws is not significant with respect to this grievance. It is the filing of a complaint against the Agency that is significant as protected activity.

³¹ Ms. W's position with the Agency was eliminated and her duties moved to the Department of General Services. The Agency argued the Secretary was in discussions with the Department of General Services in May 2009 well before Ms. W disclosed her objections to the contract with Mr. S. Although Ms. W's removal is consistent with the Secretary retaliating against Ms. W and suggests the Secretary may be capable of retaliation against Grievant, the evidence remains insufficient for the Hearing Officer to conclude that the Secretary took disciplinary action against Grievant, in part, for the purpose of retaliating against him.

those managers left the Agency voluntarily to assume another position. The other managers left based on their work performance or in response to the Agency's objective to streamline agency operations. The Agency also removed several white managers because of their work performance. There is no basis to conclude that the Agency removed employees based on their race.

Grievant argued that the Agency's discrimination based on race is revealed, in part, by the Agency's reaction to a luncheon held in late 2009. Grievant asserted that the Secretary began questioning employees who attended the luncheon about who was in attendance and how attendees were selected. Grievant was the only manager invited to the luncheon. He argued that the Secretary did not investigate white only functions. Grievant's argument fails. The Secretary's response does not indicate racial bias on her part. It indicates the opposite. She received a complaint from an African American employee that the luncheon might be perceived as creating a racially hostile work environment for individuals not invited to the luncheon. Her concern was based on the objective of avoiding the appearance of a segregated workplace. No credible evidence was presented to show that the Secretary knew of and tolerated gatherings limited to white employees.

Grievant argued that the Secretary's bias against African Americans was revealed during a meeting in which several interns were introduced to Agency employees. The Secretary announced that the interns were her slaves. Several of the interns were African American. Some of the interns were paid and some were unpaid. The Secretary intended her comment to be a joke. Shortly after hearing the Secretary's comment, an employee informed the Secretary that her comment was racially offensive. The Secretary apologized to the group.

Referring to anyone working for a State agency as a slave is inappropriate and offensive behavior. The fact that the Secretary intended her comment to be a joke, does not excuse her poor judgment. The Secretary called approximately a dozen interns slaves. Of those interns, approximately one third were African American. Because two thirds of the people the Secretary referred to were not African American, it appears the most likely motivation for the Secretary's comment was that she was referring to entry level employees who would be subject to the command of senior employees and would be poorly paid or not paid at all. It does not appear that the Secretary intended to distinguish the interns based on their race even though her comment reflected poor judgment and a lack of sensitivity.

Grievant argued that the Secretary acted inappropriately to retrieve State equipment in the possession of Ms. M. Whether the Agency acted appropriately may be subject to a difference of opinion, but the Agency's actions were not based on racial bias.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **rescinded**. The Agency's issuance to the Grievance of a Group III Written Notice is **reduced** to a Group II Written Notice.

Grievant's removal is **upheld** based on the accumulation of disciplinary action. Grievant's request for relief from retaliation and discrimination is denied.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

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

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Director
Department of Employment Dispute Resolution
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.³²

³² Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 9518 9519-R

Reconsideration Decision Issued: August 8, 2011

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it “newly discovered.” Rather, the party must show that:

(1) the evidence is newly discovered since the date of the Hearing Decision; (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

1. Grievant contends that the Hearing Officer erred in issuing Group notices.

The Agency’s Written Notice describes Grievant’s behavior to include, unsatisfactory performance, failure to follow instructions and/or policy, and insubordination. Unsatisfactory performance is a Group I offense. Failure to follow instructions and/or policy and insubordination are Group II offenses. The Agency elevated these offenses to a Group III offense because of “gross negligence”, “serious nature of this mismanagement, and “egregious nature” of Grievant’s behavior. The Written Notice specifies that Grievant’s behavior “is further magnified by your failure to report this matter and its consequences to me, as agency head when you were first made aware of the situation.”

The Hearing Officer upheld the Agency's allegation that Grievant engaged in unsatisfactory performance because he failed to report the matter to the Agency Head when he was first made aware of the situation. The Agency presented sufficient evidence to support its decision to elevate Grievant's behavior to a Group II offense because Grievant's behavior had a materially adverse impact on the Agency.³³ In particular, the amount of the money lost had a materially adverse impact on the agency. The Deputy Director testified that the amount of money lost was one of the justifications for the Agency's assertion that Grievant's behavior was "gross" negligence.³⁴

2. Grievant argues that the Hearing Officer ignored a pertinent part of the Secretary's testimony.

The Hearing Officer considered all of the Secretary's testimony. The disciplinary action presented to the Hearing Officer for consideration was a removal from employment. What action the Agency would have taken had it been able to foresee the Hearing Officer's Hearing Decision is speculative. The Agency presented sufficient evidence to support the issuance of disciplinary action that justified its decision to remove Grievant from employment.

3. Grievant argues that he was denied procedural due process because the "usurpation" issue was never raised by the former Secretary in the Written Notice, he was never put on notice that it was or even could be a ground for disciplinary action, and he was not prepared to address the issue in any shape or form at the hearing.

The Written Notice informed Grievant that he was being disciplined for failing to report the financial loss to the Agency Head when he was first made aware of the situation. The Hearing Officer's language that, "[i]n essence, Grievant usurped part of the Secretary's role as Agency Head" described the consequences of Grievant's behavior for which he was being disciplined, and did not create a separate or new basis for disciplinary action. If the Hearing Officer were to remove such language from the Hearing Decision, the outcome of this case would remain the same.

4. Grievant argues that the Hearing Officer ignored evidence consistent with retaliation.

The Hearing Officer considered all of the evidence presented during the hearing. The weight of the evidence showed that the Secretary did not retaliate against Grievant.

5. Grievant argues that the finding of usurpation was an *ex post facto* application of Agency policy contrary to Grievant's due process rights.

³³ The Hearing Officer did not elevate the disciplinary action as part of the process of determining the existence of mitigating or aggravating circumstances. Agencies have the authority to elevate disciplinary action under the Standards of Conduct.

³⁴ The Hearing Officer did not conclude that Grievant's engaged in gross negligence even though the amount of money lost was material.

The Hearing Officer's language that, "[i]n essence, Grievant usurped part of the Secretary's role as Agency Head" described the consequences of Grievant's behavior for which he was being disciplined, and did not create a separate or new basis for disciplinary action. Grievant was not disciplined for violating a policy enacted by the Agency in October 2009.³⁵

The request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, the request for reconsideration is **denied**.

APPEAL RIGHTS

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

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

Judicial Review of Final Hearing Decision

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

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

³⁵ Indeed, if the Agency had presented a written policy in effect at the time of Grievant's failure to inform the Secretary, the Agency would have presented a basis to issue a Group II Written Notice for failure to follow policy instead of a Group I Written Notice for inadequate or unsatisfactory job performance. The question would have become whether the Agency presented sufficient evidence to elevate the Group II Written Notice to a Group III Written Notice as permitted under the Standards of Conduct.

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT
In the Matter of the
State Board of Elections

September 6, 2011

The grievant, through his representative, has requested an administrative review of the hearing officer's decision in Case No. 9518/9519. The grievant is challenging the decision because he believes the hearing decision is inconsistent with policy. For the reasons stated below, we will not interfere with the application of this decision with respect to this decision. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has directed that I conduct this administrative review.

In his PROCEDURAL HISTORY, the hearing officer, in relevant part, stated the following: *

On August 11, 2010, Grievant was issued a Group II Written Notice of disciplinary action with removal for neglecting to remove the security access rights of a former employee. Also on August 11, 2010, Grievant was issued a Group III Written Notice of disciplinary action with removal for failing to ensure the timely and proper filing of financial status reports required for the retention of federal grant monies.

In his FINDINGS OF FACT, the hearing officer, in relevant part, stated the following:

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

The State Board of Elections employed Grievant as the Business Manager. He had been employed by the Agency for approximately 24 years and served as business manager for the Agency for approximately 15 years prior to his removal effective August 11, 2010.

Grievant had prior active disciplinary action. On July 28, 2009, Grievant received a Group II Written Notice for neglect of duty. On November 20, 2009, Grievant received an annual performance evaluation with an overall rating of "Marginal Contributor". His performance in prior years was otherwise satisfactory to the Agency.

In September 2007, the Secretary began working as the Agency Head. She had approximately 28 people under her supervision. She left the Agency on January 31, 2011.

In 2006, Grievant reported to be Director for Administration who reported to the Former Secretary. Ms. ML and Ms. M reported to Grievant. In 2008, Grievant reported directly to the Secretary. She considered Grievant to be her Chief Financial Officer. Ms. W was in charge of Procurement and reported to Grievant. Ms. J was hired in 2008 to be the Fiscal Officer and reported to Grievant. Ms. M was the Fiscal Tech and reported to Grievant.

In 2002, the purpose of Grievant's position was:

The business manager is the primary administrator for fiscal, accounting, and business management support to the agency's service area activities and administrative activities in delivery of effective, efficient, and quality customer service to agency's clients, customers, and constituents. This position also leads in establishing agency's strategic planning and performance objectives and metrics. Serves as a lead in analyzing operating methods with a focus on improving efficiencies and agency operations by reviewing, evaluating, and analyzing business processes. Provides essential financial and budget related information useful in the agency's decision-making process." Prepares operations and procedures manuals to assist management in operating more efficiently and effectively. Perform, evaluate, and manage financial activities involving public assets and resources in accordance with professional standards and State and federal standards. Employee performs the full range of fiscal or evaluation duties associated with specialized areas such as accounting, budgeting, grants administration and auditing. Typical duties may include, but are not limited to, strategic planning; risk evaluation and financial analysis; forecasting; accounts reconciliation and cash management.

Reportline

The Department of Accounts has a database entitled Reportline. Information in this database includes employee home addresses, home phone numbers, payroll data, leave used data, and other confidential information. Each participating agency has a Reportline security officer who is responsible for adding and removing Agency Reportline users.

On September 9, 2004, Grievant submitted a request form to the Department of Accounts to become the Agency Security Officer. The level of security he requested was "All reports for system". On September 13, 2004, the Electronic Publishing Manager of the Department of Accounts sent Grievant a memo stating, "You are activated in Reportline as the Agency Security Officer for Agency 132.

On September 14, 2004, Grievant submitted a Reportline Request Form to the Department of Accounts asking that a new account for Ms. W be created as an Agency User with the level of security of "All reports for system".

On April 27, 2005, Grievant submitted a report to the Department of Accounts as the CIPPS Security Officer.

The April 25, 2007 version of the Reportline Security Officer Manual states, "Each agency is required to identify one or more Reportline Security Officers. The Reportline Security Officer is responsible for adding, deleting, and modifying Individual User security profiles."

The Agency has an Information Security Officer. This position is different from the Agency's Security Officer for Reportline.

On March 23, 2010, Grievant completed security awareness training and received a Certification of Information Security Awareness Training. Grievant signed the certificate acknowledging:

I acknowledge that the State Board of Elections has sensitive information resources and that it is my responsibility to help protect those resources. I have completed the FY 2010 Security Awareness Training requirement as instructed by the agency's Information Security Officer.

Ms. W worked for the Agency until April 22, 2010 when she was placed on pre-layoff leave and then laid off on May 7, 2010. Ms. W had a Reportline account. Under her access privileges, she had the authority to not only access her own personal information but also the benefits, payroll, healthcare, leave, and retirement information for all Agency employees.

On May 17, 2010, Grievant accessed his Reportline account.

In July 2010, Ms. M was on leave from the Agency. On July 6, 2010, the Information Services Manager sent Ms. M a leave slip form to enable her to submit requests for leave. To complete the form, Ms. M had to write her employee identification number. Ms. M. did not know her employee identification number so she accessed the Reportline account of Ms. W to obtain that information. On July 7, 2010, Ms. W's Reportline account was accessed by Ms. M. The Secretary asked Mr. D to determine how the account was accessed. He determined that the source of the breach was from a computer located on the same block where Ms. M lived. The Department of Accounts could not determine which reports were accessed by Ms. M.

On July 29, 2010, the Fiscal Officer informed the Secretary that Ms. W's Reportline account had been accessed on July 7, 2010. When the Secretary learned of the security breach, she notified Mr. R, the Electronic Publishing Manager of the Department of Accounts to remove immediately Ms. W's access to the system. On July 30, 2010, the Secretary learned that Ms. W had a second Reportline account under a previous name. Ms. W last accessed that second account on February 22, 2004. That account was also closed.

On August 4, 2010, the Secretary sent employees an email with the subject

"Required Notification of Security Breach Affecting Your Personal Information." The Secretary wrote, "a former employee's account was used to access a SBE physical database containing sensitive personal information." Ms. M received the Secretary's email and replied to all recipients of that email and stated:

A Security Breach was not affected. After reviewing the e-mail message below from [Information Services Manager] on July 6, 2010 the account was access to retrieve my employee's identification number so that I could included on the Leave Activity Form that was delivered on July 9, 2010. The database is simply a report and no Social Security numbers were listed.

The Agency took no disciplinary action against Ms. M for accessing the Reportline using another employee's account.

Election Assistance for Individuals with Disabilities Grant

One of Grievant's Core Responsibilities in his Employee Work Profile was Grant Administration. Grievant was expected to serve:

As lead in grant administration to include but not limited to ensuring compliance with federal grant administrative requirements; compliance with federal cost principles; compliance with federal program requirements. Interpret and implement federal grant administrative procedures as outlined in applicable OMB circulars. On July 7, 2003, the Former Secretary of the Agency submitted an Application for Federal Assistance to obtain \$297,522 of federal funding under the Election Assistance for Individuals with Disabilities (EAID or VAID) project. The start date of the proposed project was September 1, 2003. The ending date for the proposed project was August 31, 2006.

The grant was from the Department of Health and Human Services (DHHS) through the Administration of Children and Families (ACF). In order to receive the grant, the Agency had to comply with several reporting requirements. One of those requirements was to submit on a quarterly basis a PSC-272 report to the Division of Payment Management of DHHS. The PSC-272 report was also known as the Federal Cash Transaction Report.

The grant awarded from the Administration of Children and Families dated September 1, 2003 stated:

With the acceptance of this award, you agree to be responsible for limiting the draw of funds to the actual time of disbursement and to submitting timely reports as required. Further, you agree that when these funds are advanced to secondary recipients, you will be responsible for effectively controlling their use of cash in compliance with Federal requirements. Federal funds to meet current disbursing needs may be drawn through Smartlink. Withdrawals of funds are not to exceed the total grant award

shown above under provisions of Treasury Circular No. 1075. Failure to adhere to these requirements may cause the suspension of grant funds. Payments under this award will be made available to grantees through HHS Payment Management System. PMS is administered by the Division of Payment Management.

One of the grant terms and conditions was "Failure to submit reports (i.e., financial, program, or other required reports) on time may be basis for withholding financial payments, suspension or termination." Another term and condition was, "Drawdown of funds from Payment Management system - In accordance with Public Law 101 - 510, grant funds must be drawn down within 5 years from the year in which the funds were awarded".

The Chief of the Governmental & Tribal Payment Branch sent Grievant a letter dated March 11, 2005 regarding a Division of Payment Management and explaining the PSC-272 reporting process. The letter states:

Grant recipients access the PMS through the Smartlink system for requesting funds and through the Electronic 272 system for reporting disbursements. To continue to receive cash advances, grant recipients are required to report quarterly the amount of expense paid out and charged to their Federal grant. As a user of the PMS, you will be able to access the Electronic 272 to report disbursements through DPM Home Page.

Grievant received an email with a letter attached from the Division of Payment Management on March 11, 2005 informing him of his user name and temporary password so he could use the Smartlink system. He also received a PIN and password for the Federal Cash Transaction Report PSC 272.

On April 5, 2005, Grievant notified the Division of Payment Management to change their contact information from Grievant to Ms. ML. Grievant wrote:

This memo is to request that [Ms. ML] be added as one of the individuals responsible for drawing down funds associated with the Election Assistance for Individuals with Disabilities (EAID) grant program for the Virginia State Board of Elections ... [Ms. ML] was recently hired as our agency's fiscal officer. As fiscal officer, she will be primarily responsible for the draw-downs as well as reporting requirements. *** As business manager of SBE, I, [Grievant] will serve as a backup for [Ms. ML].

The Agency drew down the entire award in two Payment Management System advances made on April 15, 2005 and June 8, 2006.

Ms. ML was responsible for filing the Cash Transaction Report for 2005 and 2006 but she did not do so. Prior to leaving the Agency in June 2006, Ms. ML informed Grievant that the EAID Grant had been fully extended and closed out.

On September 30, 2008, the five-year grant period and the deadline for the Agency to submit the PSC-272 report ended.

On April 13, 2009, Grievant learned that the Agency had not timely submitted reports for the EAID grant.

On July 9, 2009, Mr. L, an employee of the granting agency, the Administration for Children and Families notified the Fiscal Officer that the Agency needed to repay the funds to the Division of Payment Management, the payment office.

On July 21, 2009, the Fiscal Officer repaid DHHS \$234,119 for the EAID grant. Grievant instructed the Fiscal Officer to repay the funds. Grievant did not inform or seek approval from the Secretary prior to having the Fiscal *Officer* repay the funds. Because the grant money had already been spent, the Agency had to reimburse the federal government using other State dollars.

On July 23, 2009, the Agency filed a PSC-272 report with DHHS.

Grievant made several requests to have the money restored. On August 28, 2009, Mr. L of the Administration for Children and Families informed Grievant "I am sorry but I cannot restore these funds to the state."

In September 2009, Agency managers received a budget report for August 2009.

The report showed that the Agency expended \$234,119 for "Out of State Political Entities." On September 3, 2009, the Deputy Secretary asked Grievant "a few questions regarding dramatic changes in the budget". Grievant replied "This is a nonrecurring refund to the fed government for monies received in 2003 for disabled voters." The Secretary testified that she called Grievant regarding the expenditure and based on that conversation believed that the monies were being paid from another federal grant. She did not realize the money was being paid from the Agency's general fund.

On October 13, 2009, the Secretary sent Grievant an email stating:

I was just told that SBE recently returned nearly \$300,000 of ADA funds because we did not fill out financial reports in time. Is this true?

On November 5, 2009, the Secretary was notified by the Division of State Internal Audit that the Division was investigating the refund of EAID funds to the federal government. She initiated an internal investigation.

On November 17, 2009, the Secretary received a memorandum from the State Internal Auditor indicating there had been an anonymous complaint to the State Employee Fraud, Waste, and Abuse Hotline alleging that Grievant did not ensure that financial status reports for the EAID were timely submitted and consequently the Agency had to refund the federal government over \$200,000.

On November 17, 2009, the State Internal Auditor sent the Secretary a memorandum stating:

We recently conducted a special review, based on a call to the State Employee Fraud, Waste, and Abuse Hotline, of an allegation involving the State Board of Elections (SBE). The caller alleged that Business Manager [Grievant] did not ensure that financial status reports for a federal grant were submitted timely, which led to the SBE having to refund to the federal government over \$200,000.

[Grievant] told us that financial status reports (FSRs) were not submitted timely for the 2003 US Department of Health and Human Services (DHHS) grant titled Voting Access for Individuals with Disabilities (VAID) with a grant period of September 1, 2003 - September 30, 2008. FSRs are required to be submitted to the granting agency within 90 days of the date of each annual reporting period. He stated that the SBE did not have a Fiscal Officer and did not have an Accessibility Coordinator for a portion of the five years of the grant period, and the administrative requirements of the grant were neglected. After a new Fiscal Officer was hired, she reported prior years' expenditures but the reporting occurred after the grant period ended. We reviewed the Commonwealth Accounting and Reporting System (CARS) and found that of the grant total of \$297,522, the SBE repaid the DHHS \$234,119.49 on July 21, 2009. In addition, for our review of e-mail correspondence on September 2, 2009 between [Grievant] and [Mr. L], DHHS, the SBE may need to repay the remaining \$63,402.51.

We reviewed e-mail correspondence, from July 22, 2009 through September 2, 2009, between [Grievant] and the DHHS and found that he was seeking to get the federal government to return the 2003 grant funds to the SBE. We also found that he was aware that the SBE had not been reporting the FSRs timely since April 13, 2009.

Conclusion

The allegation is partly substantiated. The SBE repaid the DHHS \$234,119.49 because the agency had not reported the grant expenditures to the DHHS within 90 days of the end of the final reporting period (September 30, 2008) for the 2003 VAID Grant, although required to do so. In addition, the SBE may be responsible for paying back the remaining amount (\$63,402.51) of the 2003 grant monies.

It appears that the agency complied with the reporting requirements for the period of September 1, 2004 - August 31, 2005 and should not have had to return the \$124,169. Furthermore,

although the FSR for the period of September 1, 2003 - August 31, 2004 was filed late, the \$450 was properly accounted for prior to the 5 year grant expiration date and should not have had to be returned either.

In response to the November 17, 2009 Memorandum from the State Internal Water, the Secretary sent a memorandum dated December 18, 2009 stating:

As a result of SBE's internal investigation, we believe that the factual situation is different from what is described in your November 17 memorandum. I will explain the factual situation as we see it and then, in that light, address the finding of fact contained in your memorandum and the actions we have taken, plan to take, and are contemplating taking in light of your report and in your investigation.

SBE Internal Investigation

Your memorandum bases the finding of fact on financial status reports (referred to as FSRs in the memorandum) that were not the reports in question. The memorandum states, "[Grievant] told us that financial status reports (FSRs) were not submitted timely" The memorandum then goes on to document certain FSRs submitted for the 2003 VA EAID grants and bases conclusions and recommendations on this documentation. I believe that there was confusion as to which reports were involved in this issue and the required reports that were missed which triggered the reduction in our funding for this grant.

There are two types of financial reports that must be filed for these grants. The first of these are Financial Status Reports or SF269 reports. As I understand it, Financial Status Reports or reports due to the granting agency, Administration for Children and Families (AFC), an agency of the Department of Health and Human Services. Simply put, SF269 reports document to the granting agency that the grant recipient is spending money in accordance with the specifications of the award.

The second of the two financial reports are PSC 272 reports. These reports are used to report disbursements of funds from the Department of Payment Management (DPM). As documented by-emails, phone conversations, and additional grant documents, it was the untimely filing of the PSC 272 reports that triggered the problem. SBE drew down the funds but did not file any of the required PSC 272 reports in the required time frame. Because of this inaction, SBE had already drawn down the funds we had to pay back DPM to bring our ledger back in balance to account for the decrease in funding. It is this funding that SBE has been trying to restore.

These PSC 272 reports were never filed for any grant award until several months after the 03 VA EAID PSC 272 deadline of September 30, 2008. It is the PSC 272 reports, not the FSRs that were filed late and triggered the subsequent fiscal problems. This is an important distinction as I address your memorandum. Because the November 17 memorandum is based on FSRs and not PSC 272 reports, it is difficult to address the audit report in the usual manner. In its place I submit the following based on the objectives of our investigation:

Objective 1: Determine what happened and to ensure no other money is in danger

Beginning with Federal FY03, SBE has been awarded grant money through the Help America Vote Act (HAVA) program known as Election Assistants to Individuals with Disabilities (EAID). Each yearly grant has been approximately between \$200,000 and \$300,000. Each grant has a five year limitation on the funds. So, for example, the FY03 grant must be spent by the close of FY08. The funds were drawn down from federal payment management system (PMS) within the allowed timeframe and spent appropriately, as evidenced by the FRS reports that are documented in the November 17 memorandum. However, the PSC 272 reports that are mentioned above were not submitted to the Federal Government by the September 30, 2008 deadline.

When [Fiscal Officer], a new hire, attempted to draw down EAID money from PMS in April 2009, she was not able due to a restriction on the SBE account. Upon investigation, the SBE Fiscal Office learned that the SBE ledger had been debited \$234,119.49 in October 2008, because no PSC 272 reports had been filed within five years of receiving the FY03 EAID funds. Because of the laws governing federal grants, PMS is programmed to assume that SBE had not drawn down the funds because no PSC 272 report had been filed. However, because SBE had drawn down the funds, the SBE ledger balance in PMS was now incorrect. Before SBE could continue to draw down EAID funds, we had to make the ledger balance in PMS correct by submitting payment to the federal government in the amount of \$234,119.49 out of our General Fund and did so in August 2009.

Since becoming aware of the problem, I have emphasized with staff the importance of finding a way to have the funds returned to SBE. From the same email correspondence referenced in the November 17 memorandum we have found that [Grievant] has been attempting to have the funds restored. However, some of his actions have troubled me. In July 2009, when [Fiscal Officer] informed him that SBE needed to repay the funds before being allowed to draw down any additional EAID money, [Grievant] told her to process the payment from the HAVA account to avoid having to use general funds. [Fiscal Officer] was uncomfortable

with repaying Federal funds with other federal funds and expressed her discomfort with [Grievant]. When [Grievant] insisted, [Fiscal Officer] approached the Department of Accounts and DOA explained to her and to [Grievant] that his action was not allowed. [Grievant] has told me that he still believes that DOA is wrong. I am concerned because this is an example of [Grievant's] ignorance of federal grants laws and guidelines.

On January 26, 2010, the State Internal Auditor issued a report indicating that:

The reason the SBE was required to reimburse the DHHS was because of the PSE 272 form (Federal Cash Transaction Report) was submitted to the Department of Payment Management after the required deadline of September 30, 2008. We verified that the PSC 272 form was not submitted until July 23, 2009 and that it in fact was the report that caused the SBE to have to repay the \$234,119.49.

The allegation is substantiated. The SBE repaid the DHHS \$234,119.49 because the agency had not filed the required paperwork for the grant expenditures from the 2003 VAID Grant before the end of the reporting period on September 30, 2008, although required to do so. As the Business Manager, [Grievant] was ultimately responsible for ensuring that the required paperwork for the 2003 VAID Grant was submitted timely.

Furthermore, management should consider taking disciplinary action in accordance with the DHRM Standards of Conduct against [Grievant] for not ensuring that the required paperwork for the 2003 VAID Grant was timely submitted.

Retaliation and Discrimination Claims

On December 17, 2009, several employees within the Agency organized a luncheon on the same day of the Agency's holiday breakfast. Nearly all of the employees invited to attend the luncheon were African American. The Secretary received a complaint from an African American employee regarding the appearance created by the luncheon. The Secretary became concerned that by excluding nonAfrican Americans, the employees attending the luncheon could be perceived as creating a hostile work environment for non-African Americans. She began asking employees who attended the luncheon about the details regarding who was invited to attend. At least one non-African American had been invited to attend the luncheon and had actually attended it.

On November 2, 2009, the Secretary signed a contract with Mr. S authorizing his company to provide and perform certain services for the Agency, primarily involving the VERIS database. Prior to that time, Vendor Q perform those services as optional services within a contract that Vendor Q had already entered into with the Agency. In addition, because the Agency had not yet hired

an IT Director, the Agency amended the November 2, contract on November 15, 2009 so that Mr. S would provide technical research, troubleshooting, and repair services for the Agency's entire network and server equipment and other duties normally assigned to an IT Director. Under the contract, Mr. S was to be paid \$85 per hour for up to 40 hours per week with a total compensation up to \$176,800 in one year. The term of the contract was from November 1, 2009 through November 3, 2010 unless terminated by either party in writing following 30 days notice. The contract was not solicited to other vendors and was not approved as a sole source purchased by the VITA.

On November 15, 2009, Ms. W called the State Employee Fraud, Waste, and Abuse Hotline and alleged that the Agency had not properly solicited a vendor. Grievant sent emails to staff of the State Internal Auditor as part of the investigation. On March 8, 2010, the State Internal Auditor sent a memorandum to the Secretary of Administration concluding that the allegation regarding the contract with Mr. S was substantiated. The State Internal Auditor concluded that the Secretary likely violated the Virginia Public Procurement Act and that it was unlikely that the contract would have qualified as sole source procurement. The Agency disputed the State Internal Auditor's conclusion.

On April 22, 2010, the Agency placed Ms. W on layoff status and transferred her duties to the Department of General Services. In May 2009, the Secretary began discussions with staff at the Department of General Services regarding the benefits of transferring Ms. W's duties to DGS rather than having them performed within the Agency.

In his CONCLUSIONS OF POLICY, the hearing officer concluded 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." 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."

Group II Written Notice - Reportline

Grievant became the Agency Security Officer for the Agency's Reportline database on September 13, 2004. He was not relieved of that responsibility prior to his removal. As Reportline Security Officer, Grievant was responsible for removing Ms. W's excess to Reportline shortly after she left the Agency on April 22, 2010. Grievant failed to remove Mr. W's account which enabled another employee to gain access to confidential Agency information. Grievant's failure to do so constituted inadequate or unsatisfactory job performance, a Group I offense.

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" 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 nonexclusive 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.

The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice of disciplinary action for inadequate or unsatisfactory work performance, but has not presented sufficient evidence to support the issuance of a Group II Written Notice. Mitigating circumstances exist to reduce further the disciplinary action. The Agency took disciplinary action against Grievant for failing to remove Ms. W's account from Reportline but took no action against Ms. M who actually created the security breach. The Agency has inconsistently applied disciplinary action by taking action against Grievant but not taking disciplinary action against Ms. M. It is unreasonable for the Agency to take disciplinary action against an employee whose inattentiveness caused a security breach while forgoing disciplinary action against an employee who actively caused the breach. The Group II Written Notice must be reversed.

The Secretary testified that Ms. M did not admit to accessing Ms. W's account. It is not difficult for one to infer from Ms. M's response to the Secretary's email regarding a security breach, that Ms. M was the person who caused the breach. Even if that email was not sufficient for the Agency to conclude that Ms. M caused the breach, it was more than sufficient to justify an Agency investigation to ask Ms. M whether she was the one who caused a security breach. Instead, the Agency took no action.

Group III Written Notice - EAID

The Agency contends that Grievant engaged in misconduct because he failed to submit PSC 272 reports on a timely basis under the federal grant. The Agency drew down its entire EAID grant into advances made on April 15, 2005 and June 8, 2006 while Ms. ML was employed by the Agency. Ms. ML was the individual responsible for submitting these forms on a quarterly basis until she left the agency in 2006. Grievant was unaware that she had failed to submit the appropriate forms to the federal government as required by the grant. Ms. ML's position remained vacant for more than approximately a year. No additional monies were expended under the grant after Ms. ML left the agency. The Agency did not notify Grievant that he was obligated to perform all of the duties of Ms. ML until a replacement was selected and that he was obligated to verify that Ms. ML performed all over duties during her tenure with the Agency.

Ms. ML was the person responsible for filing the required PSC 272 forms, not Grievant. Although Grievant supervised Ms. ML, his status as a supervisor does not mean that he may be disciplined automatically for her failures. The Agency's failure to file PSC 272 forms is not a basis to take disciplinary action against Grievant.

On April 13, 2009, Grievant knew that the Agency was obligated to restore \$234,119.49 of EAID funds to the federal government. He subsequently learned that the federal government would not return the money. Grievant knew that the Agency would have to remove money from its General Fund to repay the federal government. \$234,119.49 is a significant amount of money that Grievant knew or should have known to report to the Secretary who was ultimately responsible for Agency budgetary decisions. When the Deputy Secretary questioned Grievant about the expenditure and other expenditures, Grievant responded but did not fully disclose the nature of the transaction. The Secretary learned of the matter in October 2009, more than five months after Grievant first learned of the problem. By failing to timely inform the Secretary, Grievant denied her the opportunity to make decisions regarding which planned or actual Agency expenditures would be reduced in order to pay the money to the federal government.

Grievant's failure to timely and fully inform the Secretary that the Agency was obligated to restore over \$234,000 to the federal government constitutes inadequate or unsatisfactory job performance, a Group I offense. Attachment A of the Standards of Conduct provides, "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." In this case, there exists a basis to elevate the Group I offense to a Group II offense. The Agency is a relatively small agency with only 28 employees. Losing \$234,000 from its General Fund budget was a materially adverse impact. The Secretary was denied the opportunity to properly manage the Agency's finances. In essence, Grievant usurped part of the Secretary's role as Agency Head.

The Group III Written Notice of disciplinary action must be reduced to a Group II Written Notice of disciplinary action. Under the standards set forth in the *Rules*, Grievant has not presented sufficient evidence to support a further reduction of the disciplinary action to a level below that of a Group II Written Notice.

Upon the accumulation of a second active Group II Written Notice, an agency may remove an employee. Grievant had a prior active Group II Written Notice. With the Group II Written Notice arising as part of this grievance, Grievant has two active Group II Written Notices. Accordingly, the Agency's decision to remove Grievant must be upheld.

Grievant argued that the Group III Written Notice should be dismissed because the Agency failed to timely issue disciplinary action. Grievant argued that the events giving rise to the disciplinary action occurred approximately seven years before the disciplinary action was taken.

The Standards of Conduct encourages agencies to take disciplinary action as soon as possible; however, it does not establish a specific time period in which agencies must act in order to have their discipline upheld. Although it appears that the Agency took disciplinary action within a reasonable time after learning of Grievant's behavior, if the Hearing Officer assumes for the sake of argument that the Agency was slow to take disciplinary action, the outcome of this case does not change. There is no basis to reverse disciplinary action simply because an agency

was slow to take disciplinary action.

Grievant argued that the Agency denied him procedural due process by relying on the second report of the State Internal Auditor even though Grievant had not been re-interviewed prior to the issuance of that report. Grievant's argument fails. To the extent Grievant was unable to explain facts supporting his decision-making to the State Internal Auditor. Grievant was able to present those facts to the Hearing Officer during the hearing.

Retaliation

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity; (2) suffered a materially adverse action; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.

Grievant engaged in protective activity. He filed a grievance against the Agency in 2003. He sent emails to and spoke with staff of the State Internal Auditor in response to the Auditor's investigation of several hotline calls. Grievant suffered a materially adverse action because he received disciplinary action. Grievant has not established a connection between his protective activity and the materially adverse action he suffered. The evidence showed that the Agency was motivated to take disciplinary action against Grievant because it believed he had engaged in inappropriate behavior. In particular, the Agency responded to the recommendation of the State Internal Auditor who recommended that disciplinary action be taken against Grievant with respect to the EAID refund. The Secretary denied taking action against Grievant in order to retaliate against him. Her testimony was credible.

Grievant argued that the Secretary retaliated against him because he opposed a contract she caused the Agency to enter into with Mr. S without following a competitive procurement process. Ms. W told the Secretary that the contract with Mr. S was improper and that the Agency should not enter into the contract. When the Secretary insisted that she would enter into the contract with Mr. S, Ms. W told the Secretary that Ms. W would file a Hotline complaint with the State Internal Auditor. Although Ms. W was in Grievant's office when she called the Hotline, Grievant did not call the Hotline. Grievant did not tell the Secretary that he had called the Hotline. The State Internal Auditor concluded that the Agency violated State procurement regulations. In essence, the State Internal Auditor affirmed Ms. W's and Grievant's opinions of the inappropriateness of the contract. Based on the evidence presented, the most logical conclusion is that the Secretary believed that Ms. W reported her to the Hotline and not that Grievant had done so. Although Grievant expressed his opinion regarding the contract, the Secretary was only aware that Ms. W filed a complaint.

Racial Discrimination

Grievant argued that the Agency discriminated against him based on his race, as an African American. Grievant argued that since 2006, the Agency has removed four African American managers because of their race. The evidence showed that one of those managers left the Agency voluntarily to assume another position. The other managers left based on their work performance or in response to the Agency's objective to streamline agency operations. The Agency also removed several white managers because of their work performance. There is no basis to conclude that the Agency removed employees based on their race.

Grievant argued that the Agency's discrimination based on race is revealed, in part, by the Agency's reaction to a luncheon held in late 2009. Grievant asserted that the Secretary began questioning employees who attended the luncheon about who was in attendance and how attendees were selected. Grievant was the only manager invited to the luncheon. He argued that the Secretary did not investigate white only functions. Grievant's argument fails. The Secretary's response does not indicate racial bias on her part. It indicates the opposite. She received a complaint from an African American employee that the luncheon might be perceived as creating a racially hostile work environment for individuals not invited to the luncheon. Her concern was based on the objective of avoiding the appearance of a segregated workplace. No credible evidence was presented to show that the Secretary knew of and tolerated gatherings limited to white employees.

Grievant argued that the Secretary's bias against African Americans was revealed during a meeting in which several interns were introduced to Agency employees. The Secretary announced that the interns were her slaves. Several of the interns were African American. Some of the interns were paid and some were unpaid. The Secretary intended her comment to be a joke. Shortly after hearing the Secretary's comment, an employee informed the Secretary that her comment was racially offensive. The Secretary apologized to the group.

Referring to anyone working for a State agency as a slave is inappropriate and offensive behavior. The fact that the Secretary intended her comment to be a joke, does not excuse her poor judgment. The Secretary called approximately a dozen interns slaves. Of those interns, approximately one third was African American. Because two thirds of the people the Secretary referred to were not African American, it appears the most likely motivation for the Secretary's comment was that she was referring to entry level employees who would be subject to the command of senior employees and would be poorly paid or not paid at all. It does not appear that the Secretary intended to distinguish the interns based on their race even though her comment reflected poor judgment and a lack of sensitivity.

Grievant argued that the Secretary acted inappropriately to retrieve State equipment in the possession of Ms. M. Whether the Agency acted appropriately may be subject to a difference of opinion, but the Agency's actions were not based on racial bias.

In his DECISION, the hearing officer stated the following:

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **rescinded**. The Agency's issuance to the Grievance of a Group III Written Notice is **reduced** to a Group II Written Notice. Grievant's removal is **upheld** based on the accumulation of disciplinary action. Grievant's request for relief from retaliation and discrimination is denied.

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. 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 grievant raised five points that he feels need to be addressed through this appeal. In our opinion, four of the five points raised questions regarding the hearing decision included ignoring pertinent testimony of the Secretary, the hearing officer denial of due process, the hearing officer ignored evidence consistent with retaliation, and usurpation was an Ex Post Facto application of agency policy. These four aforementioned issues are outside the authority of this Agency to address. The fifth point, while only remotely related to a policy issue, will be addressed by this Agency.

In his request to this Department for an administrative review, the grievant expressed concerns that the hearing officer reduced the Group III Written Notice to a Group II Written Notice for the grievant's failure "to timely and fully inform the Secretary that the Agency was obligated to restore over \$234,000 to the federal government [which] constitutes inadequate or unsatisfactory job performance, a Group I offense. The grievant's appeal continues, "The Hearing Officer then elevated the Group I offense to a Group II offense because the loss of \$234,000 "was a materially adverse impact" which denied the Secretary "the opportunity to properly manage the Agency's finances."

CONCLUSION

Summarily, the hearing officer concluded that the grievant's behavior was best categorized as poor performance. A performance issue normally is addressed by issuing a Group I Written Notice. Therefore, the hearing officer reduced the Group III Written Notice to a Group I Written Notice. However, because of the serious effect of the grievant's performance, including his delay in reporting the financial situation to the Secretary, the hearing officer determined that there was sufficient evidence to support that the grievant's performance warranted a Group II Written Notice. Thus, the hearing officer elevated the aforementioned Group I Written Notice to a Group II Written Notice. Under the Department of Human Resource Management's Policy 1.60, Standards of Conduct, discretion to increase the level of discipline based on the egregiousness of the behavior is available to agencies. However, the Department of Employment Dispute Resolution has the authority to determine if that option is available to hearing officers, and was done so in a recent

determination on this case. Thus, this Agency has no basis to interfere with the application of this hearing decision.

Ernest G. Spratley, Assistant Director
Office of Equal Employment Services

Virginia:

In the Circuit Court of the City of Richmond, John Marshall Courts Building

| | |
|-----------------------------------|---|
| Grievant/Appellant, |) |
| |) |
| v. |) |
| |) |
| Virginia State Board of Elections |) |
| Employer/Appellee |) |

Case No.: CL11-4437

FINAL ORDER

On October 25, 2011 the parties appeared by *Pro se* and by counsel on the Appellant's Grievance Appeal under Va. Code § 2.2-3000 *et seq.* The Court heard oral argument on the matter.

Upon mature consideration of the record and having considered the arguments heard, the Court hereby **ORDERS** this day that the Appellant's Appeal is hereby **DENIED**.

The statutory standard for judicial review of such appeals is whether or not the hearing officer's determination was contradictory to law. Upon hearing the arguments and reviewing the memoranda submitted by each side the Appellant has not provided any evidence that the hearing officer violated the law and has failed to identify any statute or provision that was violated. Accordingly, the Court **AFFIRMS** the ruling from the hearing officer and dismisses this appeal with prejudice.

The Clerk is directed to forward a certified copy of this Order to all parties and counsel of record.

Pursuant to Rule 1:13, the Court waives endorsement of this Order.

To the extent the rulings are adverse to any party the Court notes the parties' objections.

IT IS SO ORDERED.

ENTERED: 11, 3, 11


 Beverly W. Shukals, Judge

A Copy,
 Teste: BEVILL M. DEAN, CLERK
 BY:  D.C.