Issues: Group II Written Notice (failure to follow instructions), and Termination (due to accumulation); Hearing Date: 04/12/11; Decision Issued: 04/22/11; Agency: DSS; AHO: John V. Robinson, Esq.; Case No. 9541; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 05/03/11; EDR Ruling No. 2011-2978 issued 06/29/11; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 05/03/11; DHRM Ruling issued 07/26/11; Outcome: AHO's decision affirmed.**

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 9541

Hearing Officer Appointment: March 14, 2011
Hearing Date: April 12, 2011
Decision Issued: April 22, 2011

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge termination of his employment effective October 12, 2010, pursuant to a written notice, dated October 12, 2010 (AE 1[1]) by Management of Department of Social Services (the "Department" or "Agency"), as described in the Grievance Form A dated December 18, 2010. AE 2.

The hearing officer was appointed on March 14, 2011. The hearing officer scheduled a pre-hearing telephone conference call at 2:00 p.m. on March 22, 2011. The Grievant's attorney (the "Attorney"), the legal advocate for the Agency (the "Advocate") and the hearing officer participated in the pre-hearing conference call. During the call, the Grievant, by counsel, confirmed that he is challenging the issuance of the Group II Written Notice for the reasons provided in his Grievance Form A and confirmed that he is seeking the relief requested in his Grievance Form A, including reinstatement, with restoration of all salary and benefits and reasonable attorney's fees. Following the pre-hearing conference, the hearing officer issued a Scheduling Order entered on March 23, 2011, which is incorporated herein by this reference.

In this proceeding the agency bears the primary burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances.

At the hearing, the Agency was represented by the Advocate. The Grievant was represented by his Attorney. Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing, namely all exhibits in the Grievant's binder (1 through 7) and Agency Exhibits 1-4 and Exhibits 6-11 in the Agency's binder. Agency Exhibit 5 was not received into evidence.

[1] References to the grievant's exhibits will be designated GE followed by the exhibit number. References to the agency's exhibits will be designated AE followed by the exhibit number or AE followed by the page number.

APPEARANCES

Representative for Agency
Grievant
Witnesses

FINDINGS OF FACT

1. Until his termination, the Grievant had been an employee of the Department for approximately 21 years and 8 months.

2. The Grievant worked as a mailroom clerk where his duties included picking up mail, sorting mail, delivering mail, running the inserter, making deliveries throughout the City, etc. Tapes; GE 6.

3. From 2009, the Properties and Facilities Manager supervised the Grievant and about 8 other employees (the "Supervisor").

4. The Director, Office of General Services (the "Director") supervised the Supervisor.

5. In an effort to achieve cost savings and to streamline operations, the Director instructed the Supervisor to obtain certain information from the employees under her (including the Grievant) concerning the actual tasks they were performing on a daily basis and the amount of time spent on each task.

6. At a staff meeting before June 11, 2010 and subsequently, by e-mail communication dated June 11, 2010 the Supervisor instructed each of the 9 employees (including Grievant) whom she supervised as follows:

> Effective Monday, June 14, I would like you to begin keeping a daily activity log (attached). You should record the time you arrive at work (actual time) and begin to document what you are doing throughout the course of the day. Your log should include breaks and lunch. You may find that you are working on more than one task at a time, for instance you begin to meter mail but continue to sort mail and/or pouches or accept deliveries from UPS. You may be working on a spreadsheet, while responding to e-mails and you need to stop to assist employees. You

> should also document the time you spend responding to e-mails and voicemail messages.
>
> We all multi-task throughout the day and this activity log will give us a better idea of the amount of time it takes to complete tasks. Please submit your activity logs to me at the close of business each Friday.

AE 90 (Emphasis supplied).

7. The Grievant timely complied with his Supervisor's instruction concerning June 14, 2010. AE 32.

8. While the Grievant testified on direct examination that he submitted additional handwritten daily activity logs to his Supervisor in late July or early August 2010, on cross-examination, the Grievant admitted that he only next submitted any logs to his Supervisor on Thursday, August 19, 2010. Tapes, *see also* AE 96.

9. In the meantime, the Supervisor had requested the logs from the Grievant on numerous occasions to no avail. Tapes, *see also* AE 91-96.

10. The Grievant's office was only one floor away from the Supervisor's office and the Grievant was physically able to move to the Supervisor's office. Accordingly, while the Supervisor stated that she preferred e-mails of the logs, the Grievant could have printed out the logs and hand-delivered the logs to the Supervisor.

11. Grievant admits that he submitted logs delineating actual times and actual tasks he performed for his employer for days he did not work at all, including Saturday, July 3, 2010 (AE 39), Sunday, July 4, 2010 (AE 40), July 5, 2010, a holiday (AE 41), Saturday, July 17, 2010 (AE 44) and Friday, August 13, 2010, a personal sick day (AE 64).

12. The Grievant was not formally disciplined for his omissions and/or errors up to August 23, 2010 but was instructed that he would need to submit daily logs supplying his Supervisor with the actual information she needed to report to the Director.

13. The hearing officer decides that the Grievant did comply with the Supervisor's instruction concerning the required logs for September 7-10, 2010, when on Friday, September 10, 2010 the Grievant sent four (4) individual files of logs for the work week ending September 10, 2010. AE 98, AE 125-128; GE 5 at pages 48-52.

14. While the Department took the position at the hearing that it did not receive from the Grievant a log for September 8, 2010, the hearing officer finds that it did

receive such a log. The Supervisor's own e-mail communication of September 14, 2010 refers to four (4) individual files for the work week ending September 10, 2010. AE 98. September 6, 2010 was a holiday and the logs for September 7, 9 and 10 were admitted into evidence. AE 125-128; GE 5 at pages 46-52.

15. The Supervisor's insistence on the Grievant putting the four (4) individual files in one (1) file and resubmitting was unreasonable and unwarranted under the circumstances where the Agency's position is that it was merely seeking the actual information from the Grievant and the method of delivery was not important. The Grievant's earlier submissions of the four (4) individual files for the work week ending September 10, 2010 complied with his Supervisor's instructions.

16. However the Grievant admits that for the work week ending Friday, September 17, 2010, the Grievant did not even attempt any type of submission to his Supervisor of the required logs for the preceding work week beginning Monday, September 13, 2010.

17. The Grievant testified during cross-examination that he made no such attempt in part because he did not want to make a bother of himself but the hearing officer does not find this self-excuse credible.

18. In the Grievant's response dated October 7, 2010, to his Supervisor's "Notice of Intent to Issue Written Notice – Group II" dated October 5, 2010 (the "Notice of Intent") (AE 3A-B), the Grievant provided in part:

> If what you wanted all along was to know what I do on a daily basis, you already had that knowledge. And nothing has changed from that point in time. Please see the attached eighteen pages of the ARMICS document, as well as the attached six pages outlining my daily work duties in a narrative fashion.

AE 4.

19. From this response, the Supervisor reasonably concluded that the Grievant was deliberately thwarting her instructions. The Department also clarified that the ARMICS document was dated being 2 ½ years old and that the focus of the document was on the duties or responsibilities of the Grievant's position rather than on the specific amount of time spent on each actual task performed by the Grievant on a daily basis, which was the information the Director required to achieve cost-savings and to streamline operations.

ADDITIONAL FINDINGS, APPLICABLE LAW, ANALYSIS AND DECISION

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

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

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

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60 (the "SOC"). AE 4. The SOC provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The SOC serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Pursuant to the SOC, the Grievant's failure to follow his Supervisor's instructions by failing even to attempt to deliver his logs to his Supervisor for days during the work week ending September 17, 2010 can clearly constitute a Group II offense, as asserted by the Department.

b. **Group II Offense:**

> Offenses in this category include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action. This level is appropriate for offenses that significantly impact business operations and/or constitute neglect of duty,

> insubordination, the abuse of state resources, violations of policies, procedures, or laws.
>
> - See attachment A for examples of Group II Offenses.
>
> . . . .
>
> - A second active Group II Notice normally should result in termination . . .

AE 4.

Attachment A specifically gives failure to follow supervisor's instructions as the first example of a Group II offense. AE 4.

At the hearing, the Attorney objected that the Written Notice was defective because it gave as the "Offense Date(s)" "6/18/10 – 9/17/10". The hearing officer agrees with the Attorney that the Agency could not formally discipline the Grievant on August 23, 2010 for any offense in June 2010, for example, as the offense would be too remote in time. However, the Written Notice itself makes it clear that no such remote formal discipline was administered by Management:

> The first report was due June 18, 2010. [Grievant] completed a partial report for the day of June 14, 2010, but he failed to submit other reports to the supervisor for the next several weeks. The supervisor <u>counseled</u> [Grievant] on Aug. 16, 2010, but he did not submit the report as prompted; so, the supervisor followed up again on Aug. 18, 2010. The work product offered by the employee on Aug. 19, 2010, was illegiblewriting [sic] on a form that was to be used for another purpose, not activity logs. Of the data that could be read, [Grievant] had reported work activities on days that he was not working. His explanation was that he did not keep daily records and had to try to remember what he had done. This was indication that the information about the work reported had been fabricated.
>
> The supervisor <u>counseled</u> [Grievant] again on Aug. 23, 2010. <u>As remedial instruction</u> [Grievant] was advised that he must use the proper form and record his work activities daily. [Grievant] was required to submit the reports electronically to the supervisor by close of business each Friday.

AE 1 (Emphasis supplied).

The hearing officer decides that the Grievant complied with his Supervisor's instructions concerning submission of logs for the work weeks ending September 3, 2010 and September 10, 2010 but the Grievant did not even attempt to comply with such instructions for days in the work week ending September 17, 2010.

The Department's Written Notice makes it clear that the Grievant was simply counseled for any infractions up to August 23, 2010 and adopting the technical position of the Grievant is antithetical to the more nimble, less rule-intensive character of administrative proceedings under the Rules and the Grievance Procedure Manual. However, the hearing officer did take this factor into account for his mitigation analysis, discussed in more detail below.

The Grievant, by counsel, strongly objected to the admission into evidence of the documents behind AE 7. The Advocate offered those documents (and confirmed to the hearing officer after a break during the hearing, when the Attorney renewed his objections to these documents, that the documents were offered) as the actual documents used by the Agency concerning its mitigation analysis under Section IV of the Written Notice. The hearing officer has received and used the documents behind AE 7 solely for purposes of establishing that the Agency did in fact perform a mitigation analysis and of considering such Agency mitigation analysis.

However, despite the Advocate's insistence that the documents were only offered for the mitigation analysis, the hearing officer decides that the Supervisor, in fact, inappropriately used some of the documents in formulating her conclusion that the Grievant willfully and deliberately disobeyed her instructions in the present case. The Attorney argues that this fact requires that the hearing officer undo the discipline. The hearing officer disagrees that this result is mandated for the following reasons:

1. Subjective intent of the Grievant is not an element which is required to be proved by the Agency for the offense of failure to follow supervisor's instructions.

2. Nothing in DHRM or Agency policy requires such a result.

3. While this approach by the Supervisor is arguably unfair it is not violative of due process under the facts and circumstances of these proceedings for reasons including the following: The Grievant's response dated October 7, 2010 to the Supervisor's Notice of Intent (*see* paragraphs 18 and 19 above), the Grievant's challenging the Supervisor's right to assign the task (see, e.g. AE 1-2) and the Grievant's repeated failures over a period of about ten (10) weeks until August 19, 2010 to deliver his handwritten logs despite numerous requests from his Supervisor were also reasonably used by the Supervisor to lead her to the conclusion that this was not just an oversight on the Grievant's part. Additionally, the decision to impose formal discipline on the Grievant was made collectively with the Director and Human Resources.

The hearing officer has taken into account for his mitigation analysis such inappropriate use by the Supervisor of some documents under AE 7 in her formulation of Grievant's intent in this case.

The Attorney also argues that no documents before the Grievant's most recent EWP and Performance Evaluation of October 2009 should have been used by the Agency in its mitigation analysis. The Attorney offered no authority for his position and the hearing officer finds no support for this position in DHRM or Agency policy. The Attorney also asserts that the documents under AE 7 are wildly irrelevant. The hearing officer disagrees and decides that such documents were relevant and appropriate for the mitigation analysis performed by the Agency.

As previously stated, the Agency's burden is to show upon a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances and essentially the Grievant contests this determination by the Department in his Issue One in the Form A.

The hearing officer decides for each offense specified in the Written Notice (i) the Grievant engaged in the behavior described in the Written Notice; (ii) the behavior constituted serious misconduct; (iii) the Department's discipline was consistent with law and policy and that there are no mitigating circumstances justifying a further reduction or removal of the disciplinary action. The Grievant specifically raised mitigation as his Issue Six in the Form A so the hearing officer will undertake a more detailed analysis of this required component of his decision below.

Concerning the second and third issues raised by the Grievant, the hearing officer finds that the Department did not misapply or unfairly apply policies or otherwise act in an arbitrary and capricious manner but rather acted applying progressive discipline to obtain the sought information from the Grievant in accordance with the SOC and applicable policies. The other 8 employees under the Supervisor provided the information, the Grievant could and did send e-mail attachments, received training concerning computer use (AE 8) and was given the goal in his most recent EWP of "Become more proficient with the use of e-mail and other Microsoft Office products." AE 140.

Concerning the Grievant's Issue Four, the hearing officer decides that DHRM policy in the case of failure to follow supervisor's instructions does not require a showing that the failures were "intentionally done by Grievant with knowledge of said alleged wrongdoing."

Concerning Issue Five raised by the Grievant, the hearing officer decides, as discussed above in more detail, that failure to follow a supervisor's instructions, in general, and in particular, under the facts and circumstances of this case, can rise to the level of a Group II offense.

The Grievant asserts in his Issue Six that the Department failed to properly consider mitigating circumstances. DHRM has previously ruled that there is no requirement under an earlier version of DHRM Policy 1.60 that an agency even consider mitigating circumstances. DHRM Policy Ruling, Grievance No. 8636, September 19, 2007.

However, this DHRM ruling does not negatively impact the Grievant's position under the facts and circumstances of this proceeding because under Va. Code § 2.2-3005, this hearing

officer is charged with the duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution". EDR's *Rules for Conducting Grievance Hearings* provide in part:

> The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances" such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance." 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. *Rules* § VI(B) (alteration in original).

If the Department does not consider mitigating factors, the hearing officer should not show any deference to the Department in his mitigation analysis. In this proceeding the Department did consider mitigating factors in disciplining the Grievant, including his long service to the Department over approximately 21 years and 8 months.

The Grievant has an active Group II Written Notice (AE 10). The normal sanction for two (2) Group II violations is termination.

Accordingly, because the Department assessed mitigating factors, the Rules only allow this hearing officer to mitigate the discipline further if this hearing officer upon consideration of the evidence finds that the Department's discipline exceeded the limits of reasonableness.

While the Grievant might not have specified all of the mitigating factors herein, the hearing officer considered many factors including those specifically referenced above and all of those listed below in his analysis:

1. the Grievant's long service to the Agency over 21 years and 8 months;

2. the fact that the Grievant received an overall rating of "Contributor" on his most recent Performance Evaluation, signed by the Director and the Supervisor;

3. the fact that Grievant has received many "Contributor" ratings over his past long employment with the Agency.

In EDR Case No. 8975 involving the University of Virginia ("UVA"), a grievant received a Group III Written Notice with removal for falsifying records on five (5) separate dates. Although the evidence supported only one of those instances, the hearing officer upheld the disciplinary action. The grievant appealed to EDR asserting that the disciplinary action was

inappropriate in that the grievant did not engage in as much misconduct as alleged by UVA. The Director upheld the hearing officer's decision:

> The grievant's arguments essentially contest the hearing officer's determinations of fact as they relate to the proper sanction for the misconduct. Such determinations are within the hearing officer's authority as the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate. In this case, while it appears that the hearing officer did find that the grievant did not engage in as much misconduct as alleged by the University, it was still determined that the grievant had falsified a state record with the requisite intent, generally a Group III offense under the Standards of Conduct. [footnote omitted] Upon review of the record, there is no indication that the hearing officer abused his discretion in making these findings or that the facts were not supported by the hearing record. Consequently, this Department has no basis to disturb the hearing decision.

EDR Ruling Number 2009-2192; February 6, 2009.

Here, the hearing officer has only decided that the Grievant only failed to follow his Supervisor's instructions for days concerning the work week ending September 17, 2010. The above Ruling applies.

EDR has previously ruled that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. *Id.*

Here the offense is very serious. Clearly, the mitigation decision by the Department was within the permissible zone of reasonableness.

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

Pursuant to DHRM Policy 1.60, Standards of Conduct, and the SOC, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with

law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

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

DECISION

The Department has sustained its burden of proof in this proceeding and the action of the Department in issuing the Group II Written Notice and in terminating the employment of the Grievant because of his accumulation two (2) active Group II Written Notices is affirmed as warranted and appropriate under the circumstances. Accordingly, the Department's action concerning the Grievant is hereby upheld, having been shown by the Department, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

APPEAL RIGHTS

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

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

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

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

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

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

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

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or

2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

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

ENTER:

____

John V. Robinson, Hearing Officer

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

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Department of Social Services

July 26, 2011

The grievant has requested an administrative review of the hearing officer's decision in Case No. 9541. 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.*

FACTS

In his Findings of Fact, the hearing officer, stated, in relevant part, the following:

1. Until his termination, the Grievant had been an employee of the Department for approximately 21 years and 8 months.

2. The Grievant worked as a mailroom clerk where his duties included picking up mail, sorting mail, delivering mail, running the inserter, making deliveries throughout the City, etc. Tapes; GE 6.

3. From 2009, the Properties and Facilities Manager supervised the Grievant and about 8 other employees (the "Supervisor").

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   > Effective Monday, June 14, I would like you to begin keeping a daily activity log (attached). You should record the time you arrive at work (actual time) and begin to document what you are

> doing throughout the course of the day. Your log should include breaks and lunch. You may find that you are working on more than one task at a time, for instance you begin to meter mail but continue to sort mail and/or pouches or accept deliveries from UPS. You may be working on a spreadsheet, while responding to emails and you need to stop to assist employees. You should also document the time you spend responding to emails and voicemail messages.
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> We all multi-task throughout the day and this activity log will give us a better idea of the <u>amount of time</u> it takes to complete tasks. Please submit your activity logs to me at the close of business each Friday. AE 90 (Emphasis supplied).

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for the work week ending September 10, 2010. AE 98, AE 125-128; GE 5 at pages 48-52.

14. While the Department took the position at the hearing that it did not receive from the Grievant a log for September 8, 2010, the hearing officer finds that it did receive such a log. The Supervisor's own e-mail communication of September 14, 2010 refers to four (4) individual files for the work week ending September 10, 2010. AE 98. September 6, 2010 was a holiday and the logs for September 7, 9 and 10 were admitted into evidence. AE 125-128; GE 5 at pages 46-52.

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To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia,* the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60 (the *"S OC").* AE 4. The SOC provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The sac serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Pursuant to the SOC, the Grievant's failure to follow his Supervisor's instructions by failing even to attempt to deliver his logs to his Supervisor for days during the work week ending September 17, 2010 can clearly constitute a Group II offense, as asserted by the Department.

b. **Group II Offense:**

> Offenses in this category include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action. This level is appropriate for offenses that significantly impact business operations and/or constitute neglect of duty, insubordination, the abuse of state resources, violations of policies, procedures, or laws.
>
> - See attachment A for examples of Group II Offenses.
> - A second active Group II Notice normally should result in termination.

Attachment A specifically gives failure to follow supervisor's instructions as the first example of a Group II offense.

At the hearing, the Attorney objected that the Written Notice was defective because it gave as the "Offense Date(s)" "6118/10 - 9117/10". The hearing officer agrees with the Attorney that the Agency could not formally discipline the Grievant on August 23, 2010 for any offense in June 2010, for example, as the offense would be too remote in time. However, the Written Notice itself makes it clear that no such remote formal discipline was administered by Management:

> The first report was due June 18, 2010. [Grievant] completed a partial report for the day of June 14, 2010, but he failed to submit other reports to the supervisor for the next several weeks. The supervisor <u>counseled</u> [Grievant] on Aug. 16, 2010, but he did not submit the report as prompted; so, the supervisor followed up again on Aug. 18, 2010. The work product offered by the employee on Aug. 19, 2010, was illegible writing [sic] on a form that was to be

> used for another purpose, not activity logs. Of the data that could be read, [Grievant] had reported work activities on days that he was not working. His explanation was that he did not keep daily records and had to try to remember what he had done. This was indication that the information about the work reported had been fabricated.
>
> The supervisor counseled [Grievant] again on Aug. 23, 2010. As remedial instruction [Grievant] was advised that he must use the proper form and record his work activities daily. [Grievant] was required to submit the reports electronically to the supervisor by close of business each Friday.

The hearing officer decides that the Grievant complied with his Supervisor's instructions concerning submission of logs for the work weeks ending September 3, 2010 and September to, 2010 but the Grievant did not even attempt to comply with such instructions for days in the work week ending September 17, 2010.

The Department's Written Notice makes it clear that the Grievant was simply counseled for any infractions up to August 23, 2010 and adopting the technical position of the Grievant is antithetical to the more nimble, less rule-intensive character of administrative proceedings under the Rules and the Grievance Procedure Manual. However, the hearing officer did take this factor into account for his mitigation analysis, discussed in more detail below.

The Grievant, by counsel, strongly objected to the admission into evidence of the documents behind AE 7. The Advocate offered those documents (and confirmed to the hearing officer after a break during the hearing, when the Attorney renewed his objections to these documents, that the documents were offered) as the actual documents used by the Agency concerning its mitigation analysis under Section IV of the Written Notice. The hearing officer has received and used the documents behind AE 7 solely for purposes of establishing that the Agency did in fact perform a mitigation analysis and of considering such Agency mitigation analysis.

However, despite the Advocate's insistence that the documents were only offered for the mitigation analysis, the hearing officer decides that the Supervisor, in fact, inappropriately used some of the documents in formulating her conclusion that the Grievant willfully and deliberately disobeyed her instructions in the present case. The Attorney argues that this fact requires that the hearing officer undo the discipline. The hearing officer disagrees that this result is mandated for the following reasons:

1. Subjective intent of the Grievant is not an element which is required to

be proved by the Agency for the offense of failure to follow supervisor's instructions.

2. Nothing in DHRM or Agency policy requires such a result.

3. While this approach by the Supervisor is arguably unfair it is not violative of due process under the facts and circumstances of these proceedings for reasons including the following: The Grievant's response dated October 7, 2010 to the Supervisor's Notice of Intent *(see* paragraphs 18 and 19 above), the Grievant's challenging the Supervisor's right to assign the task (see, e.g. AE 1-2) and the Grievant's repeated failures over a period of about ten (10) weeks until August 19, 2010 to deliver his handwritten logs despite numerous requests from his Supervisor were also reasonably used by the Supervisor to lead her to the conclusion that this was not just an oversight on the Grievant's part. Additionally, the decision to impose formal discipline on the Grievant was made collectively with the Director and Human Resources.

The hearing officer has taken into account for his mitigation analysis such inappropriate use by the Supervisor of some documents under AE 7 in her formulation of Grievant's intent in this case.

The Attorney also argues that no documents before the Grievant's most recent EWP and Performance Evaluation of October 2009 should have been used by the Agency in its mitigation analysis. The Attorney offered no authority for his position and the hearing officer finds no support for this position in DHRM or Agency policy. The Attorney also asserts that the documents under AE 7 are wildly irrelevant. The hearing officer disagrees and decides that such documents were relevant and appropriate for the mitigation analysis performed by the Agency.

As previously stated, the Agency's burden is to show upon a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances and essentially the Grievant contests this determination by the Department in his Issue One in the Form A.

The hearing officer decides for each offense specified in the Written Notice (i) the Grievant engaged in the behavior described in the Written Notice; (ii) the behavior constituted serious misconduct; (iii) the Department's discipline was consistent with law and policy and that there are no mitigating circumstances justifying a further reduction or removal of the disciplinary action. The Grievant specifically raised mitigation as his Issue Six in the Form A so the hearing officer will undertake a more detailed analysis of this required component of his decision below.

Concerning the second and third issues raised by the Grievant, the hearing officer finds that the Department did not misapply or unfairly apply policies or otherwise act in an arbitrary and capricious manner but rather acted applying progressive discipline to obtain the sought information from the Grievant in

accordance with the SOC and applicable policies. The other 8 employees under the Supervisor provided the information, the Grievant could and did send email attachments, received training concerning computer use (AE 8) and was given the goal in his most recent EWP of "Become more proficient with the use of e-mail and other Microsoft Office products."

Concerning the Grievant's Issue Four, the hearing officer decides that DHRM policy in the case of failure to follow supervisor's instructions does not require a showing that the failures were "intentionally done by Grievant with knowledge of said alleged wrongdoing."

Concerning Issue Five raised by the Grievant, the hearing officer decides, as discussed above in more detail, that failure to follow a supervisor's instructions, in general, and in particular, under the facts and circumstances of this case, can rise to the level of a Group II offense.

The Grievant asserts in his Issue Six that the Department failed to properly consider mitigating circumstances. DHRM has previously ruled that there is no requirement under an earlier version of DHRM Policy 1.60 that an agency even consider mitigating circumstances. DHRM Policy Ruling, Grievance No. 8636, September 19, 2007.

However, this DHRM ruling does not negatively impact the Grievant's position under the facts and circumstances of this proceeding because under Va. Code § 2.2-3005, this hearing officer is charged with the duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution". EDR's *Rules for Conducting Grievance Hearings* provide in part:

> The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances" such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or ... an employee's long service, or otherwise satisfactory work performance." 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. *Rules* § VI(B) (alteration in original).

If the Department does not consider mitigating factors, the hearing officer should not show any deference to the Department in his mitigation analysis. In this proceeding the Department did consider mitigating factors in disciplining the Grievant, including his long service to the Department over approximately 21

years and 8 months.

The Grievant has an active Group II Written Notice (AE 10). The normal sanction for two (2) Group II violations is termination.

Accordingly, because the Department assessed mitigating factors, the Rules only allow this hearing officer to mitigate the discipline further if this hearing officer upon consideration of the evidence finds that the Department's discipline exceeded the limits of reasonableness.

While the Grievant might not have specified all of the mitigating factors herein, the hearing officer considered many factors including those specifically referenced above and all of those listed below in his analysis:

1. the Grievant's long service to the Agency over 21 years and 8 months;

2. the fact that the Grievant received an overall rating of "Contributor" on his most recent Performance Evaluation, signed by the Director and the Supervisor;

3. the fact that Grievant has received many "Contributor" ratings over his past long employment with the Agency.

In EDR Case No. 8975 involving the University of Virginia ("UV A"), a grievant received a Group III Written Notice with removal for falsifying records on five (5) separate dates. Although the evidence supported only one of those instances, the hearing officer upheld the disciplinary action. The grievant appealed to EDR asserting that the disciplinary action was inappropriate in that the grievant did not engage in as much misconduct as alleged by UV A. The Director upheld the hearing officer's decision:

> The grievant's arguments essentially contest the hearing officer's determinations of fact as they relate to the proper sanction for the misconduct. Such determinations are within the hearing officer's authority as the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate. In this case, while it appears that the hearing officer did find that the grievant did not engage in as much misconduct as alleged by the University, it was still determined that the grievant had falsified a state record with the requisite intent, generally a Group III offense under the Standards of Conduct. [footnote omitted] Upon review of the record, there is no indication that the hearing officer abused his discretion in making these findings or that the facts were not supported by the hearing record. Consequently, this Department has no basis to disturb the hearing decision.

Here, the hearing officer has *only* decided that the Grievant only failed to follow his Supervisor's instructions for days concerning the work week ending September 17, 2010. The above Ruling applies.

EDR has previously ruled that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008- 1903; EDR Ruling No. 2007-1518. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. *Id*

Here the offense is very serious. Clearly, the mitigation decision by the Department was within the permissible zone of reasonableness.

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

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

DECISION

The Department has sustained its burden of proof in this proceeding and the action of the Department in issuing the Group II Written Notice and in terminating the employment of the Grievant because of his accumulation two (2) active Group II Written Notices is affirmed as warranted and appropriate under the circumstances. Accordingly, the Department's action concerning the Grievant is hereby upheld, having been shown by the Department, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

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.

In his request to this Department for an administrative review, the grievant asserts that the hearing officer committed three errors, if corrected, will result in a revised decision that will dismiss the disciplinary action. Of the four errors submitted on appeal to the Department of Employment Dispute Resolution (EDR), three of the four were the same as the three submitted to DHRM. Our review of the responses issued by EDR on those three revealed that EDR sufficiently responded to the issues raised with DHRM. Moreover, our review of the hearing officer's decision and the issues raised by the grievant are evidentiary in nature. Thus, this Department has no authority to rule on those matters. Based on the above reasons, this Agency will not interfere with the application of this hearing decision.

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Ernest G. Spratley
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