Issues: Group II Written Notice (failure to comply with policy) and Termination (due to accumulation); Hearing Date: 11/03/11; Decision Issued: 11/04/11; Agency: DBHDS; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 9693; Outcome: Full Relief; **Administrative Review: AHO Reconsideration Request received 11/19/11; Reconsideration Decision issued 12/05/11; Outcome: Original decision affirmed; Administrative Review: DHRM Ruling Request received 11/19/11; DHRM Ruling issued 01/26/12; Outcome: AHO's decision affirmed; Fee Addendum issued 02/23/12 awarding $5,330.36.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 9693

Hearing Date: November 3, 2011
Decision Issued: November 4, 2011

PROCEDURAL HISTORY

Grievant was a security officer for the Department of Behavioral Health and Development Services ("the Agency"), with 7 years of service in this position as of the offense date. On July 27, 2011, the Grievant was charged with a Group II Written Notice for failure to follow instructions and/or policy, with an offense date of June 8, 2011. The discipline was job termination, based on the accumulation of active written notices.

Grievant timely filed a grievance to challenge the Agency's disciplinary action, and outcome of the resolution steps was not satisfactory to the Grievant and he requested a hearing. On September 26, 2011, the Department of Employment Dispute Resolution ("EDR") appointed the Hearing Officer. Following a pre-hearing conference, the grievance hearing ultimately was scheduled for the first date available between the parties and the hearing officer, November 3, 2011, on which date the grievance hearing was held, at the Agency's facility. Accordingly, for good cause shown, the time for completing the grievance has been extended.

The Agency submitted documents for exhibits that were accepted into the grievance record, subject to objection from the Grievant to the prior, inactive written notices, Agency Exh. 17, and they will be referred to as Agency's Exhibits. The Grievant submitted documents that were, without objection from the Agency, accepted into the grievance record, and they will be referred to as Grievant's Exhibits. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant
Counsel for Grievant
Advocate for Agency
Witnesses

ISSUES

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

The Grievant requests rescission of the Group II Written Notice, reinstatement, back pay, and attorney's fees.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

APPLICABLE LAW AND OPINION

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

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

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

The Agency relied on the Standards of Conduct, promulgated by the Department of Human Resource Management, Policy 1.60, which defines Group II Offenses to include acts of misconduct of a more serious and/or repeat nature (compared to Group I) 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. Agency Exh. 16.

The Agency had a policy requiring annual tuberculin testing. The policy specifically provided:

> If the employee fails to report for screening on two (2) consecutive months, following the assigned month, notification is sent to the Manager/Department Head for appropriate action. A list of delinquent employees is sent to the appropriate Manager/Department Head at the beginning of each month. Failure to follow this instruction may result in disciplinary action in accordance with the Standards of Conduct.

Agency Exh. 1.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

> While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy..."the hearing officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

The Offense

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

The Agency employed Grievant as a security officer, with 7 years of service in the position. The Grievant had prior active written notices (one Group II and two Group I).

The current written notice charged:

> [The Grievant] failed to follow supervisor[']s instructions by failing to comply with the facility policy as directed. [The Grievant] did not accurately respond to supervisor's request for information and thusly continued to be out of compliance with facility policy. [The Grievant] made 3 statements of compliance with policy which never were accomplished as stated.

Agency Exh 12. While not stated on the face of the Written Notice, all parties stipulated that the policy at issue is the tuberculin testing policy. The Grievant's assigned month for the annual test was May.

In June 2011, the Grievant's supervisor and department head received a notice that the Grievant was delinquent by not getting his tuberculin test in May, as listed. The Grievant was working the night shift at the time, and the department head sent an email message to the Grievant on June 7, 2011:

> *You have appeared on the Delinquency List for May. Please respond on why you are out of compliance. Take immediate steps to correct this deficiency and notify my office of the correction plan.*

The Grievant's response of June 8, 2011:

> *I did the shot, on May 17 or 18.*

The department head responded on June 10, 2011:

> *Did you have it read???????*

Grievant's Exh. 2.

The Grievant testified that when he replied to the department head on June 8, 2011, he thought he had completed the two-step test, the injection and then the reading two days later. The Grievant testified that after receiving the department head's June 10, 2011, reply, he questioned whether he had the test read and checked with the clinic. He learned that he did not, in fact, have the test read. The Grievant testified that he intended to follow up with a second test, but that his mother, for whom he is a caretaker, grew gravely ill and that her condition was a stressful and distracting situation throughout the months of June and July.

On June 21, 2011, the department head emailed the Grievant again regarding the tuberculin test:

> *. . . I still haven't heard back from you on the PPD test other than you got a shot; that doesn't tell me if you had it read and that you are current; please comply ASAP.*

The Grievant replied on June 21, 2011:

> *I am going to do the shot again Thursday and will have it read Saturday.*

On June 22, 2011, the department head wrote to the Grievant:

> *So in other words, you falsified to me the information that you had completed the agency PPD requirement?*

The Grievant's reply:

> *No I got the shot, I double[] checked and I did not get it read and Tuesday I will do the test and have it read on Thursday. I had the testing dates mixed up.*

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The department head testified that he considered the Grievant's June 8, 2011, response falsification because he did not complete the tuberculin testing as intimated by his response. The department head also testified that the Grievant's overall job performance had diminished during the year prior to the discipline, with the prior performance evaluation indicating below contributor on three of five factors. The overall rating, however, was contributor. The department head was unaware of the outside stressor of the Grievant's mother's critical health situation.

The Grievant testified that the tests are given on certain dates each month, and that in June he was wrong about the Thursday and Saturday test days referenced in his email. He corrected himself to indicate Tuesday (for the test) and Thursday (for the reading). The Grievant had scheduled vacation, however, and missed the June testing dates. The claimant testified that attending to his mother's grave health condition and situation interfered in his attention to completing the tuberculin test when he planned. The Grievant ultimately completed the test within the two month grace period permitted by the testing policy.

The Agency's facility director testified that he approved the discipline and termination, based on his agreement with the department head that the emails from the Grievant were misleading on his compliance with the tuberculin testing policy.

The Agency's human resources director testified at the request of the Grievant. She testified that she had reservations over termination, but that she agreed with the department head's conclusion that the Grievant's emails were misleading.

All Agency witnesses denied the discipline was motivated by retaliation against the Grievant.

Two character witnesses, current Agency employees, testified for the Grievant, stating that the Grievant was a reliable, courteous and concientious security officer.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. 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).

An agency may have valid reasons for issuing discipline to an employee. However, the grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. The Agency has the burden to prove that the Grievant is guilty of the conduct charged in the written notice.

Procedural Due Process is inextricably intertwined with the grievance procedure. The Rules for Conducting Grievance Hearings state:

> In all circumstances, however, the employee must receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge.

In support of this principal, the Rules cite *O'Keefe v. USPS*, 318 F.3d 1310 (Fed. Cir. 2002). In *O'Keefe*, the agency removed an employee with the general charge of "improper conduct/ fraudulent use of personal identifiers." The Court reversed the agency's action because the facts and reasons for the removal were not written in the Notice of Proposed Removal given to the employee.

To satisfy the requirements of procedural due process, an agency is required, at a minimum, to give the employee (1) notice of the charges against him or her, and (2) a meaningful opportunity to respond. Whether an agency has met this standard is often a matter of degree. Here, the Written Notice is tied to violation of the tuberculin testing policy, and the facts and testimony show that the Grievant was not in violation of the policy when the discipline was issued. Indeed, the testimony reveals that the Agency abandoned any contention that the Grievant violated the testing policy and that the discipline was issued on the ground of falsification of information to the department head regarding whether and when the Grievant satisfied the test policy.

Under the *Rules for Conducting Grievance Hearings*, the first issue in every disciplinary grievance is:

Whether Grievant engaged in the behavior described in the Written Notice?

Here, the Written Notice does not allege falsification or misrepresentation. The Written Notice concerns the Grievant's compliance with the tuberculin testing policy. Granted, the written notice mentions inaccuracy and failure to comply as the Grievant indicated he would. There is a significant distinction between being wrong about information and falsification. Thus, the Written Notice as issued is woefully inadequate in putting the employee on notice that the discipline was directed to him because of falsified information. While the Agency responded in

other disciplinary steps that the conduct at issue was misrepresentation or falsification, the Agency did not amend the Written Notice, even after the Agency deemed that the Grievant was not in violation of the tuberculin policy. No clarification of the Written Notice, or any Amended Written Notice, was ever issued.[1]

If the standard set forth in *O'Keefe* is to be applied meaningfully, careful review of the Written Notice is necessary when compared to the facts shown. The agency's Written Notice is at most vague and omits any articulation of a falsification charge. Based on the Written Notice and the evidence presented, I find that the Written Notice did not sufficiently detail the nature of the offense, and the agency, necessarily, did not present evidence to show the Grievant's conduct on June 8, 2011, was inconsistent with standards of the Commonwealth or [the Agency]. The Agency may not formally indicate discipline for X and actually prove Y at a grievance hearing as grounds for discipline. Accordingly, the Agency's discipline fails.

It is possible for the agency to add other offenses to a Written Notice so long as there is sufficient notice to the Grievant. The agency ultimately articulated at the grievance hearing the specific nature of the alleged offense—falsification of information. However, the non-specific and vague absence of facts alleged on the face of the Written Notice does not sufficiently raise the nature of the alleged offense. Additional charges outside the Written Notice cannot be considered as a valid reason for the discipline levied. While it is not unheard of to add additional offenses after the initial Written Notice, this too creates confusion and issues of notice. This Hearing Officer would recommend when additional charges are brought, an Amended Written Notice should be issued to the Grievant.

In making this finding, I recognize that the Agency has a legitimate interest in seeing that policies are followed and personnel honestly and completely provide information. However, the falsification issue was not raised as an amendment to the Written Notice. Nor was it raised sufficiently as to cure the lack of specific notice in the Written Notice when the Written Notice itself lacked any specificity.

Based on the aforementioned, the Hearing Officer finds that the agency inadequately informed Grievant that the basis of the discipline was something other than failing to comply with the tuberculin testing policy.

Assuming, *arguendo*, that the Written Notice can be construed to include the falsification allegation that the Agency asserts as the true nature of the offense, the Agency also fails in its burden of proof. We have to consider the evidence in light of the meaning of falsification.

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[1] EDR rulings on administrative review have held the same, concluding that only the charges set out in the Written Notice may be considered by a hearing officer. *See* EDR Rulings Nos. 2007-1409; 2006-1193; 2006-1140; 2004-720. In addition, the *Rules* provide that "[a]ny issue not qualified by the agency head, the EDR Director, or the Circuit Court cannot be remedied through a hearing." *Rules for Conducting Grievance Hearings § I.* Under the grievance procedure, charges not set forth on the Written Notice (or an attachment thereto) cannot be deemed to have been qualified. Thus, such unstated charges are not before a hearing officer.

"Falsifying" is not defined by the Standards of Conduct, but the Hearing Officer interprets this provision to require proof of an intent to falsify by the employee in order for the falsification to rise to the level justifying termination. This interpretation is less rigorous but is consistent with the definition of "Falsify" found in Blacks Law Dictionary (6th Edition) as follows:

> Falsify. To counterfeit or forge; to make something false; to give a false appearance to anything. To make false by mutilation, alteration, or addition; to tamper with, as to falsify a record or document. ***

The Hearing Officer's interpretation is also consistent with the New Webster's Dictionary and Thesaurus that defines "falsify" as:

> to alter with intent to defraud, *to falsify accounts* || to misrepresent, *to falsify an issue* || to pervert, *to falsify the course of justice.*

Based on the manner, tone, and demeanor of the witnesses, I find the Grievant credible when he testified that he never intended to falsify any information. The department head understood the Grievant's June 8, 2011, email message to be that the Grievant had, in fact, completed the test. The Grievant testified credibly that he genuinely believed on June 8, 2011, when he initially responded to his supervisor's email query, that he had completed the tuberculin test. While the Grievant had received the injection on May 17, 2011, he forgot to have it read two days later. The Agency has the burden to show convincing information beyond equipoise that the Grievant intentionally falsified his report.

While it is true that the Grievant was delinquent in completing his tuberculin test in May and June, it is undeniable that the policy allows all employees an additional two months to comply with the test before discipline may attach to this policy. Thus, when May is the designated month, completion of the test before the end of July is compliant with the policy. The Grievant, in fact, completed the tuberculin test before the end of July. Grievant Exh. 3. The Agency, however, issued its "24-hour" letter on July 18, 2011, and the Written Notice on July 27, 2011. While the Grievant was in error with his June 8, 2011, email response to his department head, the Agency has not borne its burden of proof to show the requisite intention by the Grievant to falsify information. The subsequent rescheduling of the test has been explained by the Grievant as unintentional and does not constitute falsification.

State agencies are prohibited from retaliating against employees who have participated in protected activities. Retaliation is defined by the *Grievance Procedure Manual* as "Actions taken by management or condoned by management because an employee exercises a right protected by law or reported a violation of law to a proper authority (e.g. 'whistleblowing')." When Grievant prevailed in having a prior Group III Written Notice reduced to a Group I in 2010, he was engaging in a protected activity for which the Agency may not take a retaliatory action. The Grievant asserts that this current Group II with termination is retaliatory for his successful grievance. While I find the current discipline is unjustified for the circumstances proved, I do not find sufficient evidence to conclude that the Agency's motivation was retaliation.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with termination is **reversed**. Thus, the Agency is ordered to reinstate Grievant to his former position, or if occupied, to an objectively similar position. The Grievant is awarded full **back pay** from which any interim earnings must be deducted (which includes unemployment compensation and other income earned or received to replace the loss of state employment). The Grievant is restored to full benefits and seniority. Grievant is further entitled to seek a reasonable **attorney's fee**, which cost shall be borne by the agency.

APPEAL RIGHTS

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

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

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

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

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

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

following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

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

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

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

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.

Cecil H. Creasey, Jr.
Hearing Officer

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 9693

Hearing Date:	November 3, 2011
Decision Issued:	November 4, 2011
Reconsideration:	December 5, 2011

RECONSIDERATION DECISION OF HEARING OFFICER

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.

The Agency seeks reconsideration of the original hearing decision. The Agency restates arguments that it made during the hearing or that it could have made during the hearing. The Agency does not offer any new evidence.

The request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. I consider the issues raised by the Agency on reconsideration to be the same as those addressed in the original decision. The Written Notice charged the grievant with failing to comply with facility policy as directed. The evidence and stipulation show the grievant complied with facility policy. The Written Notice, as described by the Agency during the grievance hearing, also charged the grievant with falsification of information, which was addressed in the original decision. That factual determination was resolved in the grievant's favor. The requesting party simply restates the arguments and evidence presented at the hearing. 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.

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.

Cecil H. Creasey, Jr.
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of
The Department of Behavioral Health
and Developmental Services

January 26, 2012

The agency has requested an administrative review of the hearing officer's decision in Case No. 9693. For the reasons stated below, we will not interfere with the application of this hearing 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 wrote, in relevant part, the following:

> Grievant was a security officer for the Department of Behavioral Health and Development Services ("the Agency"), with 7 years of service in this position as of the offense date. On July 27, 2011, the Grievant was charged with a Group II Written Notice for failure to follow instructions and/or policy, with an offense date of June 8, 2011. The discipline was job termination, based on the accumulation of active written notices.
>
> Grievant timely filed a grievance to challenge the Agency's disciplinary action, and outcome of the resolution steps was not satisfactory to the Grievant and he requested a hearing. On September 26, 2011, the Department of Employment Dispute Resolution ("EDR") appointed the Hearing Officer. Following a pre-hearing conference, the grievance hearing ultimately was scheduled for the first date available between the parties and the hearing officer, November 3, 2011, on which date the grievance hearing was held, at the Agency's facility. Accordingly, for good cause shown, the time for completing the grievance has been extended.
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> The Agency submitted documents for exhibits that were accepted into the grievance record, subject to objection from the Grievant to the prior, inactive written notices, Agency Exh. 17, and they will be referred to as Agency's Exhibits. The Grievant submitted documents that were, without objection from the Agency, accepted into the grievance record, and they will be referred to as Grievant's Exhibits. The hearing officer has carefully considered all evidence presented.

******

Among the relevant issues, the hearing officer listed the following in his Applicable Law and Opinions:

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The Agency relied on the Standards of Conduct, promulgated by the Department of Human Resource Management, Policy 1.60, which defines Group II Offenses to include acts of misconduct of a more serious and/or repeat nature (compared to Group I) 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, Agency Exh. 16.

The Agency had a policy requiring annual tuberculin testing. The policy specifically provided:

If the employee fails to report for screening on two (2) consecutive months, following the assigned month, notification is sent to the Manager/Department Head for appropriate action. A list of delinquent employees is sent to the appropriate Manager/Department Head at the beginning of each month. Failure to follow this instruction may result in disciplinary action in accordance with the Standards of Conduct.

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Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr.& Consumer Serv.,* 41Va. App. 110,123,582 S.E. 2d 452,458(2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

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The hearing officer described the Offense as follows:

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

The Agency employed Grievant as a security officer, with 7 years of

service in the position. The Grievant had prior active written notices (one Group II and two Group I).

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Grievant's Exh. 2.

The department head testified that he considered the Grievant's June 8, 2011, response falsification because he did not complete the tuberculin testing as intimated by his response. The department head also testified that the Grievant's overall job performance had diminished during the year prior to the discipline, with the prior performance evaluation indicating below contributor on three of five factors. The overall rating, however, was contributor. The department head was unaware of the outside stressor of the Grievant's mother's critical health situation.

The Grievant testified that the tests are given on certain dates each month, and that in June he was wrong about the Thursday and Saturday test days referenced in his email. He corrected himself to indicate Tuesday (for the test) and Thursday (for the reading). The Grievant had scheduled vacation, however, and missed the June testing dates. The claimant testified that attending to his mother's grave health condition and situation interfered in his attention to completing the tuberculin test when he planned. The Grievant ultimately completed the test within the two month grace period permitted by the testing policy.

The Agency's facility director testified that he approved the discipline and termination, based on his agreement with the department head that the emails from the Grievant were misleading on his compliance with the tuberculin testing policy.

The Agency's human resources director testified at the request of the Grievant. She testified that she had reservations over termination, but that she agreed with the department head's conclusion that the Grievant's emails were misleading.

All Agency witnesses denied the discipline was motivated by retaliation against the Grievant.

Two character witnesses, current Agency employees, testified for the Grievant, stating that the Grievant was a reliable, courteous and conscientious security officer.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. 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).

An agency may have valid reasons for issuing discipline to an employee. However, the grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. The Agency has the burden to prove that the Grievant is guilty of the conduct charged in the written notice.

Procedural Due Process is inextricably intertwined with the grievance procedure. The Rules for Conducting Grievance Hearings state:

In all circumstances, however, the employee must receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge.

In support of this principal, the Rules cite *O'Keefe v. USPS,* 318F.3d 1310 (Fed. Cir.2002). In *O'Keefe,* the agency removed an employee with the general charge of "improper conduct/fraudulent use of personal identifiers." The Court reversed the agency's action because the facts and reasons for the removal were not written in the Notice of Proposed Removal given to the employee.

To satisfy the requirements of procedural due process, an agency is required, at a minimum, to give the employee (1) notice of the charges against him or her, and (2) a meaningful opportunity to respond. Whether an agency has met this standard is often a matter of degree. Here, the Written Notice is tied to violation of the tuberculin testing policy, and the facts and testimony show that the Grievant was not in violation of the policy when the discipline was issued. Indeed, the testimony reveals that the Agency abandoned any contention that the Grievant violated the testing policy and that the discipline was issued on the ground of falsification of information to the department head regarding whether and when the Grievant satisfied the test policy.

Under the *Rules for Conducting Grievance Hearings,* the first issue in every disciplinary grievance is:

Whether Grievant engaged in the behavior described in the Written Notice?

Here, the Written Notice does not allege falsification or misrepresentation. The Written Notice concerns the Grievant's compliance with the tuberculin testing

policy. Granted, the written notice mentions inaccuracy and failure to comply as the Grievant indicated he would. There is a significant distinction between being wrong about information and falsification. Thus, the Written Notice as issued is woefully inadequate in putting the employee on notice that the discipline was directed to him because of falsified information. While the Agency responded in other disciplinary steps that the conduct at issue was misrepresentation or falsification, the Agency did not amend the Written Notice, even after the Agency deemed that the Grievant was not in violation of the tuberculin policy. No clarification of the Written Notice, or any Amended Written Notice, was ever issued.

If the standard set forth in *O'Keefe* is to be applied meaningfully, careful review of the Written Notice is necessary when compared to the facts shown. The agency's Written Notice is at most vague and omits any articulation of a falsification charge. Based on the Written Notice and the evidence presented, I find that the Written Notice did not sufficiently detail the nature of the offense, and the agency, necessarily, did not present evidence to show the Grievant's conduct on June 8, 2011, was inconsistent with standards of the Commonwealth or [the Agency]. The Agency may not formally indicate discipline for X and actually prove Y at a grievance hearing as grounds for discipline. Accordingly, the Agency's discipline fails.

It is possible for the agency to add other offenses to a Written Notice so long as there is sufficient notice to the Grievant. The agency ultimately articulated at the grievance hearing the specific nature of the alleged offense-falsification of information. However, the non-specific and vague absence of facts alleged on the face of the Written Notice does not sufficiently raise the nature of the alleged offense. Additional charges outside the Written Notice cannot be considered as a valid reason for the discipline levied. While it is not unheard of to add additional offenses after the initial Written Notice, this too creates confusion and issues of notice. This Hearing Officer would recommend when additional charges are brought, an Amended Written Notice should be issued to the Grievant.

In making this finding, I recognize that the Agency has a legitimate interest in seeing that policies are followed and personnel honestly and completely provide information. However, the falsification issue was not raised as an amendment to the Written Notice. Nor was it raised sufficiently as to cure the lack of specific notice in the Written Notice when the Written Notice itself lacked any specificity.

Based on the aforementioned, the Hearing Officer finds that the agency inadequately informed Grievant that the basis of the discipline was something other than failing to comply with the tuberculin testing policy.

Assuming, *arguendo,* that the Written Notice can be construed to include the falsification allegation that the Agency asserts as the true nature of the offense, the Agency also fails in its burden of proof. We have to consider the evidence in light of the meaning of falsification.

"Falsifying" is not defined by the Standards of Conduct, but the Hearing Officer interprets this provision to require proof of an intent to falsify by the employee in order for the falsification to rise to the level justifying termination. This interpretation is less rigorous but is consistent with the definition of "Falsify" found in Black's Law Dictionary (6th Edition) as follows:

Falsify. To counterfeit or forge; to make something false; to give a false appearance to anything. To make false by mutilation, alteration, or addition; to tamper with, as to falsify a record or document.

The Hearing Officer's interpretation is also consistent with the New Webster's Dictionary and Thesaurus that defines "falsify" as:

to alter with intent to defraud, *to falsify accounts* ‖ to misrepresent, *to falsify an issue* ‖ to pervert, *to falsify the course of justice.*

Based on the manner, tone, and demeanor of the witnesses, I find the Grievant credible when he testified that he never intended to falsify any information. The department head understood the Grievant's June 8, 2011, email message to be that the Grievant had, in fact, completed the test. The Grievant testified credibly that he genuinely believed on June 8, 2011, when he initially responded to his supervisor's email query, that he had completed the tuberculin test. While the Grievant had received the injection on May 17, 2011, he forgot to have it read two days later. The Agency has the burden to show convincing information beyond equipoise that the Grievant intentionally falsified his report.

While it is true that the Grievant was delinquent in completing his tuberculin test in May and June, it is undeniable that the policy allows all employees an additional two months to comply with the test before discipline may attach to this policy. Thus, when May is the designated month, completion of the test before the end of July is compliant with the policy. The Grievant, in fact, completed the tuberculin test before the end of July. Grievant Exh. 3. The Agency, however, issued its "24-hour" letter on July 18, 2011, and the Written Notice on July 27, 2011. While the Grievant was in error with his June 8, 2011, email response to his department head, the Agency has not borne its burden of proof to show the requisite intention by the Grievant to falsify information. The subsequent rescheduling of the test has been explained by the Grievant as unintentional and does not constitute falsification."

State agencies are prohibited from retaliating against employees who have participated in protected activities. Retaliation is defined by the *Grievance Procedure Manual* as "Actions taken by management or condoned by management because an employee exercises a right protected by law or reported a violation of law to a proper authority (e.g. 'whistleblowing')." When Grievant prevailed in having a prior Group III Written Notice reduced to a Group I in 2010, he was engaging in a protected activity for which the Agency may not take a retaliatory action. The Grievant asserts that this current Group II with termination is

retaliatory for his successful grievance. While I find the current discipline is unjustified for the circumstances proved, I do not find sufficient evidence to conclude that the Agency's motivation was retaliation.

In his DECISION, the hearing officer enumerated the following:

> For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with termination is reversed. Thus, the Agency is ordered to reinstate Grievant to his former position, or if occupied, to an objectively similar position. The Grievant is awarded full back pay from which any interim earnings must be deducted (which includes unemployment compensation and other income earned or received to replace the loss of state employment). The Grievant is restored to full benefits and seniority. Grievant is further entitled to seek a reasonable attorney's fee, which cost shall be borne by the agency.

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 an appeal to this Agency, the DBHDS requested an administrative review on the basis that there was an incorrect legal conclusion regarding the requirements of procedural due process and misrepresentations of CVTC's Employee Annual Tuberculin Testing Policy and DHRM Policy No. 1.60, Standards of Conduct.

Concerning the requirements of procedural due process, the hearing officer pointed out that the agency originally charged the grievant with violating the Tuberculin Testing Policy and when that allegation was determined that there was no basis to support that allegation, the agency then charged him with falsification of information. The hearing officer stated the following:

> To satisfy the requirements of procedural due process, an agency is required, at a minimum, to give the employee (1) notice of the charges against him or her, and (2) a meaningful opportunity to respond. Whether an agency has met this standard is often a matter of degree. Here, the Written Notice is tied to violation of the tuberculin testing policy, and the facts and testimony show that the Grievant was not in violation of the policy when the discipline was issued. Indeed, the testimony reveals that the Agency abandoned any contention that the Grievant violated the testing policy and that the discipline was issued on the ground of falsification of information to the department head regarding whether and when the Grievant

satisfied the test policy.

The hearing officer continued:

> Based on the aforementioned, the Hearing Officer finds that the agency inadequately informed Grievant that the basis of the discipline was something other than failing to comply with the tuberculin testing policy.

Concerning misinterpretation of policy, it is clear from the hearing decision that agency abandoned the allegation that the grievant violated the Tuberculin Testing policy. It is unclear from the DBHDS appeal as to how DHRM Policy No. 1.60 was misinterpreted by the hearing officer.

Thus, DHRM concludes that, based on the hearing officer's determination that the DBHDS violated procedural due process and the allegation of violation of the Tuberculin Policy failed, this Agency has no basis to interfere with the application of this decision.

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

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 9693

Hearing Date:	November 3, 2011
Decision Issued:	November 4, 2011
Reconsideration:	December 5, 2011
Addendum:	February 23, 2012

Attorney's Fee Addendum

The grievance statute provides that for those issues qualified for a hearing, the Hearing Officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the Hearing Officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust. Va. Code § 2.2-3005.1(A). For an employee to "substantially prevail" in a discharge grievance, the Hearing Officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.[2]

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

Grievant's attorney submitted a petition showing hours worked of 49.4 and expenses of $390.36. The Agency has not filed a response or objection. The billed hours appear reasonable. The contracted hourly rate of $100 is within that allowable by EDR. Thus, Grievant is entitled to attorneys' fees and expenses in the amount of $5,330.36.

AWARD

The Grievant is awarded attorney's fees and expenses in the amount of $5,330.36, to be paid by the Agency.

APPEAL RIGHTS

If neither party petitions the EDR Director for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the EDR Director issues a ruling on the

[2] § 7.2(e) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004. § VI(D) EDR *Rules for Conducting Grievance Hearings*, effective August 30, 2004.

propriety of the fees addendum, and if ordered by EDR, the hearing officer has issued a revised fees addendum, the original hearing decision becomes "final" as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.

Cecil H. Creasey, Jr.
Hearing Officer