Issues: Group I Written Notice (unsatisfactory job performance), Group II Written Notice (failure to follow instructions), Retaliation (other protected right); Hearing Date: 10/10/12; Decision Issued: 10/17/12; Agency: ABC; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 9906; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 11/01/12; EDR Ruling No. 2013-3468 issued 11/28/12; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 11/01/12; DHRM Ruling issued 11/29/12; Outcome: AHO's decision affirmed; Judicial Review: Appealed to Circuit Court – City of Richmond (12/28/12); Circuit Court Ruling issued 03/28/13; Outcome: AHO's decision reversed.**

COMMONWEALTH of VIRGINIA

Office of Employment Dispute Resolution

Department of Human Resource Management

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 9906

Hearing Date: October 10, 2012
Decision Issued: October 17, 2012

PROCEDURAL HISTORY

Grievant was a project manager for the Department of Alcoholic Beverage Control ("the Agency"), and he challenges the Group I Written Notice and Group II Written Notice and termination, both issued on April 20, 2012. The Grievant had a prior active Group II Written Notice, for failure to follow supervisor's instructions (Agency Exh. 15) and a prior Group I Written Notice, for abuse of state time (Agency Exh. 16).

Grievant timely filed a grievance to challenge the Agency's disciplinary actions. The outcome of the resolution steps was not satisfactory to the Grievant and he requested a hearing. On August 27, 2012, the Office of Employment Dispute Resolution ("EDR") appointed the Hearing Officer to hear the grievance. A pre-hearing conference was held by telephone on September 6, 2012, and the grievance hearing was scheduled for October 1, 2012. Because of a delay in the Agency's production of documents, the Grievant moved to continue the grievance hearing and another pre-hearing conference was held on September 28, 2012. For good cause shown, the Grievant's motion was granted, and the hearing ultimately was scheduled for October 10, 2012, on which date the grievance hearing was held, at the Agency's facility. Because of good cause shown, the time for concluding the grievance has been extended, accordingly.

Both sides submitted documents for exhibits that were, with some objections ultimately overruled, accepted into the grievance record, and they will be referred to as Agency's or Grievant's Exhibits, respectively. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant
Counsel for Grievant
Advocate for Agency
Agency Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the termination memorandum?
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 under applicable policy)?
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 termination, back pay to the point of re-employment on July 10, 2012, and continuing back pay for diminution in earnings since re-employment as of July 10, 2012. The Grievant does not request job reinstatement.

The Agency has requested payment for the expense of producing the documents requested by the Grievant and ordered by the Hearing Officer.

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 State Standards of Conduct, DHRM Policy 1.60, provides that accumulation of four active Group I offenses normally should result in termination unless there are mitigating circumstances. A second Group II notice normally should result in termination. A Group II notice in addition to three active Group I notices normally should result in termination. Agency Exh. 3.

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

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

The Offenses

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 Grievant has worked for the Agency for 12 years. The operable facts of the discipline are stated in the Agency's Written Notices. Agency Exh. 1. The Group I Written Notice, issued by the Grievant's immediate supervisor on April 20, 2012, stated:

> The offense in question is for the management of two separate initiatives that involved consulting services with IBM. [The Grievant] was assigned as the Project Manager to ensure the successful implementation of our Rational Tools for our Agile methodology to include adoption of the tool amongst all team

> members. Over the course of a month, [the Grievant] displayed several instances of poor job performance.

The details were further described in Section IV of the Written Notice:

> On March 9, 2012, a letter was transmitted by [the Grievant] to answer some environmental questions for IBM. The letter was very unprofessional in that it contained inaccurate information, spelling and grammatical errors and was not presented in a professional format. After being notified of the poor quality of the letter, [the Grievant] corrected the spelling mistakes and sent it to me for re-submittal. On the evening of March 12, I had to re-write the majority of the letter for accuracy and professional content. This letter was re-sent to IBM on March 14.
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> The IBM consultant arrived on March 19; the kickoff meeting scheduled for the morning did not include more than half of the individuals who would be expected to be involved in the week long engagement. Meeting invites were sent out 10 minutes before the meeting. A final meeting was scheduled for March 30 at 3:00 pm. When asked, I told [the Grievant] specifically that <u>all</u> people who are under me should be invited to the meeting along with others who are directly or indirectly involved with the Agile projects. Again, more than half of the required attendees were omitted.
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> When [the Grievant] arrived at 1:30 pm on March 30, I was told that the consultant would be leaving for the day at 3:00 pm and no meeting would occur. [The Grievant] gave incorrect information. Starting on April 2, the second engagement of consulting services began. When [the Grievant] arrived at 9:00 am, I asked if the kickoff had been scheduled and he responded that no meetings had been scheduled for the week. Again, meeting invites were sent out with a 10 minute lead time.

The Group II Written Notice, issued the same day by the Grievant's immediate supervisor, stated:

> The offense in question is for failure to follow supervisory instructions. [The Grievant] was assigned as the Project Manager to ensure the successful implementation of our Rational Tools for our Agile methodology to include adoption of the tool amongst all team members. Over the course of the engagement with the consultant from March 19, 2012, through April 2, 2012, [the Grievant] failed to follow the instructions he was given to successfully complete his tasks.

The details were further described in Section IV of the Written Notice:

> Due to the fact that I was out of the office for training offsite from March 20 through March 22, I gave [the Grievant] specific instructions that he was to

> monitor the IBM consultant's progress and keep the schedule on target for deliverables. On March 20, at 10:57 am I sent a note to [the Grievant] that the meetings for the week needed to get on the calendar due to telecommute schedules and the short duration of the engagement. Upon returning to work on March 23, I inquired about the wrap up meeting for the engagement and was then told that an additional 10 hours would be needed to complete the engagement. The communication I received was from the consultant on March 22, at 8:10 am. [The Grievant] did not follow up with this communication. The IBM consultant returned on March 28 for an additional 10 hours. By the late morning of March 29, I inquired about the final meeting. At this time, I was told that the consultant would not be able to finish on this day. I was not informed by [the Grievant] that the consultant had agreed to stay another day. I later spoke to the consultant directly who was surprised that I was not told he would remain an extra day to complete the engagement. A final meeting was scheduled for March 30 at 3:00 pm. When asked, I told [the Grievant] specifically that <u>all</u> people who are under me should be invited to the meeting along with others who are directly or indirectly involved with Agile projects. Again, more than half of the required attendees were omitted.
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> When [Grievant] arrived at 1:30 pm on March 30, I was told that the consultant would be leaving for the day at 3:00 pm and no meeting would occur. [The Grievant] gave incorrect information.
>
> On April 2, I talked to all the participants of the engagement to find out if [the Grievant] had followed up with them to ensure that they were able to use the tool for their teams on the following week. No one had spoken to [the Grievant] and many of the teams still had substantial work effort required to get started.

The Grievant's immediate supervisor, the Business Application Development Manager, testified consistently with the offenses described in the written notices. The supervisor testified that she gave specific instructions to the Grievant regarding the project; she had to re-write the letter to the consultant because of errors and unprofessional presentation (Agency Exh. 8); the meetings were critical to the project implementation and they were not managed as she instructed; and, the Grievant did not follow up with the team members for feedback. She specifically addressed Agency's Exhibits 1, 8, 10, 11, 15.

The Agency's chief information officer testified regarding the Agency's expense for producing the documents requested by the Grievant. The request was handled through the Virginia Information Technology Agency (VITA), which charged an hourly rate to recover the requested documents from the Grievant's computer. The Agency had submitted, pre-hearing, an estimate from VITA for 15 system engineer hours, with an estimated total of $1,965 ($131/hour). The estimate document was not moved into evidence at the grievance hearing, but, for purposes of this issue, the Excel spreadsheet submitted pre-hearing is made a part of the record as Hearing Officer's Exh. A.

The chief information officer also testified that he agrees with the issuance of the two Written Notices, and explained that the Grievant's job performance noticeable worsened after he was not selected for promotion in 2010 to the job held by the Grievant's immediate supervisor, the Business Application Development Manager. The Grievant has, since 2010, filed complaints with the Equal Employment Opportunity Commission (EEOC) and the DHRM Office of Equal Employment Services (EES), alleging discrimination based on race (black) and gender (male). Agency Exh. 13 & 14.

A data analyst testified on behalf of the Grievant. She stated that she worked with the Grievant on the project at issue, and she had a positive impression of his leadership. However, she admitted that her job did not involve evaluation of the Grievant. Also testifying for the Grievant was the Agency's former IT manager until 2010. She testified that her experience with the Grievant's performance was very good, his evaluations were good, and that the Grievant was well respected by his peers and subordinates. She left the Agency before the Grievant sought the job promotion in 2010.

The senior configuration manager testified that he worked with the Grievant on the project at issue. He confirmed that there was a data outage during the time the consultant was present, and that the data outage provided a setback to the project.

The Grievant testified that there was a data outage during the consultant's time and that the outage caused the need for additional time from the consultant. The Grievant testified that when he re-drafted the document for submission to IBM, it was not finished and he gave it to his supervisor just for review—not to rewrite and submit. The Grievant testified that he kept his supervisor informed to the extent he was informed regarding the changes to the project schedule and consultant's schedule. The Grievant testified that he got feedback from the team members at the conclusion of the meetings, although he did not follow up with them after the meetings. As for the meeting notices, he set up the meetings and sent the invites well in advance, but he did re-send the email invitations on the days of the meetings to include other, omitted individuals as requested by his supervisor. Grievant Exh. 18.

The Grievant also testified that the VITA cost estimate for the document production was unnecessarily high and that it should have taken about five minutes to copy the requested computer files.

The Grievant testified that he believed his supervisor and the IT manager discriminated against him and retaliated against him in response to his complaints to the EEOC and EES. The Grievant also testified that he had no intention of returning to the Agency, as he obtained employment with another state agency as of July 10, 2012.

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).

I find that the Agency has met its burden of showing the Grievant's job performance as charged in the Group I Written Notice was inadequate. The Group I Written Notice was directed to the Grievant's March 9, 2012, error-ridden letter answering the consultant's questions, and the inadequate attempt to re-write the document for re-sending. I find the Agency's dissatisfaction with the task justified and the Group I Written Notice is an appropriate response for inadequate job performance on that discrete task. While the Grievant testified that he did not intend his supervisor to re-write the document and submit it to IBM, the supervisor testified that she requested and was expecting a finished product from the Grievant, which he did not deliver, either initially or as re-written. Unsatisfactory work performance is properly characterized as a Group I offense.

Further, I find that the Agency has met its burden of showing the Grievant failed to follow supervisor's instructions regarding the Group II Written Notice. The data outage serves as an extenuating factor that led to the project's delay and additional time required by the consultant. However, even when tempering the project's lack of success for these reasons, they have no bearing on the Grievant's failure to notify and invite all required team members to the project meetings and lack of follow up with them for feedback, as specifically directed by the supervisor. Allowing for unforeseen setback from the data outage, the failure to follow the supervisor's instruction is still evident in the failure of effective meeting notices and failure to obtain direct feedback from the meeting participants. Failure to follow supervisor's instructions is properly categorized as a Group II offense.

Pursuant to applicable policy, management has 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.* As long as it acts within law and policy, the Agency is permitted to apply exacting standards to its employees.

The Grievant argues that the two Written Notices concern the same course of events and should, at most, result in a single Written Notice. While the Agency may have some discretion in how and whether it identifies discrete violations, there is a rational basis for the two Written Notices even though both are related to the course of a single project. This discretion falls within the latitude of managing the affairs and operations of the Agency, and the hearing officer cannot simply substitute his judgment to combine the Written Notices into one.

Mitigation

Under Virginia Code § 2.2-3005, the hearing officer has the duty to receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with

rules established by the Department of Human Resource Management. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation. A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

While the hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances, the hearing officer is permitted to mitigate a disciplinary action if, and only if, it exceeds the limits of reasonableness. There is no authority that requires an Agency to exhaust all possible lesser sanctions or, alternatively, show that termination was its only option. Even if the hearing officer would have levied a lesser discipline, the Agency has the management prerogative to act within a continuum of discipline as long as the Agency acts within the bounds of reasonableness.

On the issue of mitigation, EDR has ruled:

> Importantly, because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management. Rather, mitigation by a hearing officer under the *Rules* requires that he or she, based on the record evidence, make findings of fact that clearly support the conclusion that the agency's discipline, though issued for founded misconduct described in the Written Notice, and though consistent with law and policy, nevertheless meets the *Rules* "exceeds the limits of reasonableness" standard. This is a high standard to meet, and has been described in analogous Merit System Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.

EDR Ruling #2010-2483 (March 2, 2010) (citations omitted). EDR has further explained:

> When an agency's decision on mitigation is fairly debatable, it is, by definition, within the bounds of reason, and thus not subject to reversal by the hearing officer. A hearing officer "will not freely substitute [his or her] judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"

EDR Ruling 2010-2465 (March 4, 2010) (citations omitted).

The Agency presents a position in advance of its need to manage the important affairs of the Agency. The hearing officer accepts, recognizes, and upholds the Agency's important expectation of employee work performance and following supervisor's instructions. I find that

the Agency has acted reasonably in its discipline of the Grievant. The prior, active Written Notices weigh against mitigation. While the Grievant had exhibited a good work record prior to 2010, the evidence was presented of diminished performance since 2010. The Agency demonstrated a legitimate business reason to issue the Written Notices. While the Agency could have justified or exercised lesser discipline than termination, a record of four active Written Notices (two Group II's and two Group I's) is sufficient for termination based on accumulation. (Even two Group II's, alone, normally should result in termination under the Standards of Conduct.) Accordingly, I find no mitigating circumstances that permit a finding that the Agency's action is outside the bounds of reasonableness.

Retaliation

The Grievant asserts that the Agency's action is motivated by retaliation. For a claim of retaliation to succeed, the Grievant must show (1) he engaged in a protected activity; (2) he suffered a materially adverse action; and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took a materially adverse action because the employee had engaged in the protected activity. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006); s*ee, e.g.*, EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633. If the Agency presents a nonretaliatory business reason for the adverse action, then the Grievant must present sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation. *See EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 405 (4th Cir. 2005). Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

The Grievant engaged in protected activity by asserting his complaints to the EEOC and EES, alleging the Agency discriminated against him. The Grievant asserts that the retaliation he has experienced stems from this complaint. Further, he could be viewed as having potentially suffered a materially adverse action due to the agency's discipline and termination. However, as explained below, the Grievant does not satisfy the burden of proof of showing that the materially adverse action was taken because of his protected activity.

There is nothing to suggest that the Agency's handling of this discipline was in any way retaliatory beyond the Grievant's mere allegation. Grievant has not presented sufficient evidence to show that the Agency's discipline was motivated by improper factors. Rather, it appears that the determinations were based on the Grievant's actual job performance, all of which was solely within the control of the Grievant.

Job termination is inherently a harsh result. It is unfortunate that the Agency is losing an otherwise valuable employee, but there are no factors that would make it unreasonable to impose the Agency's choice to remove Grievant. Accordingly, Grievant's request for relief must be denied.

Cost of Producing Documents

The *Grievance Procedure Manual* provides that "[t]he party requesting the documents may be charged the actual cost to retrieve and duplicate the documents." *Grievance Procedure Manual* § 8.2. However, EDR must also review whether the agency's proposed charges are reasonable under the facts of this case, and the Grievant has not agreed to the Agency's asserted actual cost. The Agency has asserted a cost of $1,965, as submitted pre-hearing in a cost estimate from VITA, estimating 15 hours of a systems engineer. No actual invoice was submitted for the grievance hearing record, but the Agency asserted the cost estimate submitted pre-hearing was the invoice. In EDR Director's Ruling Nos. 2011-2787, 2011-2788 (November 2, 2010), EDR held, in the facts presented, "there is only one user and one network folder to be collected. As such, this cost should be substantially reduced to one-half hour, leaving a total of 1.5 hours maximum for collection of all these documents." In EDR Director's Ruling Nos. 2010-2628, 2010-2629 (June 4, 2010), EDR recognized that the actual time charged for a document retrieval must be tracked.

The documents requested by the Grievant and ordered to be produced were the following:

1. Copies of all calendar meetings appointments scheduled by [the Grievant] in Outlook for the time period of January 1, 2012 thru April 23, 2012.
2. Current copy of all ABC policies and procedures
3. Any and all emails with an IBM domain designation
4. All previous performance evaluations
5. Copies of all emails To and From listed in [the Grievant's] ABC Outlook email address with the named individuals for the time period of January 1, 2012 to April 23, 2012. (Eighteen individuals were listed.)

It appears that there is only one user's computer files that had to be searched (the Grievant's). The estimate of 15 system engineer hours for the search is not adequately explained, especially since the only submission was an estimate and no actual time records have been produced. Accordingly, because the Agency has not borne its burden of proof on the reasonable cost for producing the documents, the request for payment of the charges is denied.

DECISION

For the reasons stated herein, the Agency's issuance of the Group II and Group I Written Notices with termination (based on the accumulation of active Written Notices) is **upheld**. The Agency's request concerning the cost of producing documents is **denied**.

APPEAL RIGHTS

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

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the

decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

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

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[1]

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

[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.

COMMONWEALTH of VIRGINIA

SARA REDDING WILSON
DIRECTOR

Department of Human Resource Management

101 N. 14TH STREET
JAMES MONROE BUILDING, 12TH FLOOR
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POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT
In the Matter of
The Department of Alcoholic Beverage Control

November 29, 2012

The grievant has requested an administrative review of the hearing officer's decision in Case No. 9906. For the reasons stated below, the Department of Human Resource Management (DHRM) will not interfere with the application of this decision. The agency head of DHRM, Ms. Sara R. Wilson, has directed that I conduct this administrative review.

The relevant issues in this case are as follows:

Grievant was a project manager for the Department of Alcoholic Beverage Control ("the Agency"), and he challenges the Group I Written Notice and Group II Written Notice and termination, both issued on April 20, 2012. The Grievant had a prior active Group II Written Notice, for failure to follow supervisor's instructions (Agency Exh. 15) and a prior Group I Written Notice, for abuse of state time (Agency Exh. 16).

****

ISSUES

The Offenses

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions. The Grievant has worked for the Agency for 12 years. The operable facts of the discipline are stated in the Agency's Written Notices. Agency Exh. 1. The Group I Written Notice, issued by the Grievant's immediate supervisor on April 20, 2012, stated:

The offense in question is for the management of two separate initiatives that involved consulting services with IBM. [The Grievant] was assigned as the Project Manager to ensure the successful implementation of our Rational Tools for our Agile methodology to include adoption of the tool amongst all team members. Over the course of a month, [the Grievant] displayed several instances

of poor job performance.

The details were further described in Section IV of the Written Notice:

On March 9, 2012, a letter was transmitted by [the Grievant] to answer some environmental questions for IBM. The letter was very unprofessional in that it contained inaccurate information, spelling and grammatical errors and was not presented in a professional format. After being notified of the poor quality of the letter, [the Grievant] corrected the spelling mistakes and sent it to me for resubmittal. On the evening of March 12, I had to re-write the majority of the letter for accuracy and professional content. This letter was re-sent to IBM on March 14.

The IBM consultant arrived on March 19; the kickoff meeting scheduled for the morning did not include more than half of the individuals who would be expected to be involved in the week long engagement. Meeting invites were sent out 10 minutes before the meeting. A final meeting was scheduled for March 30 at 3:00 pm. When asked, I told [the Grievant] specifically that all people who are under me should be invited to the meeting along with others who are directly or indirectly involved with the Agile projects. Again, more than half of the required attendees were omitted.

When [the Grievant] arrived at 1:30 pm on March 30, I was told that the consultant would be leaving for the day at 3: 00 pm and no meeting would occur. [The Grievant] gave incorrect information. Starting on April 2, the second engagement of consulting services began. When [the Grievant] arrived at 9:00 am, I asked if the kickoff had been scheduled and he responded that no meetings had been scheduled for the week. Again, meeting invites were sent out with a 10- minute lead time.

The Group II Written Notice, issued the same day by the Grievant's immediate supervisor, stated:

> The offense in question is for failure to follow supervisory instructions. [The Grievant] was assigned as the Project Manager to ensure the successful implementation of our Rational Tools for our Agile methodology to include adoption of the tool amongst all team members. Over the course of the engagement with the consultant from March 19, 2012, through April 2, 2012, [the Grievant] failed to follow the instructions he was given to successfully complete his tasks.

The details were further described in Section IV of the Written Notice:

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> the engagement and was then told that an additional 10 hours would be needed to complete the engagement. The communication I received was from the consultant on March 22, at 8: l0am. [The Grievant] did not follow up with this communication. The IBM consultant returned on March 28 for an additional 10 hours. By the late morning of March 29, I inquired about the final meeting. At this time, I was told that the consultant would not be able to finish on this day. I was not informed by [the Grievant] that the consultant had agreed to stay another day. I later spoke to the consultant directly who was surprised that I was not told he would remain an extra day to complete the engagement. A final meeting was scheduled for March 30 at 3:00 pm. When asked, I told [the Grievant] specifically that all people who are under me should be invited to the meeting along with others who are directly or indirectly involved with Agile projects. Again, more than half of the required attendees were omitted.
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>
> On April 2, I talked to all the participants of the engagement to find out if [the Grievant] had followed up with them to ensure that they were able to use the tool for their teams on the following week. No one had spoken to [the Grievant] and many of the teams still had substantial work effort required to get started.

The Grievant's immediate supervisor, the Business Application Development Manager, testified consistently with the offenses described in the written notices. The supervisor testified that she gave specific instructions to the Grievant regarding the project; she had to re-write the letter to the consultant because of errors and unprofessional presentation (Agency Exh. 8); the meetings were critical to the project implementation and they were not managed as she instructed; and, the Grievant did not follow up with the team members for feedback. She specifically addressed Agency's Exhibits 1, 8, 10, 11, 15.

The Agency's chief information officer testified regarding the Agency's expense for producing the documents requested by the Grievant. The request was handled through the Virginia Information Technology Agency (VITA), which charged an hourly rate to recover the requested documents from the Grievant's computer. The Agency had submitted, pre-hearing, an estimate from VITA for 15 system engineer hours, with an estimated total of $1,965 ($131/hour). The estimate document was not moved into evidence at the grievance hearing, but, for purposes of this issue, the Excel spreadsheet submitted pre-hearing is made a part of the record as Hearing Officer's Exh. A.

The chief information officer also testified that he agrees with the issuance of the two Written Notices, and explained that the Grievant's job performance noticeable worsened after he was not selected for promotion in 2010 to the job held by the

Grievant's immediate supervisor, the Business Application Development Manager. The Grievant has since 2010, filed complaints with the Equal Employment Opportunity Commission (EEOC) and the DHRM Office of Equal Employment Services (EES), alleging discrimination based on race (black) and gender (male). Agency Exh. 13 & 14.

A data analyst testified on behalf of the Grievant. She stated that she worked with the Grievant on the project at issue, and she had a positive impression of his leadership. However, she admitted that her job did not involve evaluation of the Grievant. Also testifying for the Grievant was the Agency's former IT manager until 2010. She testified that her experience with the Grievant's performance was very good, his evaluations were good, and that the Grievant was well respected by his peers and subordinates. She left the Agency before the Grievant sought the job promotion in 2010.

The senior configuration manager testified that he worked with the Grievant on the project at issue. He confirmed that there was a data outage during the time the consultant was present, and that the data outage provided a setback to the project.

The Grievant testified that there was a data outage during the consultant's time and that the outage caused the need for additional time from the consultant. The Grievant testified that when he re-drafted the document for submission to IBM, it was not finished and he gave it to his supervisor just for review-not to rewrite and submit. The Grievant testified that he kept his supervisor informed to the extent he was informed regarding the changes to the project schedule and consultant's schedule. The Grievant testified that he got feedback from the team members at the conclusion of the meetings, although he did not follow up with them after the meetings. As for the meeting notices, he set up the meetings and sent the invites well in advance, but he did resend the email invitations on the days of the meetings to include other, omitted individuals as requested by his supervisor. Grievant Exh. 18.

The Grievant also testified that the VITA cost estimate for the document production was unnecessarily high and that it should have taken about five minutes to copy the requested computer files.

The Grievant testified that he believed his supervisor and the IT manager discriminated against him and retaliated against him in response to his complaints to the EEOC and EES. The Grievant also testified that he had no intention of returning to the Agency, as he obtained employment with another state agency as of July 10, 2012.

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).

I find that the Agency has met its burden of showing the Grievant's job performance as charged in the Group I Written Notice was inadequate. The Group I Written Notice was directed to the Grievant's March 9, 2012, error-ridden letter answering the consultant's questions, and the inadequate attempt to re-write the document for re-sending. I find the Agency's dissatisfaction with the task justified and the Group I Written Notice is an appropriate response for inadequate job performance on that discrete task. While the Grievant testified that he did not intend his supervisor to re-write the document and submit it to IBM, the supervisor testified that she requested and was expecting a finished product from the Grievant, which he did not deliver, either initially or as re-written. Unsatisfactory work performance is properly characterized as a Group I offense.

Further, I find that the Agency has met its burden of showing the Grievant failed to follow supervisor's instructions regarding the Group II Written Notice. The data outage serves as an extenuating factor that led to the project's delay and additional time required by the consultant. However, even when tempering the project's lack of success for these reasons, they have no bearing on the Grievant's failure to notify and invite all required team members to the project meetings and lack of follow up with them for feedback, as specifically directed by the supervisor. Allowing for unforeseen setback from the data outage, the failure to follow the supervisor's instruction is still evident in the failure of effective meeting notices and failure to obtain direct feedback from the meeting participants. Failure to follow supervisor's instructions is properly categorized as a Group II offense.

Pursuant to applicable policy, management has 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.* As long as it acts within law and policy, the Agency is permitted to apply exacting standards to its employees.

The Grievant argues that the two Written Notices concern the same course of events and should, at most, result in a single Written Notice. While the Agency may have some discretion in how and whether it identifies discrete violations, there is a rational basis for the two Written Notices even though both are related to the course of a single project. This discretion falls within the latitude of managing the affairs and operations of the Agency, and the hearing officer cannot simply substitute his judgment to combine the Written Notices into one.

Mitigation

Under Virginia Code § 2.2-3005, the hearing officer has the duty to receive

and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Human Resource Management. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation. A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

While the hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances, the hearing officer is permitted to mitigate a disciplinary action if, and only if, it exceeds the limits of reasonableness. There is no authority that requires an Agency to exhaust all possible lesser sanctions or, alternatively, show that termination was its only option. Even if the hearing officer would have levied a lesser discipline, the Agency has the management prerogative to act within a continuum of discipline as long as the Agency acts within the bounds of reasonableness.

On the issue of mitigation, EDR has ruled:

Importantly, because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management. Rather, mitigation by a hearing officer under the *Rules* requires that he or she, based on the record evidence, make findings of fact that clearly support the conclusion that the agency's discipline, though issued for founded misconduct described in the Written Notice, and though consistent with law and policy, nevertheless meets the *Rules* "exceeds the limits of reasonableness" standard. This is a high standard to meet, and has been described in analogous Merit System Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.

EDR Ruling #2010-2483 (March 2, 2010) (citations omitted). EDR has further explained:

When an agency's decision on mitigation is fairly debatable, it is, by definition, within the bounds of reason, and thus not subject to reversal by the hearing officer. A hearing officer "will not freely substitute [his or her] judgment for that of the agency on the question of what is the best penalty, but will only "assure that managerial judgment has been properly exercised within tolerable limits of reasonableness."

EDR Ruling 2010-2465 (March 4, 2010) (citations omitted).

The Agency presents a position in advance of its need to manage the important affairs of the Agency. The hearing officer accepts, recognizes, and upholds the Agency's important expectation of employee work performance and following supervisor's instructions. I find that the Agency has acted reasonably in its discipline

of the Grievant. The prior, active Written Notices weigh against mitigation. While the Grievant had exhibited a good work record prior to 2010, the evidence was presented of diminished performance since 2010. The Agency demonstrated a legitimate business reason to issue the Written Notices. While the Agency could have justified or exercised lesser discipline than termination, a record of four active Written Notices (two Group II's and two Group I's) is sufficient for termination based on accumulation. (Even two Group II's, alone, normally should result in termination under the Standards of Conduct.) Accordingly, I find no mitigating circumstances that permit a finding that the Agency's action is outside the bounds of reasonableness.

Retaliation

The Grievant asserts that the Agency's action is motivated by retaliation. For a claim of retaliation to succeed, the Grievant must show (1) he engaged in a protected activity; (2) he suffered a materially adverse action; and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took a materially adverse action because the employee had engaged in the protected activity. *Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53,67-68 (2006); *see, e.g.,* EDR Ruling Nos. 2007-1601,2007-1669, 2007 - 1706 and 2007-1633. If the Agency presents a non-retaliatory business reason for the adverse action, then the Grievant must present sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation. *See EEOC* v. *Navy Fed. Credit Union,* 424 F.3d 397,405 (4th Cir.2005). Evidence establishing a causal connection and inferences drawn there from may be considered on the issue of whether the Agency's explanation was pretextual. *See Texas Dep 't of Community Affairs* v. *Burdine,* 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

The Grievant engaged in protected activity by asserting his complaints to the EEOC and EES, alleging the Agency discriminated against him. The Grievant asserts that the retaliation he has experienced stems from this complaint. Further, he could be viewed as having potentially suffered a materially adverse action due to the agency's discipline and termination. However, as explained below, the Grievant does not satisfy the burden of proof of showing that the materially adverse action was taken because of his protected activity.

There is nothing to suggest that the Agency's handling of this discipline was in any way retaliatory beyond the Grievant's mere allegation. Grievant has not presented sufficient evidence to show that the Agency's discipline was motivated by improper factors. Rather, it appears that the determinations were based on the Grievant's actual job performance, all of which was solely within the control of the Grievant.

Job termination is inherently a harsh result. It is unfortunate that the Agency is losing an otherwise valuable employee, but there are no factors that would make it unreasonable to impose the Agency's choice to remove Grievant. Accordingly, Grievant's request for relief must be denied.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. By statute, as related to policy, 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 regarding policy issues, 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.

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 Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards 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.

In his appeal to this Agency, the grievant offered six reasons to support his request to have the written notices reversed. Three of the items will be addressed in this ruling.

> Item No. 1- [Grievant] became ill and sought medical attention and was taken out of work and places under the care of his physician on or about April 9, 2012. [Grievant] was terminated on April 23, 2012, while out of work under the care of his physician. Therefore, [Grievant] was not afforded the opportunity to respond to the Group I and II notices and he was terminated while on medical leave.

According to the hearing decision, the grievant was given 48 hours to respond to the agency's proposal to issue to him disciplinary action. DHRM Policy 1.60 provides that agencies should provide a reasonable period of time for an grievant to respond, and a 48-hour period is certainly reasonable. The DHRM can find no violation.

> Item No. 5 – The hearing officer failed to consider mitigating factors when the action by the agency of terminating the grievant exceeded the limits of reasonableness for writing a Group I and Group II on the day, April 4, 2012, and for the same reasons and circumstances.

The hearing officer concluded that the agency's justification for issuing both Written Notices on the same day was based on the fact that two violations occurred, one related to performance and one related to failure to follow instructions. The DHRM will not interfere with that determination.

> Item No. 6 – The hearing officer admitted in his opinion that the grievant was in a protected class and adverse action was taken against grievant by terminating him from his position.

The hearing officer concluded that, while the grievant suffered an adverse action, he does not

satisfy the burden of proof of showing that the materially adverse action was taken because of his protected activity. We do not disagree with the hearing officer's conclusion.

Finally, while the grievant referenced a violation of state policy, no human resource management policy was cited. Rather, the grievant raised issues that are related to the state employee Grievance Procedure. Those issues have been addressed by the Office of Employment Dispute Resolution. Thus, we have no basis to disturb the implementation of this decision.

_____

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

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

Grievant/Appellant,	
v.	**Case No.:**
VIRGINIA DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL	
Agency/Appellee.	

ORDER

On March 14, 2013, parties, represented by counsel, came before the Court to argue Grievant's appeal, pursuant to Virginia Code § 2.2-3006, from the Hearing Officer's decision to uphold his employment termination. The Court took the matter under advisement and counsel returned for the Court's ruling on March 25, 2013.

Upon mature consideration of the record and oral argument in the above-styled matter, the Court, this day, **REVERSES** the decision of the hearing officer, **AWARDS** reasonable attorney's fees to Grievant, and **GRANTS** the request for back pay from the date of termination to date of new employment. Parties are **ORDERED** to confer in calculating the appropriate amount of back pay.

Pursuant to Rule 1:13 of the Supreme Court of Virginia, the Court dispenses with the parties' endorsements of this Order.

The Clerk is directed to forward a certified copy of this Order to the parties.

It is so **ORDERED**.

ENTER: 3/28/13

Clarence N. Jenkins, Jr., Judge

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