

Issue: Group II Written Notice (failure to follow instructions/policy); Hearing Date: 01/11/18; Decision Issued: 01/31/18; Agency: VDH; AHO: Neil A.G. McPhie, Esq.; Case No. 11121; Outcome: No Relief – Agency Upheld.

**COMMONWEALTH OF VIRGINIA**  
Department of Human Resource Management  
Office of Employment Dispute Resolution

**DECISION OF HEARING OFFICER**

In re: The Virginia Department of Health

**Case Number: 11121**

Hearing Date January 11, 2018  
Decision Issued January 31, 2018

**PROCEDURAL HISTORY**

**On February 16, 2017, Grievant was issued a Group II Written Notice of disciplinary action for violation of travel reimbursement policies. (Agency Ex. 4) Specifically, the Written Notice alleged that Grievant had submitted travel reimbursement requests for work related travel between June 2, 2016 to July 28, 2016 that were not supported by agency records.**

On or around March 24, 2017, Grievant timely filed a grievance. (Agency Exhibit 5). On November 30, 2017, the Department of Human Resource Management (DHRM) assigned the matter to the undersigned Hearing Officer, effective December 5, 2017. On January 11, 2017, a hearing was held at the Prince William County Complex.

**APPEARANCES**

Grievant  
One witness for Grievant  
Agency Representative  
Two Witnesses for the Agency  
Agency Advocate

**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 1, 11, or 111 offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, aggravating circumstances existed that would overcome the mitigating circumstances?

### **EXHIBITS**

The Agency timely submitted a three-ring binder containing 13 exhibits numerically tabbed<sup>1</sup>. Grievant did not object to any of the agency's exhibits. Grievant submitted exhibits marked 1 to 8 post marked January 5, 2018. Exhibits 1 – 6 were admitted over the Agency's objection. The Agency's objection to Ex. 7 was sustained and Exhibit 8 was withdrawn.

Grievant's Ex. 1 comprises 12 pages of emails regarding grievant's reports that his portable printer and computer he uses to write and print his field reports were not working, all but one of which are prior to June 2, 2016, and one undated Food Service Establishment Inspection Report of another inspector; Ex. 2 consists of 31 pages of another inspector's Swimming Pool and Health Spa Inspections reports in July and August 2013; Ex. 3 consists of 16 pages of another inspector's Food Service Inspection and Evaluation Reports of pre certified food establishments; Ex. 4 consists of 7 pages of another inspector's Food Service Establishment Reports at food facilities at certain county schools; Ex.5 is a two-page undated memorandum Grievant submitted in response to the Agency's January 17, 2016 , Due Process Memorandum; Ex.6 consists of a two-page Food Establishment inspection Report of another inspector.

The Agency objected to the entire set of Grievant's exhibits on the basis of relevance and untimely service. The objection was overruled. The exhibits

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<sup>1</sup> Exhibit 12 and 13 were actually served by separate mail and inserted by the Hearing Officer in the binder.

totaling 70 pages that were not marked or organized were confusing to the Hearing Officer without explanation and context. Therefore their relevance could not be predetermined. The Revised Scheduling Order required exhibits to be “provided” by January 5, 2018. The Grievant’s exhibits were mailed first class on January 5, 2018 and were received by the Agency on January 9, 2018. They were clearly not “provided” by January 5<sup>th</sup>. Nevertheless, they were timely served pursuant to the mailbox rule. In addition, the rules of evidence do not strictly apply to administrative hearings.

The Agency objected to Grievant’s exhibit 7 which is a compliance ruling by the Office of Employment Dispute Resolution (EEDR). Grievant had argued to EEDR for the disclosure of the performance evaluations of two employees that he claimed were permitted to complete certain types of work by hand, while he was directed to complete such reports electronically. Because EEDR denied the request, the Hearing Officer sustained the Agency’s objection. Moreover there was no evidence offered to demonstrate why the referenced employees’ performance evaluations would shed light on the Grievant’s circumstance.

### **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. 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. Grievant has the burden of raising and establishing any affirmative defenses to the discipline and any evidence of mitigating circumstances related to the discipline.(GPM § 5.9)

### **FINDINGS OF FACT**

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

Grievant was employed as a classified employee in another state agency since April 1, 1987. He transferred to his current position as an Environmental

Health Specialist at a County Health District of the Virginia Department of Health (VDH) on November 20, 2000. At the time he received the disciplinary action that is the subject of this hearing, Grievant had 16 years and 3 months of service to VDH. (Agency Ex. 2).

Grievant's supervisor is experienced in food safety requirements. The supervisor was employed as the Environmental Health Supervisor for the County Health District since January 2012. Prior to joining the Health District, the supervisor worked two years as a Food Safety Specialist at another State agency, 3 years as an Environmental Health specialist for another County Health Department, and 2 years as a Management specialist at yet another County Health Department. In addition, the supervisor served as the Acting Environmental supervisor in 2006 for that County's Health Department and 6 months later was promoted to the Environmental Health supervisor for that County. (Agency Ex. 6)

The supervisor supervises 6 Inspectors and one tech specialist who provides training. (Testimony of the supervisor).

Food Safety Inspectors such as Grievant, are required to enter inspection results, in the field in VENIS, the Agency's electronic data base system. The report is printed by the Inspector and reviewed by the owner/operator of the establishment and signed by the Inspector and the owner/operator. Inspection reports are public information and are accessible by the public on line. Reports are legal documents. They serve as a compliance guide to the owner/operator of the food service establishment and are evidence of the Inspector's job performance. (Testimony of the supervisor)

The Virginia Department of Health ("VDH" or "the Agency") employed Grievant as an Environmental Health Specialist Sr. In this capacity, Grievant drove his personal vehicle to visit and inspect assigned commercial food establishments for compliance with applicable food service regulations.

During the period June 2, 2016 to July 28, 2016, Grievant conducted numerous food safety inspections at assigned county establishments. (Testimony of the supervisor)(Agency Ex. 13)

On August 4, 2016, Grievant submitted his travel reimbursement requests for June and July 2016 to his supervisor for review and certification. (Agency Ex. 2). "By signing the travel reimbursement request, the traveler [in this case the Grievant] is certifying the accuracy of all information and the legitimacy of the travel. The signature of the traveler's supervisor certifies that the travel was necessary and the requested reimbursements are proper." (Travel Regulations, and Travel Expense Reimbursement Voucher Form DA-02-041 (Agency Ex. 9)<sup>2</sup>.

Upon review, the supervisor noted that the amount of travel reimbursement requested for both months was significantly higher than previous requests. In addition, the supervisor noted discrepancies between the requests and potential supporting information from inspection reports for the facilities Grievant identified on his travel sheet, as well as information in the VENIS data base, documentation of telephone messages from Grievant with the travel starting point, and a list of the facilities inspected. (Agency Ex. 2)(Testimony of Grievant's supervisor).

On September 14, 2016,<sup>3</sup> the supervisor and the Environmental Health Manager met with Grievant and identified, for Grievant's benefit, numerous examples of travel reimbursement discrepancies between his submission and agency records. Agency Exs. 2 & 3) (Testimony of Grievant's supervisor).

During the meeting, Grievant took notes and stated that he must have made errors in his submission and that he would correct the Employee Travel Expense and Reimbursement Vouchers (TERV) that he had submitted. At the end of the meeting, Grievant's original submissions were returned to him. On

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<sup>2</sup> Grievant received a copy of and had electronic access to all pertinent travel reimbursement policies.

<sup>3</sup> The meeting did not occur at an earlier date because of August vacations for Grievant and the supervisor, and Grievant's absences on leave.(Agency Ex. 3)

September 29, 2016, Grievant requested and was provided a copy of his original submittal with hand written discrepancies that were reviewed during the September 14<sup>th</sup> meeting. (Agency Ex. 3)(Testimony of the supervisor)<sup>4</sup>

On October 20, 2016, Grievant submitted his corrected Employee Travel and Expense Reimbursement Vouchers for June and July 2016 that were still significantly higher than in previous months. The supervisor noted continued and additional discrepancies between the corrected submissions and Agency records in VENIS, documentation of telephone messages from Grievant to his supervisor as to the work day starting point, food establishment records maintained by the health district and food establishment.(Agency Ex. 2 pages 3-5)

On several occasions, Grievant corrected submission revealed that instead of serially inspecting facilities that were in close proximity in the same trip, he documented that he inspected one food establishment, returned to the office and then went back to the same travel destination to inspect a second food establishment thereby increasing the mileage claimed.

Another discrepancy noted was that Grievant documented that in July 2016 he inspected a restaurant in his area, returned to the office then, inspected another restaurant at another location in his area at times that were physically impossible. (Agency Ex. 3; Testimony of the supervisor and the Human Resources representative.)<sup>5</sup>

The Human Resources representative reviewed Grievant's travel reimbursement submittals and concluded that Grievant was claiming mileage reimbursement for inspections that did not occur.

The day before Grievant submitted his corrected TERV, a VENIS audit noted that on October 18 and 19, 2016, Grievant had viewed and modified the information that was originally in the VENIS data base regarding the inspections

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<sup>4</sup> Grievant testified that his original submission was not returned to him as his supervisor testified. The Hearing Officer credits the supervisor's testimony which is corroborated by Agency Ex. 3. Moreover the supervisor's testimony is credited because of her intimate familiarity with the details of the meeting and her professional and forthright demeanor in testifying.

<sup>5</sup> The witness is the Human Resources representative for the County Health District. Her responsibilities include investigating proposed disciplinary actions before they are submitted to the Central Office for approval.

he conducted in June and July of 2016. (Agency Ex. 3, Testimony of the supervisor)

After each inspection, Grievant was required to “adequately document findings and observations and enter all inspections in the field utilizing [an agency-provided] laptop computer and VENIS database system” (Grievant Employee Work Profile (Agency Ex. 11).

Grievant is required to enter all inspections in the field utilizing the agency issued laptop computer and VENIS database system. Regardless of this requirement, before and during the period in question, Grievant frequently hand wrote his reports on paper forms.

Grievant was counseled in person and in writing on this requirement multiple times, including documentation in his recent performance evaluations. Grievant did not report or notify the supervisor or the Environmental Health Manager of any complaints with the VENIS database, his computer or printer during June and July 2016. (Agency Ex. 3) (Testimony of the supervisor)

### **ANALYSIS 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 employees 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 (A) sets forth the Commonwealth’s grievance procedure and provides in pertinent part:

*It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints.... To the extent that such concerns cannot be resolved informally, the*



*grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.203001.*

In disciplinary actions for unsatisfactory performance, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. Grievance Procedure Manual (GPM) § 5.8.

The Department of Human Resource Management (DHRM) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees. Policy 1.60. (Agency Ex. 8) “The purpose of the policy is to set forth the Commonwealth’s Standards of Conduct and the disciplinary process that agencies must utilize to address unacceptable behavior, conduct, and related employment problems in the workplace, or outside the workplace when conduct impacts an employee’s ability to do his/her job and/or influences the agency’s overall effectiveness.” A legitimate goal of the policy is to “enable agencies to fairly and effectively discipline and/or terminate employees... where the misconduct and/or unacceptable performance is of such a serious nature that a first offense warrants termination.” *Id.*

Under the Policy, unacceptable behavior is divided into three types of offenses, according to their severity. Group II offenses “include acts of misconduct of a more serious nature that significantly impact agency operations such as **failure to follow supervisor’s instructions or comply with written policy**” (Attachment A of Policy 1.60)

The evidence in the case, clearly demonstrates that Grievant failed to follow his supervisor’s instruction and state travel policy.<sup>6</sup> His EWP expressly required Grievant to “[a]dequately document findings and observations and enter all inspections in the field utilizing the laptop computer and VENIS database system. (Agency Ex. 11 at p. 2). Grievant was instructed by his supervisor to use

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<sup>6</sup> The testimony of Grievant’s supervisor and the Human Resources representative are consistent with the agency’s documentary evidence.

the agency issued computer to enter his inspection report in the field and he repeatedly failed to do so. As a result, there was no accountability for the time Grievant spent at each restaurant inspection. His failures to follow inspection protocol made it difficult, and in some instance, impossible for his supervisor to certify his travel reimbursents as accurate and necessary.

Grievant does not dispute that hand wrote reports in the field, instead he claimed that other food inspectors hand wrote their reports and were not disciplined. He offers exhibits to support his position. They do not. His exhibit 2 consists of 31 pages of another inspector's Swimming Pool and Health Spa Inspections reports in July and August 2013. They are clearly outside the requisite period July 2 to July 28, 2016. Moreover his supervisor testified that the reporting requirements for pool inspections are different from food inspections; they are not reported in VENIS and can be hand-written. This testimony was un rebutted. Ex. 3 consists of 16 pages of another inspector's Food Service Inspection and Evaluation Reports of pre certified food establishments. His supervisor testified that establishments that were not yet licensed were not subject to the same reporting requirements. This testimony was un rebutted. Ex. 4 consists of 7 pages of another inspector's Food Service Establishment Reports at food facilities at certain county schools. Two facilities appear to be within the requisite review period and there is a written inspection report for one of them. However, Grievant has offered no evidence to explain the context of this solitary report.

Grievant also claimed that he experienced frequent malfunctions of his computer and printer and therefore had to hand write reports. He asserted that he reported his equipment malfunctions to his supervisor who either ignored or took a long time to respond and rectify the problem. He supports this assertion by his lone witness and his exhibit 1. Grievant's witness did not support Grievant's theory of frequent equipment malfunction, or that management took a long time or ignored inspector's equipment malfunctions. **His witness is an experienced Food Inspector. He testified that he routinely submitted his reports in the field using his agency-issued laptop computer and VENIS. He testified that his equipment malfunctioned "once in a while" but problems were resolved promptly. He opined that he had one or two malfunctions in the last 6 months.**

Grievant is an experienced Food Safety Inspector. He has been with the agency for 16 years. Grievant knew of the reporting and reimbursement protocols. Nevertheless, the record evidence clearly shows that Grievant failed to follow these protocols and was counselled many times that he was required to do so.

Grievant Ex. 1 unequivocally demonstrates that Grievant's supervisor promptly addressed his equipment malfunction concerns. Granted that exhibit 1 is outside the relevant period in this case, however it is instructive on the efforts management made to respond to Grievant's complaints of equipment problems and reporting protocols.

On March 1, 2012 his supervisor sent him an email regarding the agency's potential purchase of new equipment (Grievant Ex 1) On February 20, 2013 his supervisor sent him an email which stated **"In reviewing your work, I am again coming across hand-written inspection reports. You have been told multiple times that inspection reports shall be entered into the computer at the time of inspection. I am not aware of any computer and printer issues going on. In fact you were issued a new printer on 9/20/12. On 12/12 you were issued a brand new printer battery as you alleged that your printer was not working. Please explain why I continue to receive handwritten inspection reports against my instructions."** (Grievant Ex. 1B)

On December 2, 2013, Grievant again complained that his printer was not working. **The complaint was followed up and the printer was inspected and found to be in good working condition. The problem was that Grievant was not keeping the battery charged.** (Grievant Ex.1C).

On January 6, 2015 Grievant complained he could not log into Health Space. (Grievant Ex. 1E) **Twenty two minutes later, Grievant supervisor responded "I have looked to see if there are any larger Healthspace issues going on and there doesn't appear to be. You may handwrite today and I can take a look at your computer tomorrow..."** (Grievant Ex.1F)

On January 23, 2015 Grievant supervisor sent him an email that stated **"In reviewing your work, I came across an inspection for ... that was conducted on 1/21/15. It is hand-written on the 2<sup>nd</sup> page with a notation about the "printer not working." I haven't received any communication from you regarding a**

**printer problem or the need for more hand-written inspections so I am confused as to why this is happening. I have repeatedly reminded you about this. Please let me know.** “(Grievant Ex. 1G).

On or around June 30, 2015 Grievant was provided a new computer. (Grievant Ex. 1H).

Grievant asserts that the travel was made on official state business. This argument misses the mark because he was not charged for seeking travel reimbursements for unofficial travel. Rather he was charged for failing to follow travel reimbursement protocols while he was on official travel. Grievant admits that his travel reimbursements for June and July 2016 did contain errors as the agency proved. He offers the excuse that he made the errors because he would enter current information on old reports. This explanation is not believable considering the length of time Grievant was in his position, the frequent times he was reminded and instructed by his supervisor to follow reporting protocols, and the opportunities he was given to correct his June and July submissions. Moreover, by signing his travel request voucher he was certifying that the information was correct and reasonable. (Agency Ex. 10). In addition, in several instances, Grievant submitted and signed Travel Expense Reimbursement Vouchers (TERV) for June and July 2016 indicating that instead of serially inspecting facilities that were in close proximity in one trip, he inspected one food establishment and completed the inspection on a paper form, returned to his base office, and then went back to the same location to inspect the second establishment, again using a paper form to document the inspection. Grievant, by his own admission submitted TERV that was not accurate and reasonable as required by the travel protocol. (Agency Ex. 10).

The discipline was properly classified as Group ii Offense. Pursuant to the Standards of Conduct, Group II offenses “include acts of misconduct of a more serious nature that significantly impact agency operations such as failure to follow supervisor’s instructions or comply with written policy” (Attachment A of Policy 1.60). Grievant failed to follow his supervisor’s instructions and repeatedly failed to follow the mandatory inspection reporting and travel reimbursement policies. I therefore conclude that Grievant engaged in the misconduct as charged.

#### **MITIGATION**

In hearings contesting formal discipline, if the hearing officer finds that (1) the employee engaged in the behavior described in the Written Notice, (11) the behavior constituted misconduct, and (11) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated unless under the record evidence, the agency's discipline exceeds the limits of reasonableness."(GPM at § 5.9). The Standards of Conduct Policy provides for the reduction of discipline if there are mitigating circumstances such as (1) conditions that compel a reduction to promote the interests of fairness and objectivity, or based on an employee's otherwise satisfactory work performance; or (2) an employee's long service or otherwise satisfactory work performance. Grievant had 16 years of service when he was disciplined. However, his supervisor had put him on a Performance Improvement Plan (PIP) for the very violations he committed that resulted in the issuance of the Group 11 discipline. (Agency Ex. 7). In addition County agency officials recommended termination that was reduced to a Group 11 at the Central Office in Richmond. There is therefore no basis to mitigate the Group 11 discipline.

### **DECISION**

The disciplinary action of the Agency is affirmed.

### **APPEAL RIGHTS**

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

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

You must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.<sup>[1]</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

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Neil A.G. McPhie  
Hearing Officer

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<sup>[1]</sup> Agencies must request and receive prior approval from EEDR before filing a notice of appeal.