

Issue: Group II Written Notice (unsatisfactory performance, failure to follow instructions/policy, insubordination, jeopardizing the integrity of the agency; Hearing Date: 01/13/14; Decision Issued: 03/05/14; Agency: DGIF; AHO: John V. Robinson, Esq.; Case No. 10241.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 10241

Hearing Officer Appointment: December 11, 2013

Hearing Dates: January 13, 2014 and

January 14, 2014

Decision Issued: March 5, 2014

**PROCEDURAL HISTORY, ISSUES
AND PURPOSE OF HEARING**

The Grievant requested an administrative due process hearing to challenge the issuance of a Group III Written Notice issued October 22, 2013 by the Department of Game and Inland Fisheries (the "Department" or "Agency"), as described in the Grievance Form A dated November 20, 2013.

The Grievant raised the issues and is seeking the relief requested in his Grievance Form A including reinstatement, restoration of any lost pay and benefits and rescission and removal from his record of the Group III Written Notice.

The Grievant's attorney, the Agency's attorney, and the hearing officer participated in a first pre-hearing conference call on December 19, 2013.

Following the pre-hearing conference call, the hearing officer issued a Scheduling Order entered on December 20, 2013, which is incorporated herein by this reference.

At the hearing, the Grievant was represented by his attorney and the Agency was represented by its attorney. Both parties were given the opportunity to make opening statements, to call witnesses and to cross-examine witnesses called by the other party. Because the hearing took almost twice as long as the allotted 11 hours, the parties, by counsel, submitted closing briefs in lieu of closing argument. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing¹.

References to the agency's exhibits will be designated AE followed by the exhibit number. References to the Grievant's exhibits will be designated GE followed by the exhibit number. References to Grievant's brief will be designated GB followed by the page number and references to the Agency's brief will be designated AB followed by the page number.

In this proceeding, the Agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances. Of course, the Grievant bears the burden of proof concerning any affirmative defenses.

APPEARANCES

Representative for Agency
Grievant
Witnesses

FINDINGS OF FACT

1. Effective January 10, 2011, the Grievant was hired by the Department as the Director of Planning and Finance. AE 5 and 6.
2. The Grievant was a Policy and Planning Manager II and throughout his tenure supervised several employees, including the Accounting Manager, who is a long-term friend and former business colleague of the Grievant. AE 4 & 6. The Grievant testified that he trusted the Accounting Manager. Tapes.
3. The Grievant oversaw the Agency's \$80 million budget and was a member of the senior leadership team. ("SLT"). The purpose of the Grievant's position was described as:

Provides leadership, direction, coordination, and oversight for the proper formulation, planning, development, promulgation, and execution of Departmental legislation, regulatory, performance based budgeting/strategic planning, capital outlay budgeting, accounting, payroll, federal grants management, compliance, and audit. Serves as liaison on policy and legislative and regulatory coordination with the Secretary of Natural Resources, the Governor's Staff and cabinet, collegial bodies, General Assembly, other local, state, and federal agencies, and with private organizations and other clients of the agency, and with [Agency] senior leadership.

AE 6 at 1.

4. Establishment of strong relationships with key customer agencies, including specifically, the Department of Accounts ("DOA") and Auditor of Public Accounts ("APA"), and effective oral and written communication are stressed in the Grievant's Employee Work Profile ("EWP"). AE 6 at 1.
5. The core responsibilities for the Grievant's position as Director of Planning and Finance included addressing and documenting performance issues as they occur and determining compliance of programs. AE 6 at 3.
6. The Agency collects revenue from multiple sources and on behalf of some sister agencies. The Agency must redistribute some of the funds it collects to other agencies. Accordingly, the proper recordation of revenue and timely redistribution of funds is critical.
7. The Virginia Marine Resources Commission ("VMRC") complained about the Agency to the APA and the APA determined to focus on revenue in its next audit cycle for the period July 1, 2011 through December 31, 2012. The Accounting Manager testified that immediately he learned that revenue would be the focus of the audit, he understood and informed the Grievant, his supervisor, that the Agency would be in for a hard time because of its problems in this area. Tapes.
8. For example, during the subject audit period, the Department did not transfer VMRC revenues in the month following collection for 14 out of 18 months with transfers being as much as 2 months late. AE 19 at 2. The Department overpaid VMRC in fiscal year 2013 by approximately \$960,000 due to a system error. Furthermore, the Department did not realize the error had occurred until after transferring the funds and receiving an inquiry from VMRC staff. The Department should have caught this error through reviewing transactions and a general awareness of reasonable and normal transfer levels. Both agencies agreed that the Department would hold future revenues until they equaled the overpayment. However, at the end of the audit period, the Department had not transferred \$528,346 that it had collected through the first 6 months of fiscal year 2013. AE 19 at 2.
9. The Grievant agreed with the findings of the APA in the above paragraph 8. AE 19 at 2 and Tapes.
10. While the Department was subject to a hiring freeze, (as were many state agencies), the Director of Planning and Finance had "built his team back to a fighting weight" by the time of the subject audit. AE 6 at 7. The issue of staffing is a red herring, which was first raised by the Chief Operations Officer ("COO") at the meeting of the Department and the APA on October 2, 2013. The 2 findings of material weakness in the audit report were not due to lack of staffing. Similarly, any IT problems which the Agency was experiencing did not cause the Grievant's insubordination, failure to follow instructions, etc.

11. In his performance evaluation for the period ending November 28, 2011, the COO stressed to the Grievant the opportunity to improve communications to the SLT stating, "I want to ensure that the SLT leaders have all the information they need to plan their work...and that the Board has all the information they need to feel confident our financial forecasts and fund balances are building the way we expect and need them to." AE 6 at 11 - 12. Concerning the Grievant's evaluation regarding the Strategic and Long-Range Planning component, the COO provided in part:

The Agency was late in supplying performance metrics for our strategic plan to DPB. This could be explained by the lack of a budget analyst, but we need to deliver the expected information on time and explain why some data may be missing or delayed.

We want to keep DPB, DOA, and other downtown service agencies on our good side.

AE 6 at 12.

12. In his performance evaluation for the period ended October 23, 2012, the COO reflected that the Grievant is "dedicated to getting clean [audit] reports next cycle." AE 6 at 8. The COO also added that "[Grievant] is a trusted member of the Agency's Senior Leadership Team and counsel to me. He is encouraged to establish realistic timelines for delivering financial analysis and reports so that Board members and outside agencies are well-supported. [Grievant] needs to help the Agency re-establish a reputation of timely, complete and accurate reporting and process delivery." AE 6 at 9.
13. The APA began the subject audit in February 2013. The Auditor in charge testified that she hoped to complete the audit by April 2013. The Executive Director of the Agency instructed the Grievant that it was important to cooperate fully with the auditors. Both of the auditors from the APA testified that contrary to the Executive Director's instructions, the Grievant and the Accounting Manager did not fully cooperate and materially delayed the completion of the audit until the exit conference on October 16, 2013.
14. The Accounting Manager who was the Department's principal liaison with the auditor in charge testified that the Grievant instructed him to respond quickly to the auditor's concerning requested information which was favorable to the Agency but to intentionally withhold from the auditors information that would be unfavorable to the agency on a theory of "less is more." The Accounting Manager testified that the Grievant adopted an intentional strategy of delay and not cooperating fully with the auditors. The Accounting Manager testified that the Grievant would not let the Accounting Manager respond and when asked why he

did not go to the Executive Director for redress, the Accounting Manager testified that he follows the chain of command. The Accounting Manager received formal discipline for his role in the audit process.

15. Beginning in late June 2013, the auditor in charge informed the Accounting Manager who in turn informed the Grievant that there was a possibility that the APA would issue 2 findings of "material weakness": one related to timeliness and accuracy of revenue transfers to other agencies (AE 19) and the other related to the lack of procedures to properly identify, record and redistribute license revenues accurately and timely (AE 20).
16. The Chairman of the Finance, Audit and Compliance Committee, (the "Chairman"), the Board and the Executive Director had previously instructed the Grievant that the Grievant should inform them if something went wrong or if there was a problem - that they wanted no surprises pertaining to the Grievant's responsibilities, role and function at the Agency. The Grievant fully understood the seriousness of material weakness findings to the Agency and the importance of clean reports in the audit.
17. However, the Grievant focused on items other than the audit even as the material weakness findings became more and more probable. The Accounting Manager characterized the Grievant's strategy as delay and hope for the best.
18. Accordingly, the Grievant did not report to the Director the severity of the material weakness findings, which by all accounts were extremely harmful to the reputation of the Agency, as they progressed through several subsequent stages including conversations with the APA, e-mail communications, draft findings dated July 29, 2013 and a draft report in September 2013.
19. The Grievant made several damaging admissions in the hearing including the following:
 - (a) The Grievant admitted that the material weakness findings were a big deal and that in hindsight it was a bad work-related decision not to notify the Executive Director and Chairman in June 2013;
 - (b) On a scale of 1 to 10 (1 being the worst, 10 being the best) the Grievant rated the material weakness reports as a "1," adding "I hated it" and saying he was "totally embarrassed by it.";
 - (c) The Grievant admitted that in hindsight he failed to communicate with leadership as he should have; and
 - (d) The Grievant admits that he is part to blame.

20. The Grievant only informed the Chairman about the material weakness findings by e-mail communication on September 23, 2013. AE 13. The Chairman subsequently informed the Executive Director who had no idea until then.
21. In an e-mail dated September 24, 2013, the Chairman expressed his dismay at the report, in part as follows:

"I have reviewed the report and can't say I am happy with what I read. Hard for me to understand the lack of timeliness in reporting as that would mostly point to a lack of discipline and leadership in the accounting department."

AE 13 at 1.

22. At the time, the Grievant appeared to accept responsibility, stating:

"You are absolutely right. I am not proud of this report and will not pass off the responsibility..." AE 13 at 1.

23. While the Agency is a venerable institution of the Commonwealth, which will reach the century mark in 2016, the Agency did experience a bout of bad press in 2005. Since that time, the Agency has strived to rebuild a solid reputation and reestablish the public trust and its credibility. Negative press concerning the subject audit report of the APA (AE 16) has had a material adverse impact on Agency operations, sullyng the Agency's reputation and diminishing its credibility and the public trust.
24. The testimony of the Agency witnesses was credible. The demeanor of such witnesses was open, frank and forthright.

ADDITIONAL FINDINGS, APPLICABLE LAW, ANALYSIS AND DECISION

The Grievant for the first time in the hearing raised the issue of his summary termination and dismissal from the Agency in contravention of the SOC policy described in SOC (E) concerning due process safeguards. AE 2 at 15. Clearly, the Agency violated both policy and constitutional due process by failing to give the Grievant a reasonable opportunity to respond to the charge before terminating his employment.

However, the Grievant's reliance on this defense fails for 2 reasons. Firstly, the Grievant did not raise the issue on his Form A or in the pre-hearing conference call for inclusion in the Scheduling Order entered by the hearing officer as one of the issues to be decided at the hearing.

In Ruling Number 2007-1409 dated September 21, 2006, at page 7, the Director of EDR appropriately noted the correlation between the Written Notice and the Form A:

(Only the charge and specifications set out in the Notice may be used to justify punishment because due process requires that an employee be given notice of the charges against him in sufficient detail to allow the employee to make an informed reply.) **This standard is complementary to the burden placed on grievants in that only those grounds asserted on a grievant's Form A will be permitted to proceed to hearing.** (Emphasis supplied.)

Accordingly, because the issues concerning such due process safeguards and the asserted conflict with DHRM Policy No. 1.60 were not raised on the Form A, the hearing officer declines to take up these issues in any greater detail and will instead focus on the issues actually raised by the Grievant on the Form A. AE 1. However, the hearing officer did take the Grievant's asserted positions into account for his mitigation analysis, discussed in greater detail below.

Secondly, in any event, the hearing officer agrees with the analysis of the Agency's counsel that any due process violations prior to the grievance procedure are fully cured by the Grievant having an opportunity to present his case during the hearing. See AB 1-2; EDR Case Number 9391 and the recent EDR Ruling Number 2014-3704 (October 2, 2013).

Similarly, the hearing officer does not take up the Agency's claim that the Grievant falsified his employment application because it was not asserted in the Written Notice. AE 3.

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

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

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

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

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60 (the "SOC"). AE 2. The SOC provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The SOC serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Pursuant to Policy No. 1.60, the Grievant's conduct could clearly constitute a terminable offense, as asserted by the Agency.

Policy No. 1.60 provides in part:

Group III Offense:

Offenses in this category include acts of misconduct of such a severe nature that a first occurrence normally would warrant termination. This level is appropriate for offenses that, for example, endanger others in the workplace, constitute illegal or unethical conduct; neglect of duty; disruption of the workplace; or other serious violations of policies, procedures, or laws.

See attachment A for examples of Group III Offenses.

AE2.

Attachment A provides that the level of Group III offenses "generally includes acts of a most serious nature that severely impact agency operations. AE 2." Attachment A also provides that "*Note that in certain extreme circumstances, an offense listed as a Group II Notice may constitute a Group III offense. Agencies may consider any unique impact that a particular offense has on the Agency." AE 2 at 23.

In this instance, the Agency appropriately determined that the Grievant's insubordination, failure to follow instructions, etc. constituted a Group III offense. However, the hearing officer notes that mere unsatisfactory performance as described in the Written Notice is typically a Group I offense and cannot be elevated to a Group III offense.

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

The hearing officer agrees with the Agency's attorney that the Grievant's disciplinary infractions support termination by Management. Accordingly, the Grievant's behavior constituted misconduct and the Agency's discipline is consistent with law and consistent with policy, being properly characterized as a Group III offense.

EDR's *Rules for Conducting Grievance Hearings* provide in part:

The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances" such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance." A hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. *Rules* § VI(B) (alteration in original).

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

The Grievant has specifically raised mitigation as an issue in the hearing and in his Form A. While the Grievant might not have specified for the hearing officer's mitigation analysis all of the mitigating factors below, the hearing officer considered a number of factors including those specifically referenced herein, in the Form A, in the Grievant's brief (beginning at GB 4) and all of those listed below in his analysis:

1. the Grievant's service to the Agency of over 2 years;
2. the fact that the Grievant did not have any other discipline;
3. the demands of the Grievant's job and the often difficult and stressful circumstances of the Grievant's work environment;
4. the Grievant's last evaluation was "Advanced Contributor" and the Grievant's preceding evaluation was "Contributor.";
5. the effects of the hiring freeze;
6. that there were no transition documents when the Grievant moved into his position;
7. the dearth of policies and procedures when the Grievant moved into his position.
8. the IT needs of the Agency; and

9. the lack of an opportunity afforded to the Grievant to respond to the disciplinary charges against him when he was summarily dismissed from his employment at the Agency.

Of course, there were also aggravating factors in play, including those specified in the Agency's brief (AB 6-8). EDR has previously ruled that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518; and EDR Ruling 2010-2368. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. *!d.*

Additionally, the hearing officer agrees with the Agency's attorney that because the Grievant was a member of the SLT, he is held to a higher standard. See AB at 6 and EDR Case No. 9872.

Here the offense was very serious. Clearly, the hearing officer would not be acting responsibly or appropriately if he were to reduce the discipline under the circumstances of this proceeding.

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

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

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

In EDR Case No. 8975 involving the University of Virginia ("UVA"), a grievant received a Group III Written Notice with removal for falsifying records on five (5) separate

dates. Although the evidence supported only one of those instances, the hearing officer upheld the disciplinary action. The grievant appealed to EDR asserting that the disciplinary action was inappropriate in that the grievant did not engage in as much misconduct as alleged by UVA. The Director upheld the hearing officer's decision:

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

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

The hearing officer decides for the offense specified in the written notice (i) the Grievant engaged in the behavior described in the written notice; (ii) the behavior constituted serious misconduct; (iii) the Department's discipline was consistent with law and policy and that there are no mitigating circumstances justifying a further reduction or removal of the disciplinary action.

DECISION

The Agency has sustained its burden of proof in this proceeding and the action of the Agency in issuing the written notice and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the Agency's action concerning the Grievant is hereby upheld, having been shown by the Agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

APPEAL RIGHTS

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

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

1. 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 refer 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, 11h Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401 ore-mailed.
2. A challenge that the hearing decision does not comply with grievance procedure as well as a request to present newly discovered evidence is made to EDR. This request must refer to a specific requirement of the grievance procedure with which the decision is not in compliance. EDR'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 Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219, faxed ore-mailed to EDR.

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

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

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

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

ENTER: 3 / 5 / 14

V. K-tV YJM _____
✓ = Robinson, Hearing Officer

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