Issues: Group III Written Notice (engaging in conflict of interest and unethical behavior), Group III Written Notice (engaging in unethical behavior by withholding information and submitting inaccurate information), and Termination; Hearing Date: 07/20/16; Decision Issued: 07/22/16; Agency: DSS; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 10823; Outcome: Partial Relief; **Administrative Review: EDR Ruling Request received 08/08/16; EDR Ruling No. 2017-4407 issued 08/30/16; Outcome: AHO's decision affirmed; Judicial Review: Appealed to Richmond City Circuit Court (09/29/16); Outcome: Request Denied [CL16-4441].**

COMMONWEALTH of VIRGINIA

Department of Human Resource Management
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 10823

Hearing Date: July 20, 2016
Decision Issued: July 22, 2016

PROCEDURAL HISTORY

Grievant was a quality assurance manager for the Department of Social Services. On April 15, 2015, the Grievant was issued three Group III Written Notices, each one indicating termination.

Grievant timely filed a grievance to challenge the Agency's disciplinary action, and the grievance qualified for a hearing. On May 18, 2016, the Office of Employment Dispute Resolution, Department of Human Resource Management ("EDR"), appointed the Hearing Officer, considering the three Written Notices and termination one grievance. During the pre-hearing conference, the grievance hearing was scheduled for June 27, 2016, the first date available for the parties. For good cause shown, the grievance hearing was continued to July 20, 2016, on which date the grievance hearing was held, at the Agency's facility.

Prior to the grievance hearing, the Agency withdrew one of the Written Notices, leaving two Group III Written Notices. Agency Exhs. 2 and 3. The Agency and the Grievant submitted documents for exhibits that were accepted into the grievance record, without objection. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant
Counsel for Grievant
Counsel for Agency
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?

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

Through his grievance filings, the Grievant requested rescission or reduction of the Group III Written Notices, reinstatement, back pay, and attorney's fees.

BURDEN OF PROOF

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

APPLICABLE LAW AND OPINION

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

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

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

The Agency relied on the Standards of Conduct, promulgated by the Department of Human Resource Management, Policy 1.60, which defines Group III Offenses to include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination. The purpose of the policy is stated:

> The purpose of this 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.

The Standards of Conduct also describe the minimum expectations for acceptable workplace conduct and performance, including:

- Comply with the letter and spirit of all state and agency policies and procedures, the Conflict of Interest Act, and Commonwealth laws and regulations.

- Obtain approval from supervisor prior to accepting outside employment.

Agency Exh. 4.

Va. Code § 2.2-3100 *et seq*. sets forth the State and Local Government Conflict of Interests Act. § 2.2-3103 provides:

> **Prohibited conduct.**
> No officer or employee of a state or local governmental or advisory agency shall:
>
> 1. Solicit or accept money or other thing of value for services performed within the scope of his official duties, except the compensation, expenses or other remuneration paid by the agency of which he is an officer or employee. This prohibition shall not apply to the acceptance of special benefits that may be authorized by law;
>
> . . .
>
> 4. Use for his own economic benefit or that of another party confidential information that he has acquired by reason of his public position and which is not available to the public;
>
> 5. Accept any money, loan, gift, favor, service, or business or professional opportunity that reasonably tends to influence him in the performance of his official duties. This subdivision shall not apply to any political contribution actually used for political campaign or constituent service purposes and reported as required by Chapter 9.3 (§ 24.2-945 et seq.) of Title 24.2;
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> . . .

Agency Exh. 5.

The Agency's Code of Ethics provides that employees will, among other things:

- Act with integrity in all relationships.

- Refrain from any activity or relationship that is or could be inferred as a violation of the State and Local Government Conflict of Interest Act.

- Abide by Virginia's Standards of Conduct for Employees and related regulations.

Agency Exh. 7.

The Agency's Employee Handbook, pertaining to Outside Employment, requires:

> As a state employee, your obligation to your state job is considered to be your primary duty. An employee must receive approval from his or her agency *before* taking on an additional job, including self-employment. An employee who already has other employment when he or she enters state service or moves from one agency to another must inform the hiring manager and seek approval to continue the other employment. An employee may be disciplined for outside employment that occurs during work hours or that is deemed to affect work performance.

Agency Exh. 10.

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 Agency employed the Grievant as a quality assurance manager, with several years tenure, without any record of prior discipline. Performance evaluations, before 2015, showed extraordinary contributor. Grievant's Exh. 1, 2, 3.

The current Written Notices charged the Grievant with engaging in conflict of interest and unethical behaviors concerning outside employment. The first Written Notice charged:

> You used your role as Virginia's SNAP Quality Assurance Manager to consult with and assist other states in implementing [private firm]' methods for quality control review to lower their own error rates. Not only did you use information obtained through your position for your own personal financial gain, but you also used it to assist other states compete with Virginia for the finite amount of federal high performance bonus money. Your unauthorized outside employment with [private firm] constituted unethical conduct and a violation of law as it created a serious conflict of interest with your professional obligations to the Commonwealth and was a violation of subsection 1, 4 and 5 of Virginia Code § 2.2-3103.

Agency Exh. 2. The second Written Notice charged:

> You established a consulting business without completing the Outside Employment form that is required of all Commonwealth of Virginia employees. Additionally, you under stated your earnings from that business on your 2013 and 2014 SOEI documents.

Agency Exh. 3.

The Agency witnesses testified consistently with the Written Notices. The investigator from the Office of the Inspector General (OIG) testified that, through his joint federal investigation, he investigated the extent of the Grievant's association with Julie [last name] Consulting ([private firm]), the Grievant's failure to accurately report his economic interest with [private firm], and the Grievant's failure to notify and obtain approval of his outside self-employment. The investigator testified that he discovered payments from [private firm] exceeding the Grievant's self-reporting on his Statements of Economic Interests (SOEI) for 2013 and 2014. Agency Exh. 15 and 16. The investigator asked the Agency to keep the matter confidential during the investigation, and the investigation remains open as of the date of the grievance hearing.

The Grievant's immediate supervisor, the director of benefit programs, testified that he was unaware of the Grievant's self-employment with [private firm] until June 2015, when he learned, because of the OIG's investigation, that the Grievant had been on a trip to Alaska for [private firm]. When he learned about this, he was told that the OIG was involved in an active investigation and that these matters should be kept confidential so as not to jeopardize the ongoing investigation. While the OIG investigator did not direct or suggest the Agency not pursue discipline against the Grievant, the director felt he should await the course of the investigation. The director provided negative feedback in the Grievant's annual performance evaluation in September 2015. Grievant's Exh. 4; Agency Exh. 8. The director testified that with the knowledge he had at the time, he felt it would be inappropriate to omit the issue from the performance evaluation.

The director also testified that Virginia competed with the sister states for bonus money available from the Department of Agriculture for its SNAP program, awarded on performance criteria. The top seven or eight states shared the pool of bonus money. Prior to 2013, the Agency contracted with [private firm] to develop methods to increase performance so as to qualify for the bonus pool. He testified that the Grievant's unapproved, outside employment with [private firm] helped competing states improve their performance, which was against Virginia's interest for the limited bonus pool money. The director considered that conduct to be a glaring conflict of interest with the Grievant's position with the Agency. While the director considered the Agency's processes to be unique and rather proprietary, he conceded, however, that the information available to the Grievant for sharing through [private firm] with other states is not confidential. It is available, public information. The director testified that employees' SOEI's are filed with another agency, and not shared with his Agency.

The director testified that once civil investigative demands were served on both the Agency and the Grievant, personally, the Agency retained outside counsel to investigate, and, as a result of counsel's investigation the Agency elected to pursue discipline, even though the OIG investigation still remains open. The director was unaware of the extent of Grievant's information sharing through his outside employment, and, thus, he was unable to screen or approve any of it. The director testified that the Grievant's conduct, in secretly engaging in this self-employment involving his specialized knowledge (gained through his Agency position and experience) was a violation of trust. This breach of trust rendered any demotion or transfer within the Agency an unavailable alternative to termination.

The Agency's employee relations coordinator testified that she was involved in the disciplinary process, and was involved in meetings with management and legal counsel. She testified that it was her recommendation, after learning the available facts, that Group III discipline and termination was appropriate.

A subordinate employee testified that the Grievant asked her in 2014 to cover for him while he was away for his work with [private firm], and that he asked her not to tell anybody. She did not tell anybody at work, but she was concerned about the conflict of interest and felt intimidated.

The Grievant, through his grievance statements, asserted that his outside employment was no different than his receipt of "honoraria," which is only prohibited for high-level officials in a position to make sensitive decisions. Also, the Grievant testified that he was specifically allowed to present in a peer-to-peer information sharing at a conference in Texas in 2013. The Grievant testified that he disclosed his self-employment compensation in his 2013 and 2014 Statements of Economic Interest, but he did not specifically notify his Agency or his supervisor or obtain approval for his outside employment. The Grievant told the director about his outside employment activities after he was aware of the OIG investigation. He consulted with [private firm] on events approximately 11 times in 2014 and 2015, receiving pay and travel expenses. The Grievant conceded that he used his experience and information from his Agency position for his presentations with [private firm] to other states. He also testified that the information he gained from such events helped him with his own Agency duties.

The Grievant testified that he did not consider his outside consulting with [private firm] to be outside employment or self-employment. He was not an employee of [private firm]. He also testified that he disclosed his outside business on his SOEI's by describing his estimated taxable income, not his gross revenues. The Grievant admitted he asked his subordinate employee to keep his activities with [private firm] secret, but he testified that he only wanted to maintain his privacy and did not intimidate her or have any furtive intent.

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).

The grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. The Agency has the burden to prove that the Grievant is guilty of the conduct charged in the written notice. I find that, based on a preponderance of the evidence presented, the conduct as described in the first Group III Written Notice occurred, but that the Agency has not borne its burden of proof that the conduct violated Va. Code § 2.2-3103, as the statute is written. The alleged conduct occurred specifically outside the scope of the Grievant's official duties; the Agency information he used was not "confidential" information that he has acquired by reason of his public position and which is not available to the public; and the compensation the Grievant received is not shown to influence him in the performance of his official duties. Thus, a violation of Va. Code § 2.2-3103 is not proved. That leaves for the first Written Notice the issue of whether the activity was unethical conduct. The conduct at issue that the Agency contends is unethical was engaging in an unauthorized outside employment endeavor involving his Agency expertise and experience. As noted above, the Agency's code of ethics requires employees to:

- Act with integrity in all relationships.
- Refrain from any activity or relationship that is or could be inferred as a violation of the State and Local Government Conflict of Interest Act.
- Abide by Virginia's Standards of Conduct for Employees and related regulations.

The Grievant's conduct in secretly engaging in the unapproved outside employment, so closely related to his Agency's business, lacked integrity, raised an inference of conflict of interest (even though I find the conduct proved is not squarely in violation of the Conflict of Interest Act), and was not approved as required by the Standards of Conduct and the Agency's handbook.

This issue of the unapproved outside employment is more squarely addressed in the second Group III Written Notice. Because I find that the offense the Agency has spread over two separate Written Notices is all related to the Grievant's outside employment, without the Agency's approval, the discipline should properly be considered one Written Notice—not two. Because the nature of the outside employment was so closely aligned with the Agency's business, the ethical aspects of integrity, proprietary information, and inference of conflict of interest are aggravating factors. Because of these concerns, the nature of the unapproved outside

employment is serious rather than trivial. The Grievant sold his Agency experience and knowledge to other states. (It is not analogous to someone who, for instance, grows vegetables on the side and sells at local farmers' markets, unless, of course, the employee's primary job is in the produce business.)

With respect to the alleged incorrect Statements of Economic Interests, I find that the Agency failed to prove the Grievant materially misrepresented his business interest on the SOEI's. The Grievant noticeably indicated he was estimating taxable income for this business—not total or gross revenue as the OIG investigator was focused on.

The Grievant's explanation that his outside business was not the equivalent of employment or self-employment, for purposes of reporting and seeking approval, is contrary to the facts. I find the Grievant engaged in outside employment without notification or approval, as required by the Agency and the Standards of Conduct. I also find that the Grievant kept the business secret from his Agency, and the nature of the outside employment, being so dependent on his Agency duties and specialization, justifies a Group III Written Notice. The Agency had no knowledge or control over the dissemination of its information and processes. Termination is the normal discipline for a Group III Written Notice. Such decision falls within the discretion of the Agency so long as the discipline does not exceed the bounds of reasonableness.

Mitigation

The agency has proved (i) the employee engaged in the behavior described in the written notice (as consolidated above into one Group III Written Notice), (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy. Thus, the discipline must be upheld absent evidence that the discipline exceeded the limits of reasonableness. Rules for Conducting Grievance Hearings ("Hearing Rules") § VI.B.1.

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 Office of Employment Dispute Resolution." 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.

The Grievant argues that the length of time from when the Agency first became aware of his outside employment, June 2015, and the issuance of the discipline beginning in March 2016, is too long and should mitigate the discipline. In an appropriate case, a hearing officer may consider reducing the level of discipline where the agency's delay in the issuance of discipline is sufficiently egregious as to negate the alleged seriousness of the offense. *See, e.g.*, Decision of Hearing Officer, EDR Case Number 801, issued August 26, 2004. A hearing officer may not direct an agency on how to conduct its business, however, when an agency delays the imposition

of discipline for an extraordinarily long time, such delay will be considered an extenuating circumstance that can mitigate the level of discipline imposed. When an agency delays imposition of discipline for an extended time, it gives the appearance that the offense is not serious. Although there is no bright line test, the Agency explained that the ongoing external investigation by OIG and by other agencies actually heightened the seriousness of the situation, causing the Agency to delay its disciplinary action. While waiting months to pursue discipline can have a prejudicial effect on the Grievant's ability to defend a charge, the delay here in issuing the Written Notice did not prejudice the Grievant's ability to defend the charge. Any implication that the Agency considered the offense to be not serious is credibly refuted by the Agency's evidence. To satisfy the requirements of procedural due process, an agency is required, at a minimum, to give the employee (1) notice of the charges against him or her, and (2) a meaningful opportunity to respond. Whether an agency has met this standard is often a matter of degree. Here, I find the timing of the Written Notice did not prejudice the Grievant or present a mitigating factor sufficient to allow a hearing officer to reduce the discipline. Under the situation presented here, the Grievant obviously had more access to the information and documentation of his outside employment than the Agency.

Regarding the level of discipline and termination, the Agency had leeway to impose discipline along the permitted continuum, but the Agency relies on the aggravating factor of the lack of trust as weight against mitigation to less than termination. Because the Grievant was a valuable Agency employee, termination for this violation is unfortunate for both the Grievant and the Agency. While the Hearing Officer may have reached a different level of discipline, he may not substitute his judgment for that of the Agency when the Agency's discipline falls within the limits of reasonableness.

As with all mitigating factors, the Grievant has the burden to raise and establish any mitigating factors. *See e.g.*, EDR Rulings 2010-2473; 2010-2368; 2009-2157, 2009-2174. *See also Bigham v. Dept. of Veterans Affairs*, No. AT-0752-09-0671-I-1, 2009 MSPB LEXIS 5986, at *18 (Sept. 14, 2009) citing to *Kissner v. Office of Personnel Management*, 792 F.2d 133, 134-35 (Fed. Cir. 1986). (Once an agency has presented a *prima facie* case of proper penalty, the burden of going forward with evidence of mitigating factors shifts to the employee). However, length of service, alone, is insufficient for a hearing officer to overrule an agency's mitigation determination. EDR Ruling No. 2007-1518 (October 27, 2009) held:

> Both length of service and otherwise satisfactory work performance are grounds for mitigation by agency management under the Standards of Conduct. However, a hearing officer's authority to mitigate under the *Rules for Conducting Grievance Hearings* is not identical to the agency's authority to mitigate under the Standards of Conduct. Under the *Rules for Conducting Grievance Hearings*, the hearing officer can only mitigate if the agency's discipline exceeded the limits of reasonableness. Therefore, while it cannot be said that either length of service or otherwise satisfactory work performance are *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which these factors could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness. 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.

There is no requirement for an Agency to exhaust all possible lesser sanctions or, alternatively, to show that the chosen discipline was its only option. While the Agency could have justified or exercised lesser discipline, I find no mitigating circumstances that render the Agency's action of a Group III Written Notice outside the bounds of reasonableness. Accordingly, I find that the Agency's action of imposing termination for a Group III Written Notice is within the limits of reasonableness. The Hearing Officer, thus, lacks authority to reduce or rescind the disciplinary action.

DECISION

For the reasons stated herein, I uphold the Agency's discipline, modified and limited to one Group III Written Notice for engaging in unauthorized outside employment, a violation of the Standards of Conduct and the Agency's handbook policy, with termination, issued on April 15, 2016.

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.