Issue: Administrative Review of Hearing Officer's Decision in Case No. 9518, 9519; Ruling Date: August 29, 2011; Ruling No. 2011-3027; Agency: State Board of Elections; Outcome: Hearing Decision affirmed.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of State Board of Elections
Ruling Number 2011-3027, 2012-3061
August 29, 2011

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9518/9519. The grievant renewed many of the objections raised in his request for administrative review in a subsequent request for review of the hearing officer's reconsideration decision. Because these renewed objections are covered fully in this review, this Department need not address them again in a separate review. For the reasons set forth below, this Department will not disturb the hearing decision.

FACTS

The relevant facts as set forth in Case Number 9518/9519 are as follows:[1]

> The State Board of Elections employed Grievant as the Business Manager. He had been employed by the Agency for approximately 24 years and served as business manager for the Agency for approximately 15 years prior to his removal effective August 11, 2010.
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> Grievant had prior active disciplinary action. On July 28, 2009, Grievant received a Group II Written Notice for neglect of duty. On November 20, 2009, Grievant received an annual performance evaluation with an overall rating of "Marginal Contributor". His performance in prior years was otherwise satisfactory to the Agency.
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> In September 2007, the Secretary began working as the Agency Head. She had approximately 28 people under her supervision. She left the Agency on January 31, 2011.
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> In 2006, Grievant reported to be [sic] Director for Administration who reported to the Former Secretary. Ms. ML and Ms. M reported to Grievant. In

[1] Decision of Hearing Officer, Case No. 9518/9519 ("Hearing Decision"), issued June 15, 2011 at 2-13. (Footnotes from the Hearing Decision have been omitted here)

2008, Grievant reported directly to the Secretary. She considered Grievant to be her Chief Financial Officer. Ms. W was in charge of Procurement and reported to Grievant. Ms. J was hired in 2008 to be the Fiscal Officer and reported to Grievant. Ms. M was the Fiscal Tech and reported to Grievant.

In 2002, the purpose of Grievant's position was:

> The business manager is the primary administrator for fiscal, accounting, and business management support to the agency's service area activities and administrative activities in delivery of effective, efficient, and quality customer service to agency's clients, customers, and constituents. This position also leads in establishing agency's strategic planning and performance objectives and metrics. Serves as a lead in analyzing operating methods with a focus on improving efficiencies and agency operations by reviewing, evaluating, and analyzing business processes. Provides essential financial and budget related information useful in the agency's decision-making process. Prepares operations and procedures manuals to assist management in operating more efficiently and effectively. Perform, evaluate, and manage financial activities involving public assets and resources in accordance with professional standards and State and federal standards. Employee performs the full range of fiscal or evaluation duties associated with specialized areas such as accounting, budgeting, grants administration and auditing. Typical duties may include, but are not limited to, strategic planning; risk evaluation and financial analysis; forecasting; accounts reconciliation and cash management.

Reportline

The Department of Accounts has a database entitled Reportline. Information in this database includes employee home addresses, home phone numbers, payroll data, leave used data, and other confidential information. Each participating agency has a Reportline security officer who is responsible for adding and removing Agency Reportline users.

On September 9, 2004, Grievant submitted a request form to the Department of Accounts to become the Agency Security Officer. The level of security he requested was "All reports for system". On September 13, 2004, the Electronic Publishing Manager of the Department of Accounts sent Grievant a memo stating, "You are activated in Reportline as the Agency Security Officer for Agency 132."

On September 14, 2004, Grievant submitted a Reportline Request Form to the Department of Accounts asking that a new account for Ms. W be created as an Agency User with the level of security of "All reports for system".

On April 27, 2005, Grievant submitted a report to the Department of Accounts as the CIPPS Security Officer.

The April 25, 2007 version of the Reportline Security Officer Manual states, "Each agency is required to identify one or more Reportline Security Officers. The Reportline Security Officer is responsible for adding, deleting, and modifying Individual User security profiles."

The Agency has an Information Security Officer. This position is different from the Agency's Security Officer for Reportline.

On March 23, 2010, Grievant completed security awareness training and received a Certification of Information Security Awareness Training. Grievant signed the certificate acknowledging:

> I acknowledge that the State Board of Elections has sensitive information resources and that it is my responsibility to help protect those resources. I have completed the FY 2010 Security Awareness Training requirement as instructed by the agency's Information Security Officer.

Ms. W worked for the Agency until April 22, 2010 when she was placed on pre-layoff leave and then laid off on May 7, 2010. Ms. W had a Reportline account. Under her access privileges, she had the authority to not only access her own personal information but also the benefits, payroll, healthcare, leave, and retirement information for all Agency employees.

On May 17, 2010, Grievant accessed his Reportline account.

In July 2010, Ms. M was on leave from the Agency. On July 6, 2010, the Information Services Manager sent Ms. M a leave slip form to enable her to submit requests for leave. To complete the form, Ms. M had to write her employee identification number. Ms. M. did not know her employee identification number so she accessed the Reportline account of Ms. W to obtain that information. On July 7, 2010, Ms. W's Reportline account was accessed by Ms. M. The Secretary asked Mr. D to determine how the account was accessed. He determined that the source of the breach was from a computer located on the same block where Ms. M lived. The Department of Accounts could not determine which reports were accessed by Ms. M.

On July 29, 2010, the Fiscal Officer informed the Secretary that Ms. W's Reportline account had been accessed on July 7, 2010. When the Secretary learned of the security breach, she notified Mr. R, the Electronic Publishing Manager of the Department of Accounts to remove immediately Ms. W's access to the system. On July 30, 2010, the Secretary learned that Ms. W had a second Reportline account under a previous name. Ms. W last accessed that second account on February 22, 2004. That account was also closed.

On August 4, 2010, the Secretary sent employees an email with the subject "Required Notification of Security Breach Affecting Your Personal Information." The Secretary wrote, "a former employee's account was used to access a SBE physical database containing sensitive personal information." Ms. M received the Secretary's email and replied to all recipients of that email and stated:

> A Security Breach was not affected. After reviewing the e-mail message below from [Information Services Manager] on July 6, 2010 the account was access to retrieve my employee's identification number so that I could included on the Leave Activity Form that was delivered on July 9, 2010. The database is simply a report and no Social Security numbers were listed.

The Agency took no disciplinary action against Ms. M for accessing the Reportline using another employee's account.

Election Assistance for Individuals with Disabilities Grant

One of Grievant's Core Responsibilities in his Employee Work Profile was Grant Administration. Grievant was expected to serve:

> as lead in grant administration to include but not limited to ensuring compliance with federal grant administrative requirements; compliance with federal cost principles; compliance with federal program requirements. Interpret and implement federal grant administrative procedures as outlined in applicable OMB circulars.

On July 7, 2003, the Former Secretary of the Agency submitted an Application for Federal Assistance to obtain $297,522 of federal funding under the Election Assistance for Individuals with Disabilities (EAID or VAID) project. The start date of the proposed project was September 1, 2003. The ending date for the proposed project was August 31, 2006.

The grant was from the Department of Health and Human Services (DHHS) through the Administration of Children and Families (ACF). In order to receive the grant, the Agency had to comply with several reporting requirements.

One of those requirements was to submit on a quarterly basis a PSC-272 report to the Division of Payment Management of DHHS. The PSC-272 report was also known as the Federal Cash Transaction Report.

The grant awarded from the Administration of Children and Families dated September 1, 2003 stated:

> With the acceptance of this award, you agree to be responsible for limiting the draw of funds to the actual time of disbursement and to submitting timely reports as required. Further, you agree that when these funds are advanced to secondary recipients, you will be responsible for effectively controlling their use of cash in compliance with Federal requirements. Federal funds to meet current disbursing needs may be drawn through Smartlink. Withdrawals of funds are not to exceed the total grant award shown above under provisions of Treasury Circular No. 1075. Failure to adhere to these requirements may cause the suspension of grant funds. Payments under this award will be made available to grantees through HHS Payment Management System. PMS is administered by the Division of Payment Management.

One of the grant terms and conditions was "Failure to submit reports (i.e., financial, program, or other required reports) on time may be basis for withholding financial payments, suspension or termination." Another term and condition was, "Drawdown of funds from Payment Management system – In accordance with Public Law 101 – 510, grant funds must be drawn down within 5 years from the year in which the funds were awarded".

The Chief of the Governmental & Tribal Payment Branch sent Grievant a letter dated March 11, 2005 regarding a Division of Payment Management and explaining the PSC-272 reporting process. The letter states:

> Grant recipients access the PMS through the Smartlink system for requesting funds and through the Electronic 272 system for reporting disbursements. To continue to receive cash advances, grant recipients … are required to report quarterly the amount of expense paid out and charged to their Federal grant. As a user of the PMS, you will be able to access the Electronic 272 to report disbursements through DPM Home Page.

Grievant received an email with a letter attached from the Division of Payment Management on March 11, 2005 informing him of his user name and temporary password so he could use the Smartlink system. He also received a PIN and password for the Federal Cash Transaction Report PSC 272.

On April 5, 2005, Grievant notified the Division of Payment Management to change their contact information from Grievant to Ms. ML. Grievant wrote:

> This memo is to request that [Ms. ML] be added as one of the individuals responsible for drawing down funds associated with the Election Assistance for Individuals with Disabilities (EAID) grant program for the Virginia State Board of Elections …. [Ms. ML] was recently hired as our agency's fiscal officer. As fiscal officer, she will be primarily responsible for the draw-downs as well as reporting requirements. *** As business manager of SBE, I, [Grievant] will serve as a backup for [Ms. ML].

The Agency drew down the entire award in two Payment Management System advances made on April 15, 2005 and June 8, 2006.

Ms. ML was responsible for filing the Cash Transaction Report for 2005 and 2006 but she did not do so. Prior to leaving the Agency in June 2006, Ms. ML informed Grievant that the EAID Grant had been fully extended and closed out.

On September 30, 2008, the five-year grant period and the deadline for the Agency to submit the PSC-272 report ended.

On April 13, 2009, Grievant learned that the Agency had not timely submitted reports for the EAID grant.

On July 9, 2009, Mr. L, an employee of the granting agency, the Administration for Children and Families notified the Fiscal Officer that the Agency needed to repay the funds to the Division of Payment Management, the payment office.

On July 21, 2009, the Fiscal Officer repaid DHHS $234,119 for the EAID grant. Grievant instructed the Fiscal Officer to repay the funds. Grievant did not inform or seek approval from the Secretary prior to having the Fiscal Officer repay the funds. Because the grant money had already been spent, the Agency had to reimburse the federal government using other State dollars.

On July 23, 2009, the Agency filed a PSC-272 report with DHHS.

Grievant made several requests to have the money restored. On August 28, 2009, Mr. L of the Administration for Children and Families informed Grievant "I am sorry but I cannot restore these funds to the state."

In September 2009, Agency managers received a budget report for August 2009. The report showed that the Agency expended $234,119 for "Out of State

Political Entities." On September 3, 2009, the Deputy Secretary asked Grievant "a few questions regarding dramatic changes in the budget". Grievant replied "This is a non-recurring refund to the fed government for monies received in 2003 for disabled voters." The Secretary testified that she called Grievant regarding the expenditure and based on that conversation believed that the monies were being paid from another federal grant. She did not realize the money was being paid from the Agency's general fund.

On October 13, 2009, the Secretary sent Grievant an email stating:

> I was just told that SBE recently returned nearly $300,000 of ADA funds because we did not fill out financial reports in time. Is this true?

On November 5, 2009, the Secretary was notified by the Division of State Internal Audit that the Division was investigating the refund of EAID funds to the federal government. She initiated an internal investigation.

On November 17, 2009, the Secretary received a memorandum from the State Internal Auditor indicating there had been an anonymous complaint to the State Employee Fraud, Waste, and Abuse Hotline alleging that Grievant did not ensure that financial status reports for the EAID were timely submitted and consequently the Agency had to refund the federal government over $200,000.

On November 17, 2009, the State Internal Auditor sent the Secretary a memorandum stating:

> We recently conducted a special review, based on a call to the State Employee Fraud, Waste, and Abuse Hotline, of an allegation involving the State Board of Elections (SBE). The caller alleged that Business Manager [Grievant] did not ensure that financial status reports for a federal grant were submitted timely, which led to the SBE having to refund to the federal government over $200,000.
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> [Grievant] told us that financial status reports (FSRs) were not submitted timely for the 2003 US Department of Health and Human Services (DHHS) grant titled Voting Access for Individuals with Disabilities (VAID), with a grant period of September 1, 2003 – September 30, 2008. FSRs are required to be submitted to the granting agency within 90 days of the date of each annual reporting period. He stated that the SBE did not have a Fiscal Officer and did not have an Accessibility Coordinator for a

> portion of the five years of the grant period, and the administrative requirements of the grant were neglected. After a new Fiscal Officer was hired, she reported prior years' expenditures but the reporting occurred after the grant period ended. We reviewed the Commonwealth Accounting and Reporting System (CARS) and found that of the grant total of $297,522, the SBE repaid the DHHS $234,119.49 on July 21, 2009. In addition, for our review of e-mail correspondence on September 2, 2009 between [Grievant] and [Mr. L], DHHS, the SBE may need to repay the remaining $63,402.51.
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> ***
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> We reviewed e-mail correspondence, from July 22, 2009 through September 2, 2009, between [Grievant] and the DHHS and found that he was seeking to get the federal government to return the 2003 grant funds to the SBE. We also found that he was aware that the SBE had not been reporting the FSRs timely since April 13, 2009.
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> Conclusion
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> The allegation is partly substantiated. The SBE repaid the DHHS $234,119.49 because the agency had not reported the grant expenditures to the DHHS within 90 days of the end of the final reporting period (September 30, 2008) for the 2003 VAID Grant, although required to do so. In addition, the SBE may be responsible for paying back the remaining amount ($63,402.51) of the 2003 grant monies.
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> It appears that the agency complied with the reporting requirements for the period of September 1, 2004 – August 31, 2005 and should not have had to return the $124,169. Furthermore, although the FSR for the period of September 1, 2003 – August 31, 2004 was filed late, the $450 was properly accounted for prior to the 5 year grant expiration date and should not have had to be returned either.

In response to the November 17, 2009 Memorandum from the State Internal Water [sic], the Secretary sent a memorandum dated December 18, 2009 stating,

> As a result of SBE's internal investigation, we believe that the factual situation is different from what is described in your November 17 memorandum. I will explain the factual situation as

we see it and then, in that light, address the finding of fact contained in your memorandum and the actions we have taken, plan to take, and are contemplating taking in light of your report and in your investigation.

SBE Internal Investigation

Your memorandum bases the finding of fact on financial status reports (referred to as FSRs in the memorandum) that were not the reports in question. The memorandum states, "[Grievant] told us that financial status reports (FSRs) were not submitted timely …." The memorandum then goes on to document certain FSRs submitted for the 2003 VA EAID grants and bases conclusions and recommendations on this documentation. I believe that there was confusion as to which reports were involved in this issue and the required reports that were missed which triggered the reduction in our funding for this grant.

There are two types of financial reports that must be filed for these grants. The first of these are Financial Status Reports or SF269 reports. As I understand it, Financial Status Reports or reports due to the granting agency, Administration for Children and Families (AFC), an agency of the Department of Health and Human Services. Simply put, SF269 reports document to the granting agency that the grant recipient is spending money in accordance with the specifications of the award.

The second of the two financial reports are PSC 272 reports. These reports are used to report disbursements of funds from the Department of Payment Management (DPM). As documented by e-mails, phone conversations, and additional grant documents, it was the untimely filing of the PSC 272 reports that triggered the problem. SBE drew down the funds but did not file any of the required PSC 272 reports in the required time frame. Because of this inaction, SBE had already drawn down the funds we had to pay back DPM to bring our ledger back in balance to account for the decrease in funding. It is this funding that SBE has been trying to restore.

These PSC 272 reports were never filed for any grant award until several months after the 03 VA EAID PSC 272 deadline of September 30, 2008. It is the PSC 272 reports, not the FSRs, that were filed late and triggered the subsequent fiscal problems. This is an important distinction as I address your memorandum. Because the November 17 memorandum is based on FSRs and not PSC 272 reports, it is difficult to address the audit report in the

usual manner. In its place I submit the following based on the objectives of our investigation:

Objective 1: Determine what happened and to ensure no other money is in danger

Beginning with Federal FY03, SBE has been awarded grant money through the Help America Vote Act (HAVA) program known as Election Assistants to Individuals with Disabilities (EAID). Each yearly grant has been approximately between $200,000 and $300,000. Each grant has a five year limitation on the funds. So, for example, the FY03 grant must be spent by the close of FY08. The funds were drawn down from federal payment management system (PMS) within the allowed timeframe and spent appropriately, as evidenced by the FRS reports that are documented in the November 17 memorandum. However, the PSC 272 reports that are mentioned above were not submitted to the Federal Government by the September 30, 2008 deadline.

When [Fiscal Officer], a new hire, attempted to draw down EAID money from PMS in April 2009, she was not able due to a restriction on the SBE account. Upon investigation, the SBE Fiscal Office learned that the SBE ledger had been debited $234,119.49 in October 2008, because no PSC 272 reports had been filed within five years of receiving the FY03 EAID funds. Because of the laws governing federal grants, PMS is programmed to assume that SBE had not drawn down the funds because no PSC 272 report had been filed. However, because SBE had drawn down the funds, the SBE ledger balance in PMS was now incorrect. Before SBE could continue to draw down EAID funds, we had to make the ledger balance in PMS correct by submitting payment to the federal government in the amount of $234,119.49 out of our General Fund and did so in August 2009.

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Since becoming aware of the problem, I have emphasized with staff the importance of finding a way to have the funds returned to SBE. From the same email correspondence referenced in the November 17 memorandum we have found that [Grievant] has been attempting to have the funds restored. However, some of his actions have troubled me. In July 2009, when [Fiscal Officer] informed him that SBE needed to repay the funds before being allowed to draw down any additional EAID money, [Grievant] told her to process the payment from the HAVA account to avoid

> having to use general funds. [Fiscal Officer] was uncomfortable with repaying Federal funds with other federal funds and expressed her discomfort with [Grievant]. When [Grievant] insisted, [Fiscal Officer] approached the Department of Accounts and DOA explained to her and to [Grievant] that his action was not allowed. [Grievant] has told me that he still believes that DOA is wrong. I am concerned because this is an example of [Grievant's] ignorance of federal grants laws and guidelines.

On January 26, 2010, the State Internal Auditor issued a report indicating that

> The reason the SBE was required to reimburse the DHHS was because of the PSE 272 form (Federal Cash Transaction Report) was submitted to the Department of Payment Management after the required deadline of September 30, 2008. We verified that the PSC 272 form was not submitted until July 23, 2009 and that it in fact was the report that caused the SBE to have to repay the $234,119.49.
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> ***
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> The allegation is substantiated. The SBE repaid the DHHS $234,119.49 because the agency had not filed the required paperwork for the grant expenditures from the 2003 VAID Grant before the end of the reporting period on September 30, 2008, although required to do so. As the Business Manager, [Grievant] was ultimately responsible for ensuring that the required paperwork for the 2003 VAID Grant was submitted timely.
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> ***
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> Furthermore, management should consider taking disciplinary action in accordance with the DHRM Standards of Conduct against [Grievant] for not ensuring that the required paperwork for the 2003 VAID Grant was timely submitted.

Retaliation and Discrimination Claims.

On December 17, 2009, several employees within the Agency organized a luncheon on the same day of the Agency's holiday breakfast. Nearly all of the employees invited to attend the luncheon were African American. The Secretary received a complaint from an African American employee regarding the appearance created by the luncheon. The Secretary became concerned that by excluding non-African Americans, the employees attending the luncheon could be

perceived as creating a hostile work environment for non-African Americans. She began asking employees who attended the luncheon about the details regarding who was invited to attend. At least one non-African American had been invited to attend the luncheon and had actually attended it.

On November 2, 2009, the Secretary signed a contract with Mr. S authorizing his company to provide and perform certain services for the Agency, primarily involving the VERIS database. Prior to that time, Vendor Q perform those services as optional services within a contract that Vendor Q had already entered into with the Agency. In addition, because the Agency had not yet hired an IT Director, the Agency amended the November 2, contract on November 15, 2009 so that Mr. S would provide technical research, troubleshooting, and repair services for the Agency's entire network and server equipment and other duties normally assigned to an IT Director. Under the contract, Mr. S was to be paid $85 per hour for up to 40 hours per week with a total compensation up to $176,800 in one year. The term of the contract was from November 1, 2009 through November 3, 2010 unless terminated by either party in writing following 30 days notice. The contract was not solicited to other vendors and was not approved as a sole source purchased by the VITA.

On November 15, 2009, Ms. W called the State Employee Fraud, Waste, and Abuse Hotline and alleged that the Agency had not properly solicited a vendor. Grievant sent emails to staff of the State Internal Auditor as part of the investigation. On March 8, 2010, the State Internal Auditor sent a memorandum to the Secretary of Administration concluding that the allegation regarding the contract with Mr. S was substantiated. The State Internal Auditor concluded that the Secretary likely violated the Virginia Public Procurement Act and that it was unlikely that the contract would have qualified as a sole source procurement. The Agency disputed the State Internal Auditor's conclusion.

On April 22, 2010, the Agency placed Ms. W on layoff status and transferred her duties to the Department of General Services. In May 2009, the Secretary began discussions with staff at the Department of General Services regarding the benefits of transferring Ms. W's duties to DGS rather than having them performed within the Agency.

* *

On August 11, 2010, Grievant was issued a Group II Written Notice of disciplinary action with removal for neglecting to remove the security access rights of a former employee. Also on August 11, 2010, Grievant was issued a Group III Written Notice of disciplinary action with removal for failing to ensure the timely and proper filing of financial status reports required for the retention of federal grant monies.

> On September 10, 2010, Grievant timely filed grievances to challenge the Agency's actions. The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and he requested a hearing. On January 28, 2011, the EDR Director issued Ruling No. 2011-2886, 2011-2887 consolidating the two grievances for a single hearing. On March 17, 2011, the first day of the hearing was held at the Agency's office. On March 29, 2011, the second day of the hearing was held. On April 4, 2011, the parties submitted written closing arguments.

In a June 15, 2011 hearing decision, the hearing officer rescinded the Group II Written Notice of disciplinary action and reduced the Group III Written Notice to a Group II Written Notice.[2] Furthermore, the hearing officer upheld the grievant's removal based upon the accumulation of disciplinary action.[3] The hearing officer denied the grievant's request for reconsideration on August 8, 2011.[4] The grievant now seeks administrative review from this Department.

DISCUSSION

By statute, this Department has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions … on all matters related to procedural compliance with the grievance procedure."[5] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[6]

Witness Testimony

The grievant's request for administrative review alleges that the hearing officer "ignored pertinent testimony of the Secretary." Specifically, the grievant argues that "[t]he record reflects that the former Secretary of the Agency testified in unequivocal terms and language that were it not for the fact that the Grievant was the responsible person for filing the PSC 272 forms, she would not have recommended his termination."

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[7] and to determine the grievance based "on the material issues and grounds in the record for those findings."[8] Further, in cases involving discipline, the hearing officer reviews the facts *de novo* to determine whether the cited actions constituted misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or

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[2] *Id*. at 18.
[3] *Id*. at 19.
[4] *See* Decision of Hearing Officer, Case No. 9518/9519-R ("Reconsideration Decision") issued August 8, 2011 at 3.
[5] Va. Code § 2.2-1001(2), (3), and (5).
[6] *See Grievance Procedure Manual* § 6.4(3).
[7] Va. Code § 2.2-3005.1(C).
[8] *Grievance Procedure Manual* § 5.9.

aggravating circumstances to justify the disciplinary action.[9] Thus, in disciplinary actions the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.[10] Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. As long as the hearing officer's findings are based upon evidence in the record and the material issues of the case, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings.

As to this Department's review of the hearing officer's findings that the grievant's actions warranted a Group II violation, we cannot find that the hearing officer exceeded or abused his authority under the grievance procedure where, as here, his findings were supported by the record evidence and pertain to a material issue in the case. The record supports that the Secretary testified that she would not have recommended disciplinary action against the grievant if the internal audit report had indicated that the grievant was not responsible for the agency's lost funds.[11] However, four witnesses, including the Secretary, testified that the grievant was ultimately responsible for the agency losing over $234,000.00.[12] More importantly, the August 11, 2010 Written Notice was based not only on the $234,000.00 loss, but also the grievant's failure to report the loss to the Secretary. The hearing officer found that the grievant did not report the matter for five months and this failure denied the agency head the opportunity to properly manage the finances of her agency.[13] There is record evidence supporting the hearing officer's findings regarding the issue of the grievant's failure to timely report. Thus, this Department has no basis to disturb the decision on the basis of factual findings or the hearing officer's consideration thereof.

Reduction of the Group III Written Notice

EDR's *Rules for Conducting Grievance Hearings (Rules)* provides that "a hearing officer is not a 'super-personnel officer.' Therefore, in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."[14] More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

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[9] *Rules for Conducting Grievance Hearings* § VI(B).
[10] *Grievance Procedure Manual* § 5.8.
[11] *See* Hearing Recording Track 1 at 3:15:38 through 3:16:11 (testimony of Secretary).
[12] *See* Hearing Recording Track 1 at 1:28:00 through 1:35:59 (testimony of Secretary); Hearing Recording Track 2 at 27:00 through 32:40 (testimony of human resource manager); Hearing Recording Track 2 at 1:12:00 through 1:14:40 (testimony of Deputy Secretary); and Hearing Record Track 2 at 2:11:00 through 2:11:49 (testimony of auditor). *See also* Agency Exhibit 18, the January 26, 2010 State Internal Auditor Report which concluded that "As the Business Manager, [grievant] was ultimately responsible for ensuring that the required paperwork for the 2003 VAID grant was submitted timely," and that "management should consider taking disciplinary action in accordance with the DHRM Standards of Conduct against [the grievant] for not ensuring that the required paperwork for the 2003 VAID grant was submitted timely."
[13] Hearing Decision at 15.
[14] *Rules for Conducting Grievance Hearings* § VI(A).

> (i) the employee engaged in the behavior described in the Written Notice,
> (ii) the behavior constituted misconduct, and
> (iii) the agency's discipline was consistent with law and policy,
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> the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[15]

The grievant asserts that the hearing officer's decision to reduce the Group III Written Notice to a Group I Written Notice, and then elevate it to a Group II Written Notice "was an *ultra vires* judicial act which usurped the Agency's head's right to discipline employees." Specifically, the grievant contends that because the hearing officer found that the grievant was not the person responsible for filing the required PSC 272 forms, the hearing officer only had the authority to rescind the Group III Written Notice and erred by issuing a "new" Group II Written Notice.

We note that the "failure to timely file the PSC 272 forms" does not appear to be the exclusive or perhaps even the primary focus of the charge set forth in the agency's Group III Written Notice.[16] Instead, the agency disciplined the grievant not merely for the failure to timely file financial reports, but also for unsatisfactory job performance, failure to follow instructions and/or policy, and insubordination. In applying the *Rules* framework set forth above, the hearing officer found that although the grievant was not the person personally responsible for filing the required PSC 272 forms, the grievant did in fact fail to "timely and fully inform the Secretary that the Agency was obligated to restore over $234,000 to the federal government [which] constitutes inadequate or unsatisfactory job performance, a Group I offense."[17]

In this case, the hearing officer did not issue a "new" group notice, but instead he found it appropriate to reduce the agency's Group III Written Notice for *unsatisfactory job*

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[15] *Rules for Conducting Grievance Hearings* § VI(B). The Merit Systems Protection Board's ("Board's") approach to mitigation, while not binding on this Department, can be persuasive and instructive, serving as a useful model for EDR hearing officers. For example, under Board law, which also incorporates the "limits of reasonableness" standard, the Board must gives deference to an agency's decision regarding a penalty unless that penalty exceeds the range of allowable punishment specified by statute or regulation, or the penalty is "so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion." Parker v. U.S. Postal Service, 819 F.2d 1113, 1116 (Fed. Cir. 1987). *See also* Lachance v. Devall, 178 F.3d 1246, 1258 (Fed. Cir. 1999) (stating that the Board may reject those penalties it finds abusive, but may not infringe on the agency's exclusive domain as workforce manager). This is because the agency has primary discretion in maintaining employee discipline and efficiency. Stuhlmacher v. U.S. Postal Service, 89 M.S.P.R. 272, 279 (2001). The Board will not displace management's responsibility in this respect but instead will ensure that managerial judgment has been properly exercised. *Id. See also* Mings v. Department of Justice, 813 F.2d 384, 390 (Fed. Cir. 1987)(holding that the Court "will not disturb a choice of penalty within the agency's discretion unless the severity of the agency's action appears totally unwarranted in light of all factors").

[16] Specifically, the Written Notice was coded as "11, 13, 56 & 99," which are the codes for "Unsatisfactory Performance," "Failure to Follow Instructions and/or Policy," "Insubordination," and "Other" respectively.

[17] Hearing Decision at 15.

performance,[18] which the Commonwealth's Standards of Conduct specifically characterizes as a Group I offense.[19] Thus, the hearing officer concluded that the agency's Group III Written Notice was inconsistent with the general principles of the Standards of Conduct and he reduced the discipline to a Group I offense. However, pursuant to those same Standards of Conduct, the hearing officer also found that it was reasonable to elevate the grievant's Group I offense to a Group II offense because the agency had presented sufficient evidence to show that the grievant's actions materially and adversely impacted the agency.[20] This Department will not disturb a hearing officer's findings if there is record evidence to support such a finding. Here, such evidence exists. The Secretary testified that as the agency's chief financial officer, it was the grievant's responsibility to oversee the grant administration program and to comply with all the grant requirements in order to avoid any repayment of federal funds.[21] After a State Employee Fraud, Waste, and Abuse internal investigation took place, the Secretary testified that she first learned the reason the agency repaid the federal government $234,119.49 was because the grant forms had not been timely submitted.[22] Furthermore, she testified that the internal audit report found the grievant was ultimately responsible for ensuring those grant forms had been timely submitted, and because the agency lost over $234,000 when it failed to meet the filing deadline, the auditor recommended disciplinary action be taken against the grievant.[23] In addition, the Secretary testified that the grievant did not fully disclose to her that the $234,119.49 repayment was withdrawn from the agency's general fund.[24] Because there is record evidence to support grievant's unsatisfactory job performance materially and adversely impacted the agency in a fiscal manner, this Department finds no abuse of discretion by the hearing officer in determining the grievant's Group I offense could be elevated to a Group II offense.

Due Process

The grievant asserts his due process rights were violated because the Group III Written Notice did not expressly state that the grievant "usurped" the former Secretary's role as agency head. Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"[25] is a legal concept which may be raised with the circuit court in the

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[18] *Id*.
[19] Department of Human Resource Management (DHRM) Policy 1.60, *Standards of Conduct*, *Attachment A*, effective April 16, 2008.
[20] *Id*.
[21] *See* Hearing Recording Track 1 at 1:17:00 through 1:18:06 (testimony of Secretary). *See also* Hearing Recording Track 1 at 1:28:00 through 1:29:15 (testimony of Secretary).
[22] *See* Hearing Recording Track 1 at 1:26:00 through1:35:59 (testimony of Secretary).
[23] *Id*.
[24] *See* Hearing Recording Track 1 at 2:47:40 through 2:48:19 (testimony of Secretary).
[25] Davis v. Pak, 856 F.2d 648, 651 (4th Cir. 1988); *see also* Matthews v. Eldridge, 424 U.S. 319, 348 (1976) ("The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it'.") (quoting Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring) (alteration in original)); Bowens v. N.C. Dep't of Human Res., 710 F.2d 1015, 1019 (4th Cir. 1983) ("At a minimum, due process usually requires adequate notice of the charges and a fair opportunity to meet them."). *See also* Huntley v. N.C. State Bd. Of Educ., 493 F.2d 1016, 1018-21 (4th Cir. 1974) (holding that the notice prior to the hearing was not adequate when the employee was told that the hearing would be held to argue for reinstatement, and instead was changed by the agency midstream and held as an actual revocation hearing). *See also* Garraghty v. Jordon, 830 F.2d 1295, 1299 (4th Cir. 1987) ("It is well settled that due process

jurisdiction where the grievance arose.[26] However, the grievance procedure incorporates the concept of due process and therefore we address the issue upon administrative review as a matter of compliance with the grievance procedure's *Rules*. Section VI (B) of the *Rules* provides that in every instance, an "employee must receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge."[27] Our rulings on administrative review have held the same, concluding that only the charges set out in the Written Notice may be considered by a hearing officer.[28] In addition, the *Rules* provide that "any issue not qualified by the agency head, the EDR Director, or the Circuit Court cannot be remedied through a hearing."[29] Under the grievance procedure, charges not set forth on the Written Notice cannot be deemed to have been qualified, and thus are not before a hearing officer.

In this case, the description of the offense in the Group III Written Notice stated:

> As reported and subsequently substantiated to me by the Virginia Department of Accounts through its Fraud, Waste and Abuse Hotline investigative report (see attached), you have failed to ensure the timely and proper filing of financial status reports required for the retention of federal grant monies in connection with the Voting Access to Individuals with Disabilities (VAID) grant program administered by the State Board of Elections. This gross negligence and failure to adequately perform you job duties resulted in a tremendous financial loss to the SBE of $234,119.49 in fiscal year 2009-10, reflecting a tangible and substantial damage to this agency, its mission and its credibility as a grant administrator. The significance of this mismanagement and negligence of duties is further magnified by your failure to report this matter and its consequences to me, as agency head when you were first made aware of the situation. The serious nature of this mismanagement, coupled with my other concerns regarding your performance and inappropriate and cavalier behavior described below in the aggravating factors is of such an egregious nature for a critical member of this agency's executive management team that it merits the termination of your employment.

In his hearing decision, the hearing officer found that the grievant's conduct constituted unsatisfactory job performance, which he described was "in essence" a usurpation of the Secretary's role as Agency Head.[30] While the Group III Written Notice codes and description did not specifically use the term "usurpation," this Department concludes that the description

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requires that a public employee who has a property interest in his employment be given notice of the charges against him and a meaningful opportunity to respond to those charges prior to his discharge.")(citing to Cleveland Bd. of Education v. Loudermill, 105 S. Ct. 1487, 1495 (1985); Arnett v. Kennedy, 416 U.S. 134, 170-71, 40 L. Ed. 2d 15, 94 S. Ct. 1633, reh'g denied, 417 U.S. 977, 41 L. Ed. 2d 1148, 94 S. Ct. 3187 (1974).

[26] *See* Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

[27] *Rules for Conducting Grievance Hearings* § VI(B) citing to O'Keefe v. United States Postal Serv., 318 F.3d 1310, 1315 (Fed. Cir. 2002), which holds that "[o]nly 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."

[28] *See* EDR Rulings Nos. 2007-1409; 2006-1193; 2006-1140; 2004-720.

[29] *Rules for Conducting Grievance Hearings § I.*

[30] Hearing Decision at 15.

above fully informs the grievant of the unsatisfactory job performance with which he was charged. Accordingly, we cannot conclude, for purposes of compliance with the grievance procedure only, that the grievant's due process rights were violated simply because the term "usurpation" was not used on the Group III Written Notice.

Finally, as noted above, due process is a legal concept. Thus, once the hearing decision becomes final, the grievant is free to raise any due process claims with the circuit court in the jurisdiction where the grievance arose.

Evidence of Retaliation

In addition, the grievant asserts that the hearing officer failed to consider the grievant's retaliation evidence. The agency contends that the grievant's retaliation claim was purely speculative, and that he failed to present any direct or credible circumstantial evidence to support such a claim. Although the hearing officer found that the grievant engaged in prior protective activity,[31] this Department's review of the hearing tapes revealed that the grievant presented limited evidence of retaliation. That is, at hearing, the grievant introduced an internal audit report which was issued after a State Employee Fraud, Waste, and Abuse Hotline tip alleged that the agency had not properly followed the competitive procurement process.[32] This report, which the grievant asserted reflected adversely upon him, was issued a month prior to the grievant's termination. As such, the grievant argued that his participation in the Hotline investigation was the actual reason for his termination.[33] However, the Secretary denied ever knowing that the grievant was involved with any Hotline investigation.[34] Furthermore, the Deputy Secretary testified that he had no reason to believe the grievant's termination was done out of retaliation.[35] Likewise, the hearing officer found the Secretary's testimony was credible and held that the "evidence showed that the Agency was motivated to take disciplinary action against Grievant because it believed he had engaged in inappropriate behavior."[36] Therefore, he concluded that the "[g]rievant has not established a connection between his protective activity and the materially adverse action he suffered."[37] In light of the foregoing and in particular, the limited evidence presented by the grievant at hearing regarding his retaliation claim, this Department finds there is evidence to support the hearing officer's findings that no connection existed between the grievant's protected activity and the disciplinary action he received.

[31] Hearing Decision at 17.
[32] *See* Hearing Recording Track 2 at 2:27:22 through 2:35:31 (statements of grievant's advocate and the administrative hearing officer).
[33] *Id*.
[34] *See* Hearing Recording Track 1 at 1:58:30 through 1:59:00 (testimony of Secretary). *See also* Hearing Recording Track 1 at 5:00:29 through 5:02:07 (testimony of Secretary).
[35] *See* Hearing Recording Track 2 at 1:28:00 through 1:28:43 (testimony of Deputy Secretary).
[36] Hearing Decision at 17.
[37] *Id*.

Ex Post Facto Application of Agency Policy

The grievant's request for administrative review alleges that the hearing officer's decision is an *ex post facto* application of agency's October 2009 payment reporting policy. The agency asserts that the grievant was not disciplined for violating the October 2009 payment reporting policy, but instead "was disciplined for his failure to inform the Secretary of the problem with the grant funds." Furthermore, the agency states that its October 2009 policy was "adopted as part of corrective action taken by the Secretary in response to findings of the State Internal Auditor and the Agency's internal investigation of the loss of federal funds."

The hearing decision reflects that the hearing officer based his discipline analysis on the grievant's unsatisfactory job performance of not reporting to the agency head the funding loss--not for failure to follow agency policy. The failure to report the loss was one of the charges expressly set forth on the August 11, 2010 Written Notice and is the charge which has supporting evidence. Accordingly, there is no reason to disturb the decision on this basis.

CONCLUSION AND APPEAL RIGHTS

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.[38] Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.[39] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[40]

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Claudia T. Farr
Director

[38] *Grievance Procedure Manual* § 7.2(d).
[39] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[40] *Id.*; *see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319 (2002).