Issue: Group III Written Notice with Termination (inappropriate conduct); Hearing Date: 09/24/12; Decision Issued: 12/03/12; Agency: VDH; AHO: Carl Wilson Schmidt, Esq.; Case No. 9879; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 12/18/12; EDR Ruling No. 2013-3503 issued 02/04/13; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 12/18/12; DHRM Ruling issued 02/11/13; Outcome: AHO's decision affirmed.**

# *COMMONWEALTH of VIRGINIA*

***Department of Human Resource Management***

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

## DECISION OF HEARING OFFICER

In re:

**Case Number: 9879**

Hearing Date: September 24, 2012
Decision Issued: December 3, 2012

## PROCEDURAL HISTORY

On July 11, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for engaging in misconduct and/or inappropriate conduct dating back to 2006.

On July 19, 2012, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On August 6, 2012, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision in this matter due to the unavailability of a party. On September 24, 2012, a hearing was held at the Agency's office.

## APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel
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?

## BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

## FINDINGS OF FACT

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

The Virginia Department of Health employed Grievant as a Business Manager C at one of its locations. He had been employed by the Agency for approximately 25 years prior to his removal effective July 11, 2012. The purpose of Grievant's position was:

> Single and top administrative position in a health District/Central office work unit. Functions with a strategic focus on long-term issues, vision for central office work unit/District. Characteristics include: serves in the absence of the District/Office Director for all non-medical issues, primary spokesperson of business operations for external and internal entities. Independently allocates funding and staffing resources, promotes programs, prepares the budget, manage facilities, finances, and human resources based on management input and keeps the director informed on actions taken. Has overall responsibility to ensure quality assurance in relation to unit's strategic plans and areas of responsibility.[1]

Grievant began reporting to Dr. G in December 2010. Ms. S reported to Grievant.

[1] Agency Exhibit 3.

Ms. S resided in Location B. The Agency had two offices south of Location B. The Agency's office in Location C was approximately 22 miles south of Ms. S's home. The Agency's office in Location D was approximately 22 miles south of Location C.

On February 25, 2003, Ms. S was hired as an Administrative Office Specialist II based in Location C. In 2006, Ms. S applied for the position of Program Support Technician which was based in Location D.[2] To perform the duties of the position, Ms. S would have to travel more frequently to Location D thereby increasing the length and expense of her daily commute to work. Grievant and two other employees were on the hiring panel for the Program Support Technician position. Grievant offered the position to Ms. S. She inquired regarding whether she would receive a salary increase. Because the new position was a lateral transfer, Ms. S was told she would not receive a significant pay increase. Ms. S refused to accept the offer of employment. Ms. S was asked to reconsider her refusal. Ms. S said that she would accept the position if the base was changed to Location C from Location D. Grievant agreed to do so and Ms. S accepted the offer of employment in the new position.

Grievant designated Ms. S's base point as Location C. Even though Ms. S's base point was in Location C she spent the majority of her time in Location D. This was especially true when Ms. S became the Acting Clerical Supervisor in May 2011 for the employees working in Location D. Instead of working two to three days per week in Location D, Ms. S began working three to five days in Location D as Acting Clerical Supervisor.

Grievant assigned Ms. S responsibility for transporting interoffice mail between Location C and Location D. Ms. S's Employee Work Profile did not include reference to the task of transporting interoffice mail. Ms. W would leave her home at approximately 6:15 a.m. and arrive at Location C at approximately 6:35 a.m. or 6:40 a.m. She would drop off the mail she had picked up from Location D on the prior day. She would pick up mail from Location C intended to be delivered to Location D. Ms. S would drive to Location D and arrive there at approximately 6:55 a.m. or 7 a.m. After she finished her shift at Location D, Ms. S would drive home. She usually did not stop at Location C but rather drove directly to her home.

When Ms. S worked at Location D, she would submit a travel reimbursement voucher to Grievant. She did not claim mileage reimbursement for the approximately 22 mile distance from her home to Location C. She claimed reimbursement for the 22 mile distance while travelling from Location C to Location D. She claimed reimbursement for the 22 mile distance while travelling from Location D to Location C, but not from Location C to her home. Ms. S would claim mileage for travelling the distance between Location D and Location C even if she did not stop at Location C prior to reaching her home. In other words, Ms. S sought reimbursement for travelling 44 miles on nearly every day she went to work at Location D. For example, in December 2011, Ms. S

[2] Ms. C previously held the position in Location D and was not paid for mileage unless she travelled outside of Location D.

claimed reimbursement at 55.5 cents per mile for 44 miles or $24.42 for 14 days. From January 2011 through April 2012, Ms. S worked at Location D for the majority of the workdays in the month as follows:

| **Month, Year** | **Number of Days Ms. S Reimbursed for Travel between Location C and Location D** |
|---|---|
| January, 2011 | 16 |
| February, 2011 | 15 |
| March, 2011 | 20 |
| April, 2011 | 15 |
| May, 2011 | 18 |
| June, 2011 | 18 |
| July, 2011 | 16 |
| August, 2011 | 20 |
| September, 2011 | 16 |
| October, 2011 | 15 |
| November, 2011 | 14 |
| December, 2011 | 14 |
| January, 2012 | 13 |
| February, 2012 | 15 |
| March, 2012 | 15 |
| April, 2012 | 15 |

Ms. S submitted her monthly travel vouchers to Grievant for his review. He reviewed, signed and dated each voucher. In the space on the form directly above Grievant's signature, the following language appeared:

> I HEREBY CERTIFY THAT THE TRAVEL UNDERTAKEN IN THIS REIMBURSMENT VOUCHER HAS BEEN REVIEWED AND APPROVED AS NECSSARY FOR THE CONDUCT OF BUSINESS OF THE COMMWEALTH.

From fiscal year 2006 through April 2012, Grievant approved mileage reimbursement for Ms. S for her travel between Location C and Location D in the amount of $21,251.96. Grievant knew how Ms. S travelled from her home to Location D and when she stopped at Location C.

Dr. G recognized that an employee could not hold an "acting" position for an unlimited period of time. Several months after Ms. S became the Acting Clerical Supervisor in May 2011, Dr. G discussed with Grievant about when he intended to fill the clerical supervisor with a permanent employee and she discussed with Grievant that he should change Ms. S's base point to Location D since that was where she was performing her supervisory duties. Grievant did not make the changes Dr. G requested. In April 2012, Dr. G was turning in her travel reimbursement vouchers to the appropriate clerk and noticed aa travel voucher belonging to Ms. S showing that Ms. S was

continuing to receive mileage reimbursement for her travel between Location C and Location D. Dr. G brought her concern to the attention of the HR Manager and asked why Ms. S's base had not been moved to Location D. The HR Manager said that "Those things are supposed to be confidential." Given that Dr. G was in charge of the district office, she was taken aback by the HR Manager's comment and asked Grievant if Ms. S's base point had been changed. Grievant said it had not been changed. The following week, Dr. G reported to the Deputy Commissioner her concerns about Grievant's failure to change Ms. S's base point and the response she received from the HR Manager.

On May 1, 2012, Dr. G, Grievant, Ms. S and Ms. R attended a meeting regarding Ms. S's work duties and location. Dr. G directed Grievant to change Ms. S's base point from Location C to Location D because Ms. S was performing most of her duties in Location D. Grievant and Ms. S objected because it would result in a reduction in income to Ms. S. Grievant and Ms. S discussed the matter and Ms. S decided she could no longer perform as the Acting Clerical Supervisor. Grievant later sent an email to the clerks informing them that he would begin supervising them instead of Ms. S. The Deputy Commissioner instructed Dr. G to begin an investigation regarding Ms. S's mileage reimbursement.

The Agency's local WIC program was located with the Agency's other programs in the Agency's main office building. The Agency planned to move the WIC program to a separate building approximately one mile away. The new building was in the shape of an "L". The Agency planned to put the WIC office staff in the long part of the "L" while the smaller part would remain unoccupied.

In 2011, Grievant began the process of leasing the office space making up the smaller part of the "L" in the WIC office building. In June 2011, the Division of Real Estate Services approved Grievant's plan regarding how to use the office space. On February 3, 2012, the WIC program moved to the longer part of the new office building.

On February 10, 2012, Grievant moved Ms. S's office out of the Agency's main office in Location C to the unoccupied portion of WIC office. Grievant ordered new furniture for the formerly unoccupied portion of the WIC office building. Furniture was shipped in April and May 2012. Dr. G was not aware that Grievant had moved Ms. S to the new office space or that Grievant had furnished that office space. Beginning in April 2012, Grievant approved the expenditure of at least $7,926.84 to furnish the unused portion of the WIC office building.

During a meeting on September 23, 2011, staff requested some external signage related to dedicated parking for environmental health and vital records customers and a designated parking spot for the physician working the clinic. Dr. G endorsed the request and told Grievant of the request the following week. Grievant agreed to "do that right away." As of May 7, 2012, Grievant had not ordered the signage. In addition, during the September 23, 2011 meeting, staff expressed a desire to have a door cut between the patient record and the nursing office where there was a pass through

window. On the following week, Dr. G informed Grievant that she wanted him to order the change to the doorway to be made. She reminded Grievant several times later. On March 25, 2012, Grievant presented Dr. G with an estimate for the work but it involved more work than Dr. G had requested. As of May 7, 2012, no work had been initiated to address Dr. G's request.

## CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."[3] Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

Combining Several Disciplinary Behaviors into One Written Notice

Combining facts otherwise giving rise to separate disciplinary action does not provide a basis to elevate the level of disciplinary action given to an employee. In other words, if an employee engaged in behavior violating one policy and also engages in unrelated behavior giving rise to another policy, the agency could issue two Group II written notices. An agency cannot combine the two separate offenses into one offense and elevate that offense to a Group III offense.[4] When agencies combine separate disciplinary behavior into one written notice, the question becomes whether any of the separate behaviors support the level of disciplinary action taken. It becomes unnecessary for the Hearing Officer to address allegations that if true would not rise to the level of the disciplinary action given.

In this case, the Agency has combined distinct fact scenarios into one Group III offense. Only if at least one of those fact scenarios forms supports the issuance of a Group III offense can the disciplinary action be upheld. Accordingly, the Hearing Officer will focus on the allegations that could rise to the level of a Group III offense.

The Agency alleged Grievant should be disciplined for engaging in unethical behavior. Agency's ethics policies are not standards of conduct forming a basis for disciplinary action. Whether Grievant should receive disciplinary action depends on whether he violated DHRM Policy 1.60 and not whether his behavior was unethical under the Agency's policy on ethics. The Hearing Officer will disregard the Agency's

[3] The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

[4] This is true in part because doing so may serve to unfairly extend the life of disciplinary action against an employee. For example, if an employee is removed upon the issuance of two Group II Written Notices, those written notices remain active for three years. If the same employee is given one Group III Written Notice, the active life of that Group III Written Notice is four years.

allegation of unethical conduct as it appears to be merely an additional characterization of its allegations that Grievant violated DHRM Policy 1.60.

Falsification

"[F]alsification of records" is a Group III offense.[5] Falsification is not defined by the Standards of Conduct but the Hearing Officer interprets this provision to require proof of an intent to falsify by the employee in order for the falsification to rise to the level justifying termination. This interpretation is less rigorous but is consistent with the definition of "Falsify" found in Blacks Law Dictionary (6th Edition) as follows:

> Falsify. To counterfeit or forge; to make something false; to give a false appearance to anything. To make false by mutilation, alteration, or addition; to tamper with, as to falsify a record or document. ***

The Hearing Officer's interpretation is also consistent with the New Webster's Dictionary and Thesaurus which defines "falsify" as:

> to alter with intent to defraud, *to falsify accounts* || to misrepresent, *to falsify an issue* || to pervert, *to falsify the course of justice.*

Virginia Travel Regulations are issued by the Department of Accounts. Topic 20335[6] provides:

> It is the policy of the Commonwealth of Virginia to limit travel costs to only those expenses that are necessary for providing essential services to the Commonwealth's citizens. Further, travelers and travel planners must seek ways to reduce the cost of essential travel.

"Base point" is defined as:

> Place, office, or building where the traveler performs his/her duties on a routine basis. Multiple base points are not allowed.

"Commuting mileage" is defined as:

> Round-trip mileage traveled routinely by the employee between his residence and base point. Mileage and other commuting cost incurred during commuting status are considered a personal expense and are not reimbursable.

"Trip" is defined as:

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[5] See, Attachment A, DHRM Policy 1.60.

[6] This version was issued in October 2010.

> Any period of continuous travel between when the traveler leaves his residence or base point and returns to his residence or base point.

The policy provides:

> By signing the travel reimbursement request, the traveler is certifying the accuracy of all information and the legitimacy of the travel. The signature of the traveler's supervisor certifies that the supervisor agrees that the travel was necessary and the requested reimbursements are proper.

The policy provides:

> An employee can only have one base point, even if the employee has multiple work locations. It is the agency's responsibility to assign the base point to be used for reimbursement purposes.

Grievant falsified the travel vouchers submitted by Ms. S when he signed them to certify that the reimbursement to her was necessary and proper. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

In 2006, Grievant offered Ms. S a position whose duties were primarily in Location D. When she refused the position, he decided to assign Location C as her base point so the he could increase her compensation and account for the additional travel time from her home to Location D. Grievant should have assigned Ms. S the base point of Location D since that was where she performed most of her daily duties. Grievant assigned Ms. S responsibility for transporting interoffice mail between Location C and Location D in order to support her claim for reimbursement for miles driven between Location C and Location D. In many instances, Ms. S's sole reason for going to Location C was to pick up the mail. If Grievant had assigned Location D as the base point for Ms. S, her commute would have been from her home to Location D. She would not have been able to claim reimbursement for travelling from her home to Location D. By making Location C Ms. S's base point, Grievant circumvented the State Travel Regulations in order to provide Ms. S with additional compensation. Grievant granted Ms. S the right to claim mileage reimbursement in lieu of the salary increase that Ms. S wanted and Grievant believed Ms. S was due. Each time Grievant approved Ms. S's travel reimbursement, he was certifying that the travel was necessary and the requested reimbursements were proper. Grievant knew or should have known that reimbursing Ms. S for travel from Location C to Location D on those days she worked in Location D and merely picked up the mail in Location C was not necessary and was not proper.

Even if the Hearing Officer assumes for the sake of argument that it was appropriate to have Ms. S pick up and deliver mail from Location C, the Agency has met its burden of proving Grievant falsified Ms. S's travel reimbursement. Ms. S testified

that she often picked up mail from Location D when she finished her shift in the afternoon and took that mail directly to her home without stopping at Location C that afternoon. On the following morning, she would take the mail she held overnight at her home and deliver it to Location C. Since Ms. S drove from Location D directly to her home and did not stop at Location C in the afternoon prior to reaching her home, she would not have been entitled to reimbursement for taking mail from Location D and driving directly to her home. Ms. S claimed reimbursement for travel between Location D and Location C when she took mail from Location D and drove directly to her home without stopping at Location C even though she was not entitled to do so under the Travel Regulations. Grievant knew of Ms. S's practice and yet he approved reimbursement simply because Ms. S drove past Location C without stopping. Grievant authorized Ms. S to receive reimbursement for mileage for which she was not entitled.

Grievant argued that it was appropriate to assign Location C to Ms. S because she had a work station there and performed duties in Location C. The evidence showed that even if it was unclear where Ms. S's base point should have been when Ms. S was first hired, it should have been obvious to Grievant that Ms. S's base point should have been in Location D once Ms. S became the Acting Clerical Supervisor.

WIC Office Space

The Agency alleged that Grievant falsified documents in order to purchase furniture for a new office area attached to the WIC office building. The Agency points out that Grievant did not obtain permission from Dr. G before obligating the Agency to pay rent for the new office space. Although the Agency has established that Grievant's decision to lease the office space was unwise, it has not established that Grievant falsified any documents as part of that decision.

As the Business Manager, Grievant had considerable autonomy, authority, and responsibility for public funds entrusted to the Agency. Grievant began planning how to use the additional space in the WIC building. He submitted documents to the Division of Real Estate that were based on assumptions of personnel the Agency would obtain in the future and on the Agency's needs and operations in the future. It is difficult for the Hearing Officer to conclude that Grievant had a present intent in 2011 to falsify documents regarding his expectations of future events that were not certain to happen.

Grievant purchased office furniture for the additional space. This purchase was not made differently from his purchase of other equipment and furniture. He was not instructed to obtain Dr. G's permission before making purchases like the one he made to furnish the additional space in the WIC Office.

The Agency alleged that there was no business need for the office space. It appears that this allegation is true, but even if true it would constitute unsatisfactory work performance which would be a Group I offense which could be elevated to a Group II offense.

At best, the Agency can establish that Grievant's utilization of the WIC Office space was poorly planned, poorly implemented, and a waste of Agency funds. These facts rise to the level of a Group II offense, not a Group III offense.

Insubordination

The Agency alleged that Grievant was insubordinate because he failed to follow Dr. G's instruction to move Ms. S to Location D because she spent most of her work time there. The Agency asserted that on January 26, 2012, in anticipation of the WIC staff moving to their new location on February 3, 2012, Dr. G directed Grievant to change Ms. S's base point from Location C to Location D because her role as Acting Clerical Supervisor for Location D was ongoing and without an end date. Instead of moving Ms. S to Location D, Grievant moved Ms. S to the extra space in the WIC office building. Insubordinate is only a Group II offense. The allegations would not be sufficiently extreme so as to justify elevation of the offense to a Group III offense.

Mitigation

*Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Human Resource Management …."[7] Under the *Rules for Conducting Grievance Hearings,* "[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. 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.

Grievant contends the disciplinary action should be mitigated because of his length of service and excellent work performance. Rarely is an employee's work performance and/or length of service a sufficient basis to reduce disciplinary action. Although there is little doubt that except for the facts giving rise to this grievance, Grievant was valuable and knowledgeable employee, his work performance and length of service are not sufficient to mitigate the disciplinary action against him.

When agency managers decide to remove an employee and then begin a process of finding a basis to discipline an employee, that approach serves as a basis to mitigate disciplinary action. In other words, Agency managers cannot act based on an improper motive. Managers should encourage good work performance and only react

[7] Va. Code § 2.2-3005.

with disciplinary action after an employee demonstrates behavior giving rise to disciplinary action.

It is not unusual for tension and conflict to exist between an employee and a manager when the manager believes the employee's work performance is inadequate. That conflict, by itself, is not sufficient for an employee to establish that the disciplinary action was motivated by an improper purpose.

Grievant argued that the Deputy Commissioner had targeted him for disciplinary action and then sought evidence to accomplish his objective of removing Grievant. He presented evidence showing that the Deputy Commissioner did not like him and desired to remove him from employment. For example, Ms. R wrote a note on June 24, 2011 stating:

> "[Dr. G] came in my office and closed the door. She stated that she felt that [Deputy Commissioner] was out to get [Grievant] and she said [Grievant] is my friend and I think you are [Grievant's] friend.[8]

The conflict between Grievant and the Deputy Commissioner was long standing and reflected mutual dislike. The decision to remove Grievant, however, was made by the Agency Head, Deputy Commissioner, human resource managers, and Dr. G. It does not appear that the Deputy Commissioner reached conclusions inconsistent with the views of the other employees involved in the disciplinary decision or that he unduly influenced the decision to discipline and remove Grievant. Dr. G, not the Deputy Commissioner, triggered the disciplinary investigation and process. Only after Dr. G realized that Grievant had not changed Ms. S's base point to Location D as they had discussed did Dr. G begin to believe that Grievant's behavior should be addressed. Dr. G did not have a long standing personal dislike of Grievant. She viewed him favorably and was concerned about the conflict between Grievant and the Deputy Commissioner. She enjoyed working with Grievant except that she was concerned that he was not fully sharing information with her. She was the highest ranking employee in the district and believed that Grievant should not have been keeping information from her. Based on the evidence presented, the Hearing Officer cannot conclude that the disciplinary action against Grievant was taken for an improper purpose.

In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Motion to Reopen

Grievant moved to reopen the hearing because the Agency Head had resigned, the Deputy Commissioner was scheduled to retire November 30, 2012, and Dr. G had resigned from her position with the Agency. Grievant did not specify how these changes would affect the outcome of the case. Although it is possible that different

[8] Grievant Exhibit p. 684.

managers would have made different decisions regarding how to discipline Grievant, that possibility is not a basis to reverse or alter disciplinary action. There is no basis to reopen the hearing because key managers have left the Agency following the hearing.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**.

## 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.[9]

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

*S/Carl Wilson Schmidt*

_____

Carl Wilson Schmidt, Esq.
Hearing Officer

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

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Department of Health

February 11, 2013

The grievant has requested an administrative review of the hearing officer's decision in Case No. 9879. For the reason stated below, we will not interfere with the application of this decision. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has directed that I conduct this administrative review.

The hearing officer listed the following in the PROCEDURAL HISTORY of this case:

> On July 11, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for engaging in misconduct and/or inappropriate conduct dating back to 2006.
>
> On July 19, 2012, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On August 6, 2012, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision in this matter due to the unavailability of a party. On September 24, 2012, a hearing was held at the Agency's office.

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As per the hearing officer, the relevant FINDINGS OF FACT in this case are as follows:

> After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:
>
> The Virginia Department of Health employed Grievant as a Business Manager C at one of its locations. He had been employed by the Agency for approximately 25 years prior to his removal effective July 11, 2012. The purpose of Grievant's position was:
>
> Single and top administrative position in a health District/Central office work unit. Functions with a strategic focus on long-term issues, vision for central office work unit/District. Characteristics include: serves in the absence of the District/Office Director for all non-medical issues, primary spokesperson of business operations for external and internal entities. Independently allocates funding and staffing resources, promotes programs, prepares the budget, manage facilities, finances, and

human resources based on management input and keeps the director informed on actions taken. Has overall responsibility to ensure quality assurance in relation to unit's strategic plans and areas of responsibility.

Grievant began reporting to Dr. G in December 2010. Ms. S reported to Grievant. Ms. S resided in Location B. The Agency had two offices south of Location B. The Agency's office in Location C was approximately 22 miles south of Ms. S's home. The Agency's office in Location D was approximately 22 miles south of Location C.

On February 25, 2003, Ms. S was hired as an Administrative Office Specialist II based in Location C. In 2006, Ms. S applied for the position of Program Support Technician which was based in Location D. To perform the duties of the position, Ms. S would have to travel more frequently to Location D thereby increasing the length and expense of her daily commute to work. Grievant and two other employees were on the hiring panel for the Program Support Technician position. Grievant offered the position to Ms. S. She inquired regarding whether she would receive a salary increase. Because the new position was a lateral transfer, Ms. S was told she would not receive a significant pay increase. Ms. S refused to accept the offer of employment. Ms. S was asked to reconsider her refusal. Ms. S said that she would accept the position if the base was changed to Location C from Location D. Grievant agreed to do so and Ms. S accepted the offer of employment in the new position.

Grievant designated Ms. S's base point as Location C. Even though Ms. S's base point was in Location C she spent the majority of her time in Location D. This was especially true when Ms. S became the Acting Clerical Supervisor in May 2011 for the employees working in Location D. Instead of working two to three days per week in Location D, Ms. S began working three to five days in Location D as Acting Clerical Supervisor.

Grievant assigned Ms. S responsibility for transporting interoffice mail between Location C and Location D. Ms. S's Employee Work Profile did not include reference to the task of transporting interoffice mail. Ms. W would leave her home at approximately 6:15 a.m. and arrive at Location C at approximately 6:35 a.m. or 6:40 a.m. She would drop off the mail she had picked up from Location D on the prior day. She would pick up mail from Location C intended to be delivered to Location D. Ms. S would drive to Location D and arrive there at approximately 6:55 a.m. or 7 a.m. After she finished her shift at Location D, Ms. S would drive home. She usually did not stop at Location C but rather drove directly to her home.

When Ms. S worked at Location D, she would submit a travel reimbursement voucher to Grievant. She did not claim mileage reimbursement for the approximately 22 mile distance from her home to Location C. She claimed reimbursement for the 22 mile distance while travelling from Location C to Location D. She claimed reimbursement for the 22 mile distance while travelling from Location D to Location C, but not from Location C to her home. Ms. S would claim mileage for

travelling the distance between Location D and Location C even if she did not stop at Location C prior to reaching her home. In other words, Ms. S sought reimbursement for travelling 44 miles on nearly every day she went to work at Location D. For example, in December 2011, Ms. S claimed reimbursement at 55.5 cents per mile for 44 miles or $24.42 for 14 days. From January 2011 through April 2012, Ms. S worked at Location D for the majority of the workdays in the month as follows:

| **Month, Year** | **Number of Days Ms. S Reimbursed for Travel between Location C and Location D** |
|---|---|
| January, 2011 | 16 |
| February, 2011 | 15 |
| March, 2011 | 20 |
| April, 2011 | 15 |
| May, 2011 | 18 |
| June, 2011 | 18 |
| July, 2011 | 16 |
| August, 2011 | 20 |
| September, 2011 | 16 |
| October, 2011 | 15 |
| November, 2011 | 14 |
| December, 2011 | 14 |
| January, 2012 | 13 |
| February, 2012 | 15 |
| March, 2012 | 15 |
| April, 2012 | 15 |

Ms. S submitted her monthly travel vouchers to Grievant for his review. He reviewed, signed and dated each voucher. In the space on the form directly above Grievant's signature, the following language appeared:

I HEREBY CERTIFY THAT THE TRAVEL UNDERTAKEN IN THIS REIMBURSMENT VOUCHER HAS BEEN REVIEWED AND APPROVED AS NECSSARY FOR THE CONDUCT OF BUSINESS OF THE COMMONWEALTH.

From fiscal year 2006 through April 2012, Grievant approved mileage reimbursement for Ms. S for her travel between Location C and Location D in the amount of $21,251.96. Grievant knew how Ms. S travelled from her home to Location D and when she stopped at Location C.

Dr. G recognized that an employee could not hold an "acting" position for an unlimited period of time. Several months after Ms. S became the Acting Clerical Supervisor in May 2011, Dr. G discussed with Grievant about when he intended to fill the clerical supervisor with a permanent employee and she discussed with Grievant that he should change Ms. S's base point to Location D since that was where she was performing her supervisory duties. Grievant did not make the changes Dr. G requested.

In April 2012, Dr. G was turning in her travel reimbursement vouchers to the appropriate clerk and noticed a travel voucher belonging to Ms. S showing that Ms. S was continuing to receive mileage reimbursement for her travel between Location C and Location D. Dr. G brought her concern to the attention of the HR Manager and asked why Ms. S's base had not been moved to Location D. The HR Manager said that "Those things are supposed to be confidential." Given that Dr. G was in charge of the district office, she was taken aback by the HR Manager's comment and asked Grievant if Ms. S's base point had been changed. Grievant said it had not been changed. The following week, Dr. G reported to the Deputy Commissioner her concerns about Grievant's failure to change Ms. S's base point and the response she received from the HR Manager.

On May 1, 2012, Dr. G, Grievant, Ms. S and Ms. R attended a meeting regarding Ms. S's work duties and location. Dr. G directed Grievant to change Ms. S's base point from Location C to Location D because Ms. S was performing most of her duties in Location D. Grievant and Ms. S objected because it would result in a reduction in income to Ms. S. Grievant and Ms. S discussed the matter and Ms. S decided she could no longer perform as the Acting Clerical Supervisor. Grievant later sent an email to the clerks informing them that he would begin supervising them instead of Ms. S. The Deputy Commissioner instructed Dr. G to begin an investigation regarding Ms. S's mileage reimbursement.

The Agency's local WIC program was located with the Agency's other programs in the Agency's main office building. The Agency planned to move the WIC program to a separate building approximately one mile away. The new building was in the shape of an "L". The Agency planned to put the WIC office staff in the long part of the "L" while the smaller part would remain unoccupied.

In 2011, Grievant began the process of leasing the office space making up the smaller part of the "L" in the WIC office building. In June 2011, the Division of Real Estate Services approved Grievant's plan regarding how to use the office space. On February 3, 2012, the WIC program moved to the longer part of the new office building.

On February 10, 2012, Grievant moved Ms. S's office out of the Agency's main office in Location C to the unoccupied portion of WIC office. Grievant ordered new furniture for the formerly unoccupied portion of the WIC office building. Furniture was shipped in April and May 2012. Dr. G was not aware that Grievant had moved Ms. S to the new office space or that Grievant had furnished that office space. Beginning in April 2012, Grievant approved the expenditure of at least $7,926.84 to furnish the unused portion of the WIC office building.

During a meeting on September 23, 2011, staff requested some external signage related to dedicated parking for environmental health and vital records customers and a designated parking spot for the physician working the clinic. Dr. G endorsed the request and told Grievant of the request the following week. Grievant agreed to "do that right away." As of May 7, 2012, Grievant had not ordered the signage. In addition, during the September 23, 2011 meeting, staff expressed a desire

to have a door cut between the patient record and the nursing office where there was a pass through window. On the following week, Dr. G informed Grievant that she wanted him to order the change to the doorway to be made. She reminded Grievant several times later. On March 25, 2012, Grievant presented Dr. G with an estimate for the work but it involved more work than Dr. G had requested. As of May 7, 2012, no work had been initiated to address Dr. G's request.

The CONCLUSIONS OF POLICY in this case are as follows:

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action." Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

Combining Several Disciplinary Behaviors into One Written Notice

Combining facts otherwise giving rise to separate disciplinary action does not provide a basis to elevate the level of disciplinary action given to an employee. In other words, if an employee engaged in behavior violating one policy and also engages in unrelated behavior giving rise to another policy, the agency could issue two Group II written notices. An agency cannot combine the two separate offenses into one offense and elevate that offense to a Group III offense. When agencies combine separate disciplinary behavior into one written notice, the question becomes whether any of the separate behaviors support the level of disciplinary action taken. It becomes unnecessary for the Hearing Officer to address allegations that if true would not rise to the level of the disciplinary action given.

In this case, the Agency has combined distinct fact scenarios into one Group III offense. Only if at least one of those fact scenarios forms supports the issuance of a Group III offense can the disciplinary action be upheld. Accordingly, the Hearing Officer will focus on the allegations that could rise to the level of a Group III offense.

The Agency alleged Grievant should be disciplined for engaging in unethical behavior. Agency's ethics policies are not standards of conduct forming a basis for disciplinary action. Whether Grievant should receive disciplinary action depends on whether he violated DHRM Policy 1.60 and not whether his behavior was unethical under the Agency's policy on ethics. The Hearing Officer will disregard the Agency's allegation of unethical conduct as it appears to be merely an additional characterization of its allegations that Grievant violated DHRM Policy 1.60.

*Falsification*

"[F]alsification of records" is a Group III offense. Falsification is not defined by the Standards of Conduct but the Hearing Officer interprets this provision to require

proof of an intent to falsify by the employee in order for the falsification to rise to the level justifying termination. This interpretation is less rigorous but is consistent with the definition of "Falsify" found in Blacks Law Dictionary ($6^{th}$ Edition) as follows:

> Falsify. To counterfeit or forge; to make something false; to give a false appearance to anything. To make false by mutilation, alteration, or addition; to tamper with, as to falsify a record or document. ***

The Hearing Officer's interpretation is also consistent with the New Webster's Dictionary and Thesaurus which defines "falsify" as:

> to alter with intent to defraud, *to falsify accounts* || to misrepresent, *to falsify an issue* || to pervert, *to falsify the course of justice.*

Virginia Travel Regulations are issued by the Department of Accounts. Topic 20335 provides:

> It is the policy of the Commonwealth of Virginia to limit travel costs to only those expenses that are necessary for providing essential services to the Commonwealth's citizens. Further, travelers and travel planners must seek ways to reduce the cost of essential travel.

"Base point" is defined as:

> Place, office, or building where the traveler performs his/her duties on a routine basis. Multiple base points are not allowed.

"Commuting mileage" is defined as:

> Round-trip mileage traveled routinely by the employee between his residence and base point. Mileage and other commuting cost incurred during commuting status are considered a personal expense and are not reimbursable.

"Trip" is defined as:

> Any period of continuous travel between when the traveler leaves his residence or base point and returns to his residence or base point.

The policy provides:

> By signing the travel reimbursement request, the traveler is certifying the accuracy of all information and the legitimacy of the travel. The signature of the traveler's supervisor certifies that the supervisor agrees that the travel was necessary and the requested reimbursements are proper.

The policy provides:

An employee can only have one base point, even if the employee has multiple work locations. It is the agency's responsibility to assign the base point to be used for reimbursement purposes.

Grievant falsified the travel vouchers submitted by Ms. S when he signed them to certify that the reimbursement to her was necessary and proper. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

In 2006, Grievant offered Ms. S a position whose duties were primarily in Location D. When she refused the position, he decided to assign Location C as her base point so the he could increase her compensation and account for the additional travel time from her home to Location D. Grievant should have assigned Ms. S the base point of Location D since that was where she performed most of her daily duties. Grievant assigned Ms. S responsibility for transporting interoffice mail between Location C and Location D in order to support her claim for reimbursement for miles driven between Location C and Location D. In many instances, Ms. S's sole reason for going to Location C was to pick up the mail. If Grievant had assigned Location D as the base point for Ms. S, her commute would have been from her home to Location D. She would not have been able to claim reimbursement for travelling from her home to Location D. By making Location C Ms. S's base point, Grievant circumvented the State Travel Regulations in order to provide Ms. S with additional compensation. Grievant granted Ms. S the right to claim mileage reimbursement in lieu of the salary increase that Ms. S wanted and Grievant believed Ms. S was due. Each time Grievant approved Ms. S's travel reimbursement, he was certifying that the travel was necessary and the requested reimbursements were proper. Grievant knew or should have known that reimbursing Ms. S for travel from Location C to Location D on those days she worked in Location D and merely picked up the mail in Location C was not necessary and was not proper.

Even if the Hearing Officer assumes for the sake of argument that it was appropriate to have Ms. S pick up and deliver mail from Location C, the Agency has met its burden of proving Grievant falsified Ms. S's travel reimbursement. Ms. S testified that she often picked up mail from Location D when she finished her shift in the afternoon and took that mail directly to her home without stopping at Location C that afternoon. On the following morning, she would take the mail she held overnight at her home and deliver it to Location C. Since Ms. S drove from Location D directly to her home and did not stop at Location C in the afternoon prior to reaching her home, she would not have been entitled to reimbursement for taking mail from Location D and driving directly to her home. Ms. S claimed reimbursement for travel between Location D and Location C when she took mail from Location D and drove directly to her home without stopping at Location C even though she was not entitled to do so under the Travel Regulations. Grievant knew of Ms. S's practice and yet he approved reimbursement simply because Ms. S drove past Location C without

stopping. Grievant authorized Ms. S to receive reimbursement for mileage for which she was not entitled.

Grievant argued that it was appropriate to assign Location C to Ms. S because she had a work station there and performed duties in Location C. The evidence showed that even if it was unclear where Ms. S's base point should have been when Ms. S was first hired, it should have been obvious to Grievant that Ms. S's base point should have been in Location D once Ms. S became the Acting Clerical Supervisor.

*WIC Office Space*

The Agency alleged that Grievant falsified documents in order to purchase furniture for a new office area attached to the WIC office building. The Agency points out that Grievant did not obtain permission from Dr. G before obligating the Agency to pay rent for the new office space. Although the Agency has established that Grievant's decision to lease the office space was unwise, it has not established that Grievant falsified any documents as part of that decision.

As the Business Manager, Grievant had considerable autonomy, authority, and responsibility for public funds entrusted to the Agency. Grievant began planning how to use the additional space in the WIC building. He submitted documents to the Division of Real Estate that were based on assumptions of personnel the Agency would obtain in the future and on the Agency's needs and operations in the future. It is difficult for the Hearing Officer to conclude that Grievant had a present intent in 2011 to falsify documents regarding his expectations of future events that were not certain to happen.

Grievant purchased office furniture for the additional space. This purchase was not made differently from his purchase of other equipment and furniture. He was not instructed to obtain Dr. G's permission before making purchases like the one he made to furnish the additional space in the WIC Office.

The Agency alleged that there was no business need for the office space. It appears that this allegation is true, but even if true it would constitute unsatisfactory work performance which would be a Group I offense which could be elevated to a Group II offense.

At best, the Agency can establish that Grievant's utilization of the WIC Office space was poorly planned, poorly implemented, and a waste of Agency funds. These facts rise to the level of a Group II offense, not a Group III offense.

Insubordination

The Agency alleged that Grievant was insubordinate because he failed to follow Dr. G's instruction to move Ms. S to Location D because she spent most of her work time there. The Agency asserted that on January 26, 2012, in anticipation of the

WIC staff moving to their new location on February 3, 2012, Dr. G directed Grievant to change Ms. S's base point from Location C to Location D because her role as Acting Clerical Supervisor for Location D was ongoing and without an end date. Instead of moving Ms. S to Location D, Grievant moved Ms. S to the extra space in the WIC office building. Insubordination is only a Group II offense. The allegations would not be sufficiently extreme so as to justify elevation of the offense to a Group III offense.

*Mitigation*

*Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Human Resource Management …." Under the *Rules for Conducting Grievance Hearings*, "[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. 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.

Grievant contends the disciplinary action should be mitigated because of his length of service and excellent work performance. Rarely is an employee's work performance and/or length of service a sufficient basis to reduce disciplinary action. Although there is little doubt that except for the facts giving rise to this grievance, Grievant was valuable and knowledgeable employee, his work performance and length of service are not sufficient to mitigate the disciplinary action against him.

When agency managers decide to remove an employee and then begin a process of finding a basis to discipline an employee, that approach serves as a basis to mitigate disciplinary action. In other words, Agency managers cannot act based on an improper motive. Managers should encourage good work performance and only react with disciplinary action after an employee demonstrates behavior giving rise to disciplinary action.

It is not unusual for tension and conflict to exist between an employee and a manager when the manager believes the employee's work performance is inadequate. That conflict, by itself, is not sufficient for an employee to establish that the disciplinary action was motivated by an improper purpose.

Grievant argued that the Deputy Commissioner had targeted him for disciplinary action and then sought evidence to accomplish his objective of removing Grievant. He presented evidence showing that the Deputy Commissioner did not like

him and desired to remove him from employment. For example, Ms. R wrote a note on June 24, 2011 stating:

"[Dr. G] came in my office and closed the door. She stated that she felt that [Deputy Commissioner] was out to get [Grievant] and she said [Grievant] is my friend and I think you are [Grievant's] friend.

The conflict between Grievant and the Deputy Commissioner was long standing and reflected mutual dislike. The decision to remove Grievant, however, was made by the Agency Head, Deputy Commissioner, human resource managers, and Dr. G. It does not appear that the Deputy Commissioner reached conclusions inconsistent with the views of the other employees involved in the disciplinary decision or that he unduly influenced the decision to discipline and remove Grievant. Dr. G, not the Deputy Commissioner, triggered the disciplinary investigation and process. Only after Dr. G realized that Grievant had not changed Ms. S's base point to Location D as they had discussed did Dr. G begin to believe that Grievant's behavior should be addressed. Dr. G did not have a long standing personal dislike of Grievant. She viewed him favorably and was concerned about the conflict between Grievant and the Deputy Commissioner. She enjoyed working with Grievant except that she was concerned that he was not fully sharing information with her. She was the highest ranking employee in the district and believed that Grievant should not have been keeping information from her. Based on the evidence presented, the Hearing Officer cannot conclude that the disciplinary action against Grievant was taken for an improper purpose.

In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Motion to Reopen

Grievant moved to reopen the hearing because the Agency Head had resigned, the Deputy Commissioner was scheduled to retire November 30, 2012, and Dr. G had resigned from her position with the Agency. Grievant did not specify how these changes would affect the outcome of the case. Although it is possible that different managers would have made different decisions regarding how to discipline Grievant, that possibility is not a basis to reverse or alter disciplinary action. There is no basis to reopen the hearing because key managers have left the Agency following the hearing.

*DECISION*

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**.

## DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the

case and to determine the grievance based on the evidence. By statute, the DHRM has the authority to determine whether the

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In each instance where a request is made to this Agency for an administrative review, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent or is misinterpreted. In his request for an administrative review of policy violation by the hearing officer in making his decision, the grievant raised several issues which appear to contest the facts of this case.

For example, the grievant recites the provisions of the *Standards of Conduct* and correctly surmises that these provisions apply to most state agencies. He states further that the investigation that resulted in the grievant being charged with various violations was flawed and unethical. He pointed out also that because the hearing officer determined that most of the allegations against the grievant were groundless and did not warrant any discipline at all, much less a Group Three Written Notice. Finally, the grievant stated that the hearing officer did not prove by the preponderance of the evidence that discipline was warranted and appropriate under the circumstances. These are evidentiary issues and will not be addressed in this ruling.

In addition, the grievant raised the question as to what level of disciplinary action under the Standards of Conduct policy may be applied. According to the hearing officer, the decision to uphold the Group III Written Notice with termination was based on the evidence that the grievant falsified documents. An agency has the discretion to issue a level I, II, or III Written Notice based on the severity of the violation. Because the hearing officer was within his authority to make that determination, this Agency has no authority to make any modifications. It appears that the grievant is contesting the evidence the hearing officer considered, how he assessed that evidence, and the resulting decision. Thus, we will not interfere with the application of this decision.

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