Issue: Group III Written Notice with termination (falsifying State records); Hearing Date: December 19, 2001; Decision Date: January 2, 2002; Agency: Department of Agriculture and Consumer Services; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5331; **Administrative Review: Hearing Officer Reconsideration Request received 01/14/02; Reconsideration Decision dated 01/16/02; Outcome: No newly discovered evidence or incorrect legal conclusions. Request denied; Administrative Review: EDR Ruling requested 01/14/02; EDR Ruling dated 03/02/02 (Ruling #2002-008); Outcome: HO did not abuse discretion or exceed authority; Administrative Review: DHRM Ruling requested 01/14/02; DHRM Ruling dated 03/08/02; Outcome: No violation concerning HO's application of provision of DHRM policy. No basis to interfere with decision; Judicial Review: Appealed to the Circuit Court in the City of Richmond on 04/02/02; Outcome: HO decision reversed as being contrary to law; HS-608-1 dated 08/22/02; Judicial Review: Appealed to the Court of Appeals; Outcome: Reversed Circuit Court's decision and reinstated HO's decision. Decision Date: 06/24/03; [2003 Va. App. LEXIS 356]**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5331

Hearing Date: December 19, 2001
Decision Issued: January 2, 2002

PROCEDURAL HISTORY

On September 10, 2001, Grievant was issued a Group III Written Notice of disciplinary action for falsifying leave records, timesheets, and work activity reports.

On September 27, 2001, Grievant timely filed a grievance to challenge the disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On November 20, 2001, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 19, 2001, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Legal Assistant Advocate
Division Director
Program Supervisor
Program Supervisor
Program Support Technician

Consumer Appliances Inspector
Metrologist

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with removal.

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 Agriculture and Consumer Services employed Grievant as an Agricultural Inspector until his removal in September 2001. He had been employed by the Agency for approximately nine years. One of his primary duties was to inspect gasoline pumps to make sure they are accurately calibrated. He worked independently in the field. He usually visited the Agency's office in order to submit routine paperwork.

Grievant was required to complete three records to account for his time including sick leave. He had to complete a Leave Activity Reporting Form, a timesheet, and an internal work report. On November 20 and 21, 2000, Grievant was working at his part-time job in another State.[1] He was not ill. He wrote on each of the records that he was taking personal sick leave.

Grievant elected to participate in the Virginia Sickness and Disability Program and, thus, accrued family and personal leave. Family and personal leave may be used for "absences due to personal and family reasons …." Unused family and personal

[1] Grievant began his business on November 17, 2000 as a sole proprietorship. He obtained approval from his supervisor before beginning the business. Grievant received a Group II Written Notice on September 7, 2001 arising out of the Agency's investigation of his outside employment. The Agency alleged that Grievant's outside employment created a conflict of interest, that he was insubordinate during the investigation, and that he attempted to mislead the Agency regarding certain facts about his outside employment. Grievant did not appeal that Group II Written Notice.

leave may not be carried over to the following calendar year.[2] Grievant failed to use 16 hours of his accrued family and personal leave in 2000 and that leave lapsed.[3]

Grievant's performance was evaluated as exceeding the Agency's expectations for seven of eight evaluation periods.[4] Grievant's November 2000 performance evaluation describes his performance as:

> [Grievant's] work relations with Inspectors and the regulated community is very effective. [Grievant's] professionalism is demonstrated through his abilities to accept responsibility for the Team's objective and contribute selflessly to its accomplishment. Through his planning and work effort, [Grievant] sets a strong example for other Inspectors to follow.

CONCLUSIONS OF LAW

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." P&PM § 1.60(V)(B).[5] Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." P&PM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." P&PM § 1.60(V)(B)(3).

Group III offenses include, "Falsifying any records, including, but not limited to, vouchers, reports, insurance claims, time records, leave records, or other official state documents." (Emphasis added). P&PM § 1.60(V)(B)(3)(b). "Falsifying" is not defined by the P&PM, 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. ***

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[2] P&PM § 4.57.

[3] Grievant also lost 14 hours of annual leave that he failed to use in 2000. See Grievant's Exhibit 10.

[4] Grievant's Exhibit 7.

[5] The Department of Human Resource Management has issued its *Policies and Procedures Manual* (P&PM") setting forth Standards of Conduct for State employees.

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.*

Grievant was not sick when he claimed personal sick time. An employee may only claim personal sick leave to take time off from work (1) if medically necessary, (2) the employee is exposed to contagious disease, or (3) medically-related appointments cannot be scheduled during non-work hours.[6] The Agency has established by a preponderance of the evidence that when he claimed sick leave he knew that his claim was false. Consequently, Grievant falsified his leave records thereby committing a Group III offense.

Grievant contends he entered personal sick leave in error and intended to enter family and personal leave instead. He asserts that because the leave reporting form did not contain a code for the family and personal leave, he entered an incorrect leave code. Grievant's argument fails for several reasons. First, given Grievant's length of employment, he should have been aware of what constitutes sick leave and that family and personal leave is different from personal sick leave[7]. Second, the Agency presented evidence[8] showing that on May 19, 2000 and June 16, 2000, Grievant claimed family and personal leave and entered the correct code of "FP" on the Leave Activity Reporting Form even though that form was an "old form" that did not reference "FP" as one of the available types of leave.[9] Third, Grievant completed two other forms that did not require use of any code, yet he wrote out "personal sick leave".

Grievant argues that his behavior rises only to the level of a Group I offense for "Abuse of state time, including, for example, unauthorized time away from the work area, use of state time for personal business, and abuse of sick leave." P&PM § 1.60(V)(B)(1)(b). The Hearing Officer rejects this argument because an employee's behavior may fall within more than one of the listed offenses. Grievant's behavior may very well have constituted an abuse of state time, but it also amounted to falsification of leave records thereby justifying issuance of a Group III Written Notice.

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[6] P&PM § 4.55(II)(A).

[7] The leave reporting code for personal sick leave is "SP".

[8] See Agency Exhibit 2.

[9] Grievant argues that a secretary may have corrected the examples in Agency Exhibit 2 after he originally submitted a leave activity reporting form with a personal sick leave code. Even if the Hearing Officer assumes that this allegation is true, it shows that Grievant was instructed regarding when to use the FP code for family and personal leave. This further supports the Agency's contention that Grievant knew different codes existed for personal sick leave and for family and personal leave and that Grievant knew he was acting improperly when he claimed personal sick leave.

Grievant presented credible evidence of another inspector who submitted a leave record claiming personal sick leave on a day the employee played golf with a retiring supervisor. The retiring supervisor caught the mistake and allowed the other inspector to revise the leave report. Grievant contends it is unfair to permit the other inspector to correct his leave but not allow Grievant to do so. The Hearing Officer concludes that senior Agency management was not aware of the other inspector's actions, and, thus, the Agency has not inconsistently disciplined its employees.

Corrective action may be reduced based on mitigating circumstances. Mitigating circumstances include: (1) conditions related to an offense that justify a reduction of corrective action in the interest of fairness and objectivity, and (2) consideration of an employee's long service with a history of otherwise satisfactory work performance. P&PM § 1.60(VII)(C)(1).

Grievant's favorable work performance and approximately nine years of employment with the Commonwealth form a sufficient basis to reduce Grievant's discipline from a Group III Written Notice with removal to a Group III Written Notice without removal. The Hearing Officer will not award back pay because the Group III Written Notice is upheld and because Grievant also received a Group II Written Notice.[10]

The Agency argues that because Grievant failed to fully cooperate with the Agency's investigation he created aggravating circumstances prohibiting mitigation of the discipline against him. The Hearing Officer rejects this argument because the Hearing Officer measures the existence of aggravating circumstances at the time of the facts giving rise to the disciplinary action.[11] In addition, to the extent Grievant was reluctant to answer Agency questions, the questions primarily related to its investigation of his outside employment. Grievant did not appeal disciplinary action relating to his outside employment. Grievant's behavior following the facts giving rise to disciplinary action cannot serve as aggravating circumstances in this case.

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 **reduced** to a Group III Written Notice. The Agency is directed to **reinstate** Grievant to his former position or, if

[10] The Hearing Officer gives less weight to the Group II Written Notice because it arose out of the same facts giving rise to the Group III Written Notice. Had Grievant received the Group II Written Notice for independent reasons, the outcome of this case may have been different.

[11] Because the concept of aggravating circumstances exists only in the *Rules for Conducting Grievance Hearings* and not in the DHMR *Policies and Procedures Manual*, aggravating circumstances should be constructed narrowly. In contrast, circumstances that would mitigate disciplinary action are specifically identified by the DHRM in P&PM § 1.60(VII)(C)(1).

occupied, to an objectively similar position. The Agency is not required to provide Grievant with back pay or benefits. GPM § 5.9(a).

APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

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

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.
4. In grievances arising out of the Department of Mental Health, Mental Retardation and Substance Abuse Services which challenge allegations of patient abuse, **a challenge that a hearing decision is inconsistent with law** may be made to the Director of EDR. The party challenging the hearing decision must cite to the specific error of law in the hearing decision. The Director's authority is limited to ordering the hearing officer to revise the decision so that it is consistent with law.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar** days of the **date of the original hearing decision.** (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

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

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or HRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

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

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Carl Wilson Schmidt, Esq.
Hearing Officer

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5331-R

Reconsideration Decision Issued: January 16, 2002

PROCEDURAL HISTORY

On January 2, 2002, the Hearing Officer issued a decision reinstating Grievant. On January 11, 2002, the Agency filed a timely request for reconsideration.

DISCUSSION

Non-probationary classified employees have a property interest in continued employment as a state employee. Before that property interest can be affected, Virginia law requires four basic elements in a post-termination grievance hearing. These requirements include: (1) written notice of the termination with the reasons thereof; (2) a hearing before an impartial hearing officer; (3) an opportunity to present, examine, and cross-examine witnesses; and (4) a hearing officer decision that adheres to law and written policies.[12]

Role of the Hearing Officer

The role of the Hearing Officer in grievance hearings is not to merely verify that a State agency has followed all of the necessary procedural steps, and, if so, affirm ("rubber-stamp") whatever action was taken by the agency. Grievance hearings are *de novo.* This means the Hearing Officer must base his decision on an independent review of the evidence and as if no disciplinary determination yet had been made by the agency. Although an agency may believe the Hearing Officer is substituting his judgement for that of the agency, the Hearing Officer's decision is based on the

[12] Leftwich v. Bevilacqua, 635 F. Supp. 238 (W.D. Va. 1986).

evidence presented at the hearing and the Hearing Officer's assessment of that evidence. For example, if an agency disciplines an employee based on a unique item of evidence available to the agency, but the agency fails to present that evidence to a Hearing Officer, the Hearing Officer cannot uphold the discipline. In short, the procedure by which an agency reaches the conclusion that an employee should be terminated is separate from the procedure a Hearing Officer uses to determine whether an employee should be terminated.

The Agency argues that the Hearing Officer lacks the authority to mitigate discipline. It cites Policy 1.60(VII)(C) stating "agencies may reduce the disciplinary action if there are mitigating circumstances." (Emphasis added.) There is no merit to this argument because the Hearing Officer's determination is *de novo* and reflects an independent review of facts and policies. In an Annotation to Policy 1.60, DHRM states, "A panel[13] correctly viewed the lack of counseling before the issuance of a Group II Written Notice as a mitigating factor justifying reduction of disciplinary action to a Group I Written Notice." If DHRM agreed with the Agency's argument, then surely DHRM would not have issued an Annotation confirming the panel's authority to mitigate.

Mitigating and Aggravating Circumstances

There are two central questions a Hearing Officer must address in a grievance hearing. First, the Hearing Officer must determine whether an agency has presented sufficient evidence to support the level of disciplinary action taken by the agency. If the agency does not present this evidence, then the grievant must prevail and the analysis ends. Second, if the agency meets its burden of proof, then the Hearing Officer must determine whether sufficient mitigating circumstances exist to justify a reduction in the disciplinary action. Mitigating circumstances include: (1) conditions related to an offense that justify a reduction of corrective action in the interest of fairness and objectivity, and (2) consideration of an employee's long service with a history of otherwise satisfactory work performance. P&PM § 1.60(VII)(C)(1).

Implicit in the concept of fairness and objectivity is an evaluation of all relevant[14] circumstances suggesting it is not appropriate to reduce disciplinary action. Thus, aggravating circumstances would normally be considered when determining whether fairness requires a reduction of discipline. The Department of Employment Dispute Resolution has drafted Rules for Conducting Grievance Hearing which formalize the concept of aggravating circumstances.

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[13] Prior to utilizing individual hearing officers, a three person panel resolved employee grievances.

[14] Fairness must be evaluated within the context of employment. For example, an employee who is terminated for embezzlement may have a life threatening illness that would be exacerbated by his loss of employment. After considering all of the events in the employee's life, fairness may suggest the employee should not lose employment. Unless the employee can establish some connection between his life threatening illness and the termination, however, it is unlikely a Hearing Officer would conclude fairness requires a reduction in discipline. In this example, the life threatening illness would not be a relevant circumstance for consideration.

Aggravating circumstances must be construed narrowly because their consideration arises only in the context of mitigation.[15] Only if the Hearing Officer first concludes that some mitigating circumstances exist which might otherwise justify a reduction in discipline, should the Hearing Officer then evaluate whether aggravating circumstances also exist. The Hearing Officer lacks the authority to increase disciplinary action and, thus, aggravating circumstances would not be considered except when attempting to determine whether discipline should be reduced (i.e. the mitigation phase of the analysis).

The Agency disagrees with the Hearing Officer's conclusion that the concept of aggravating circumstances should be construed narrowly. The Agency believes that DHRM specifically identified the concept of aggravating circumstances when it revised Section IV of its Written Notice form to state "Describe circumstances or background information used to mitigate (reduce) or to support the offense described above." (Emphasis added.)

Before an employee may be disciplined for violating a policy, the employee must have been given some sort of notice of that policy. Hidden terms are not enforceable. The Agency's contention that a change in a DHRM form showed a change in DHRM policy is untenable. If DHRM intended to change its policy, it would have expressly revised the text of its policy. The Hearing Officer lacks the authority to re-write DHRM policy. The Written Notice form does not mention the phrase "aggravating circumstances" and cannot be construed as a change in DHRM Policy 1.60.

The Agency infers that Grievant testified untruthfully because he denied intentionally falsifying leave records whereas the Hearing Officer concluded that Grievant knew that his claim for sick leave was false. The Hearing Officer did not make a finding that Grievant's testimony was untruthful. The Hearing Officer concluded that the Agency presented sufficient circumstantial documentary evidence to meet its burden of proof. It was not necessary for the Hearing Officer to address Grievant's credibility at the hearing because the Agency met its burden of proof based on evidence independent of Grievant's testimony. Whether Grievant was truthful during the hearing is neither a mitigating nor aggravating circumstance.

The Agency contends Grievant's failure to cooperate with its investigation of him was an aggravating circumstance. No evidence was presented suggesting Grievant had a duty to cooperate with the Agency's investigation. The Hearing Officer finds that to the extent Grievant refused to participate in the Agency's investigation, his refusal was reasonable under the circumstances. The Agency's investigators attempted to mislead him about the nature of their investigation and regularly refused to answer his legitimate questions.

[15] The Rules discuss mitigating and aggravating circumstances together and only with respect to whether discipline should be reduced.

The Agency argues that Grievant's separate misconduct concerning his outside employment was also an aggravating factor. Grievant received a separate Group II Written Notice and as such it cannot serve as an aggravating circumstance in Grievant's Group III Written Notice. The analysis governing mitigating and aggravating circumstances is distinct from the analysis involved in determining the outcome of a case based on the accumulation of discipline. The Group II is only relevant with respect to the accumulation of discipline.

Accumulation of Discipline

Assuming all other facts are equal, it may be the case that an employee with a pattern of two or more independent disciplinary actions should be disciplined differently from an employee with two disciplinary actions arising out of the same set of facts within the same time frame. In this case, Grievant received two disciplinary actions arising out of the same general set of facts – the events surrounding his outside employment.[16] The Agency has not established a pattern of discipline that would suggest Grievant cannot learn from his mistakes or otherwise properly perform his job. Accordingly, the Hearing Officer gives less weight to the Group II Written Notice that Grievant failed to appeal than the Hearing Officer otherwise would have given had the Grievant had a pattern of disciplinary action.[17]

Due Consideration to Agency's Discipline

In the section addressing mitigating and aggravating circumstances, the Rules for Conducting Grievance Hearings state:

> In considering mitigating circumstances, the hearing officer must also consider management's right to exercise its good faith business judgment in employee matters. The agency's right to manage its operations should be given due consideration when the contested management action is consistent with law and policy.

The Agency argues that it can no longer trust Grievant to do his job because he falsified leave. No evidence was presented suggesting Grievant ever falsified any of his inspection duties or records. Indeed, the evidence showed Grievant was very good at his job and took it seriously. While it may be factually true that the Agency Party Designee not longer trusts Grievant's work product, no evidence was presented suggesting his conclusion was reasonable or appropriate. The Agency's assumption that one act of falsification forever condemns Grievant's entire work product is inappropriate.

[16] The Agency devoted a significant portion of its presentation explaining how Grievant had allegedly engaged in a conflict of interest even though Grievant had not appealed his Group II Written Notice for having a conflict of interest.

[17] The Agency contends the Hearing Officer dismissed or discredited Grievant's existing Group II Written Notice. The Agency's contention is simply untrue.

After giving due consideration to the Agency's judgment, the Hearing Officer finds that its judgment was in error. The Agency's decision to terminate was based on its false conclusion that it could no longer trust Grievant to perform his inspection duties. Consequently, the Agency's decision to terminate was inappropriate.

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. "[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis …" to grant the request.

The Agency's request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, the Agency's request for reconsideration is **denied.**

APPEAL RIGHTS

The parties should review the Grievance Procedure Manual, the Code of Virginia, and Rules of the Supreme Court of Virginia if they wish to appeal this Reconsideration Decision.

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Carl Wilson Schmidt, Esq.
Hearing Officer

POLICY RULING OF DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the matter of the Department of Agriculture and Consumer Services
March 8, 2002

The agency, through its representative, has appealed the hearing officer's January 2, 2002, decision in Grievance No. 5331. The agency challenges the hearing officer's decision as to whether it is consistent with state policy, specifically the DHRM Policies and Procedures Manual, Policy 1.60. The agency also submitted a challenge to the Department of Employment Dispute Resolution on the basis that the hearing officer exceeded his authority or abused his discretion under the grievance procedure. The agency head, Ms. Sara Redding Wilson, has requested that I respond to this appeal.

FACTS

The Department of Agriculture and Consumer Services (VDACS) employed the grievant. On September 10, 2001, VDACS issued a Group II Written Notice and a Group III Written to the grievant. The Group II Written Notice was based on his accepting outside employment with a business that he regulated as an Inspector for VDACS. The Group III Written Notice was based on his falsification of timesheets. The Group III Written Notice resulted in his termination. The grievant challenged his termination by filling a grievance to have his Group III Written Notice rescinded. He did not challenge the Group II Written Notice. The hearing officer, while letting the Group III Written Notice remain in the grievant's file, reinstated him without back pay. The agency, through its representative, appealed the decision to the Department of Employment Dispute Resolution (EDR) and the Department of Human Resource Management (DHRM). In its ruling, EDR addressed whether the hearing officer exceeded his authority or abused his discretion by reinstating the grievant.

The relevant policy, the Department of Human Resource Management's Policy 1.60, states that it is the Commonwealth's objective to promote the well-being of its employees in the workplace and to maintain high standards of professional conduct and work performance. This policy also sets forth (1) standards for professional conduct, (2) behavior that is unacceptable, and (3) corrective actions that agencies may be imposed to address behavior and employment problems. Section V, Unacceptable Standards of Conduct, of that policy sets forth, but is not all-inclusive, examples of unacceptable behavior for which specific disciplinary action may be warranted.

In the instant case, the hearing officer stated, "The Agency has established by a preponderance of the evidence that when he claimed sick leave he knew that his claim was false. Consequently, Grievant falsified his leave records thereby committing a Group III offense." Thus, the hearing officer concluded that while the Agency proved its case, in consideration of mitigating circumstances terminating the grievant was inappropriate. While he let stand the Group III Written Notice, he reversed the termination.

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. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found but the hearing officer determines that the disciplinary action is too severe, he may reduce the discipline. By statute, this Department has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by this Agency or the agency in which the grievance is filed. The challenges must cite a particular mandate or provision in policy. The 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 the present case, the hearing officer explained that mitigating circumstances played a role in his reducing the disciplinary action. The Department of Employment Dispute Resolution addressed the Agency's concerns as to the proper application of mitigating circumstances and aggravating circumstances and this ruling will not address these issues.[*] Regarding DHRM Policy #1.60, Standards of Conduct, DHRM finds that there is no violation concerning the hearing officer's application of the provisions of that policy. Thus, we have no basis to interfere with this decision.

If you have any questions regarding this determination, please call me at (804) 225-2136.

Ernest G. Spratley, Manager

Employment Equity Services

[*] In a compliance ruling dated March 1, 2002, the Department of Employment Dispute Resolution addressed issues of compliance. Namely, the ruling addressed the procedural requirements of the grievance process and the use of mitigating and aggravating circumstances.