Issue: Group III Written Notice with Termination (failure to comply with established written policy; unprofessional conduct); Hearing Date: March 5, 2002; Decision Date: March 12, 2002; Agency: Department of Alcoholic Beverage Control; AHO: David J. Latham, Esquire; Case Number: 5385

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5385

Hearing Date: March 5, 2002
Decision Issued: March 12, 2002

APPEARANCES

Grievant
Attorney for Grievant
Two witnesses for Grievant
Deputy Director for Agency
Legal Assistant Advocate for Agency
One witness for Agency

ISSUES

Was the grievant's conduct on October 20, 2000 and April 26, 2001 such as to warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue? Was the disciplinary action issued within a reasonably prompt time?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group III Written Notice issued on October 30, 2001 because he failed to comply with established written policy and because he engaged in unprofessional conduct bringing discredit to the agency.[1] He was discharged from employment on October 30, 2001. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.

The Department of Alcoholic Beverage Control (hereinafter referred to as "agency") has employed the grievant as a special agent for 24 years. He has no other active disciplinary actions. As a special agent in Law Enforcement Operations, grievant carries a badge and a firearm on his belt while on agency business.

In October 2000, the agency received a telephonic complaint that a tanning salon was illegally permitting the consumption of alcoholic beverages on its premises. Grievant was assigned to investigate the complaint. At about 11:00 a.m. on October 20, 2000, he went to the tanning salon and was met by the operator in attendance - a 23-year-old female. A male customer was also in the tanning salon during grievant's visit. After introducing himself as an ABC agent and explaining the purpose of his visit, grievant asked if alcohol was being consumed on the premises. The female said no alcohol was consumed and she showed grievant a small bar area at which soft drinks and bottled water are available. The owner of the salon was not present during the visit. Grievant gave the female a note for the owner and his business card, and requested that she have the owner call him.

During the course of his 15-20 minute visit, the female acted friendly and flirtatious. Grievant wanted to establish good rapport and was friendly in return. He noticed that the female had a tongue stud and commented that it must have hurt. She responded that it didn't hurt as much as a tattoo. He asked her if she had a tattoo. She said she did, and grievant asked if he could see it. She showed him one tattoo on her shoulder, a second tattoo on her upper chest and then volunteered that she had another tattoo that she couldn't show him (while pointing to her lower abdominal or pelvic area). Grievant said, "Oh come on; show me." She refused and he said, "Why not?" When grievant left shortly thereafter, they parted on friendly terms.

Later that day, the female salon employee called the local police department and accused grievant of assault and battery, contending that he had touched her when she showed him the tattoo on her upper chest. The police department notified the Virginia State Police, which notified the Commonwealth's Attorney. During the next several months, the agency took no action because the State Police were investigating the matter and because the criminal charge was pending. When grievant was formally charged, he was suspended on March

[1] Exhibit 1. Written Notice, issued October 30, 2001.

13, 2001. The matter was tried on April 25, 2001 and grievant was found innocent of all charges. The agency then reinstated grievant and reimbursed him for back pay lost during the suspension.

When grievant was first suspended, the agency required him to turn in his badge, firearm and laptop computer. The agency examined the computer's hard drive and found, under a folder labeled "Download," a subfolder labeled "Bravezgirl." The subfolder was created on June 20, 2000 and contained one photographic image of a female wearing only panties.[2] The female has pulled her panties down just far enough to reveal two tattoos, one below the navel and the other close to the pubic area. The computer's temporary Internet file folder was examined and found to contain nine addresses for websites that purvey pornographic material.[3] The grievant was confronted with a printout of the photograph and asked for an explanation of how it came to be on his computer. Grievant had never seen the image before and had no explanation.

Over the course of the next six months, the Deputy Director investigated prior unrelated complaints of sexual harassment by the grievant that had been made years earlier, including one in 1983. At the time of these allegations, grievant was neither convicted of any improper action nor was he disciplined by the agency in any way. Nevertheless, the Deputy Director concluded that these incidents represent a pattern of behavior that support the offenses alleged in the instant Written Notice. In May 2001, the agency gave grievant's laptop computer to the Virginia State Police laboratory for examination by forensic computer experts; no other inappropriate material was found on the computer.[4]

The Deputy Director decided by October 2001 that grievant had misused state computer equipment, engaged in unprofessional conduct, discriminated against the tanning salon employee on the basis of sex, and sexually harassed the tanning salon employee.[5] He subsequently directed grievant's supervisor to issue a Group III Written Notice and terminate grievant's employment.

In March 1998, the agency distributed laptop computers to special agents. Grievant, who had never previously worked with a computer, attended agency training classes but felt unsure of how to perform many functions on the computer. The training instructors had encouraged grievant and others to solicit assistance from family members who might be more familiar with the use of computers. Grievant has a teenage daughter who had a computer and was very computer-literate. Grievant often sought her assistance when trying new procedures.

At one point, grievant had been asked by a fraternal organization to maintain a spreadsheet for bingo receipts. Grievant asked his supervisor for

[2] Exhibit 7. Computer image printed from grievant's laptop computer.
[3] Exhibit 7. The addresses include: sexswap.com; sexlist.com; clit2.sextracker.com, etc.
[4] The State Police laboratory was very busy with criminal cases during 2001. The examination of grievant's computer was a low priority request which was not acted on until September 2001.
[5] Exhibit 2. Memorandum from grievant's supervisor to grievant, October 4, 2001.

permission to keep this data on the agency computer, and the supervisor granted permission. In June 2000, grievant decided to transfer the spreadsheet records to his home computer. He again solicited assistance from his daughter since he did not know how to accomplish such a transfer. His daughter logged the agency computer on through AOL Instant Messenger service using her chat name of "Bravezgirl."[6] She established a connection through the Internet to the family's home computer utilizing another chat name she had previously established. Because the Internet connections were slow, the transfer of files took approximately two hours, during which the daughter went to another room and watched television.

Grievant's daughter believes that, during the lengthy transfer, an unknown friend sent the female image to her Bravezgirl address and that the AOL program automatically created a subfolder with the label of Bravezgirl and downloaded the image into the subfolder. Neither the grievant nor his daughter was aware that the image was on his computer until the agency discovered it in March 2001. Grievant was unaware that his daughter used the chat name of Bravezgirl.

The addresses for nine pornographic web sites were in the temporary Internet file folder – a type of cache in the computer's operating system. Grievant stated that when he uses the Internet, unsolicited "popup" ads, occasionally including ads or links to pornographic sites, sometimes appear on the screen. He deletes those ads when they appear. However, testimony from the agency's computer expert established that the addresses of such popup ads are automatically retained in the temporary Internet file folder even when the screen is deleted.

APPLICABLE LAW AND OPINION

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

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

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .

[6] Grievant's daughter is a fan of the Atlanta Braves baseball team.

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

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.[7]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Personnel and Training[8] promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Section V.B.3 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group III offenses includes acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.[9]

The four allegations against grievant will be addressed separately.

Misuse of State Equipment

The agency has demonstrated, and grievant does not deny, that the state computer issued to him contains the image of a female clothed only in panties, which she has pulled down to expose two tattoos and a small portion of her pubic area. Further, the photograph does constitute "a lewd exhibition of nudity"[10], which is included in the definition of "sexually explicit content"[11] as used in Chapter 52 of the Code of Virginia:

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[7] § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*. Effective July 1, 2001.

[8] Now known as the Department of Human Resource Management (DHRM).

[9] Exhibit 11. Section V.B.3, DHRM Policy 1.60, *Standards of Conduct*, effective September 16, 1993.

[10] Code of Virginia § 18.2-390 defines "nudity" as "a state of undress … showing the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple."

[11] Code of Virginia § 2.1-804 defines "sexually explicit content" as "content having as a dominant theme … (ii) any lascivious picture, photograph, drawing, motion picture film, digital image or similar visual representation depicting sexual bestiality, a lewd exhibition of nudity, as nudity is defined in § 18.2-390 …"

> **Restriction on agency employee access via computers to material with sexually explicit content**. – Except to the extent required in conjunction with a bona fide, agency-approved research project or other agency-approved undertaking, no agency employee shall utilize agency-owned or agency-leased computer equipment to access, download, print or store any information infrastructure files or services having sexually explicit content.[12]

The language of this law plainly requires knowledge and intent by the agency employee. The operative words in the statute state that no employee shall utilize computer equipment to download or store sexually explicit content. Thus, the agency must demonstrate that grievant personally downloaded the image, or that he knowingly stored the image after downloading. In this case, the uncontroverted and credible testimony of grievant's daughter is that the image was automatically and unknowingly downloaded into the laptop computer during an extended data transfer over the Internet. Further, neither the grievant nor his daughter knew that the image had been downloaded, or that it had been stored in a subfolder.

This situation is analogous to an employee's use of a state-owned vehicle. If during the course of an employee's trip on state business, the vehicle incurs damage from an unseen pothole in a heavy rainstorm, the employee is not guilty of misuse of the vehicle. Similarly, grievant may not be held accountable for misuse of the state computer when he had no knowledge that the image had been downloaded and no knowledge that the image had been stored in the computer. If the evidence showed that grievant had found the image, and thereafter failed to delete it, the outcome might be different.

The agency provided testimony that an image attached to a regular e-mail message could be placed in a subfolder only by utilizing a "save as" command. While this is true for regular e-mail, the agency did not rebut the testimony of grievant's daughter that messages delivered by the AOL Instant Messenger program can automatically create a subfolder and download the image into that folder for later viewing.

The agency also relies on its internal policy regarding the use of microcomputers, which states that, "If inappropriate use is found, an employee may be subject to disciplinary action as found under the Commonwealth's Standards of Conduct policy."[13] For the reasons stated above, the grievant may not be held accountable for an inappropriate use that occurred without his knowledge.

The agency did not include in the written notice any mention of the nine addresses for pornographic web sites. However, even if this charge had been included, the hearing officer would conclude that grievant's explanation, as

[12] Code of Virginia § 2.1-805.
[13] Exhibit 8. Policy No. 12, *Employee Use of Microcomputers*, effective June 30, 2000.

supported by the agency's computer expert, precludes a finding of any wrongdoing by grievant. The agency permitted him access to the Internet. The hearing officer takes administrative notice that popup ads during Internet access have become even more frequent and annoying than billboards along our highways. One's only defense to both popup ads and billboards is to try to avoid looking at them. Grievant did so, but a trace of such unsolicited popups is left behind in the computer in the form of an address.

Sex Discrimination

The agency cited its Law Enforcement Manual to support the allegation that grievant discriminated against the tanning salon operator on the basis of her sex.[14] The Manual states, in pertinent part:

> It is the policy of the Department of Alcoholic Beverage Control to provide the highest level of police service to all citizens without regard to race, color, religion, creed, ethnic origin, sex, age, disabilities or political affiliation. … No employee will engage in any activity, either directly or indirectly, which serves to harass, intimidate, belittle or otherwise abuse any person due to the aforementioned distinctions. Any employee who feels that they are victims of a discriminatory act or harassment should report the incident directly to the Office of Professional Standards….[15]

Grievant argues that the above policy is not applicable because it states that, "any *employee* who feels that they are victims…." Grievant suggests that this language means that the policy applies to employees only and not to complaints filed by non-employees. After reviewing the entire policy, it is concluded that grievant's interpretation is too narrow and therefore, incorrect. A Standards of Conduct policy applies to employee conduct whenever he is conducting state business, not just when he is dealing with other employees. Where, as here, a significant portion of the employee's working hours involves contact with the public, he must adhere to the standards at all times. Moreover, the first sentence of Section V refers specifically to "service to **all** *citizens*."

However, there is more to proving sex discrimination than mere allegation. To establish sex discrimination, one must prove that the conduct in question (1) was unwelcome; (2) was based on the accuser's sex; (3) was sufficiently severe or pervasive to alter the plaintiff's conditions of employment and to create an abusive work environment; and (4) was imputable on some factual basis to the employer.[16]

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[14] Although the language includes "sex" as one basis for discrimination, it is presumed that this is intended to be a reference to gender. To maintain consistency, this opinion will use the term "sex" throughout.

[15] Exhibit 6. Section V, Bureau of Law Enforcement Operations Manual General Order No. A-002, *Standards of Conduct*, revised April 20, 2000.

[16] Spicer v. Commonwealth of Virginia, Dept. of Corrections, 66 F.3d 705 (4th Cir. 1995).

The available evidence regarding the encounter between grievant and his accuser at the tanning salon pits grievant's sworn testimony against hearsay evidence in the form of an unsigned report prepared by a State Police investigator. The female operator did not testify at the hearing. The agency did not proffer either an affidavit or any written statement from the accuser. In fact, there is no written record whatsoever of the accuser's version of what occurred. Accordingly, more evidentiary weight must be given to grievant's sworn testimony than to the double hearsay statement of the agency's witness about the accuser's allegation.

The female accused grievant of touching her. However grievant has consistently denied doing so and was exonerated of the charge of battery in court. Grievant offered unrebutted testimony that the female had motivation to lie about the encounter.[17] Given the accuser's very questionable credibility and the absence of any testimony or written statement from the accuser, grievant's version of the encounter is entitled to substantially more weight. There is no evidence that the female indicated to grievant during the encounter that his conduct was unwelcome. There is no evidence that his comments were based on the grievant's sex. Finally, there is no evidence that grievant's comments created an abusive workplace for the female. Accordingly, it is concluded that the agency has not demonstrated, by a preponderance of the evidence, that grievant discriminated against the salon operator on the basis of her sex.

Sexual Harassment

The agency also cited the Standards of Conduct policy as support for its contention that grievant sexually harassed the female salon operator. The policy states, "Sexual harassment of any kind will not be tolerated within the agency."[18] The test to establish sexual harassment is essentially the same as cited in the Spicer case, supra. In addition, the plaintiff must show that she belongs to a protected group.[19] In the instant case, a preponderance of the credible evidence supports a conclusion that grievant's accuser was not subject to unwelcome conduct, that the conduct was not based on sex and, that the conduct did not create an abusive working environment. Therefore, it is held that the agency has not shown that grievant sexually harassed the female salon operator.

Unprofessional Conduct that Discredits the Agency

The agency's Standards of Conduct policy addresses conduct by sworn employees and states, in pertinent part:

[17] The accuser knew that grievant had previously been instrumental in ordering the closing of a bar at which the accuser's mother had been employed, thus causing her to lose her job.
[18] Exhibit 6. Section XLII, Bureau of Law Enforcement Operations Manual General Order No. A-002, *Standards of Conduct*, April 20, 2000.
[19] Henson v. City of Dundee, 682 F.2d 897, 901(11th Cir. 1982).

> All sworn personnel are expected to conduct themselves in a professional manner to bring credit to themselves and the Department.[20]

Viewing the evidence of grievant's encounter with the salon operator in the light most favorable to grievant, it must nevertheless be concluded that his conversation was unprofessional and did discredit the agency. Grievant argues, reasonably, that in his encounters with the public he attempted to establish rapport with people he met. It certainly makes one's job easier if encounters are friendly, informative and educational rather than adversarial. Grievant also points out, correctly, that he is required to deal with people from all socio-economic and educational levels. Certainly a conversation with a physician might be quite different from a conversation with a 23-year-old tanning salon operator.

However, there is a line – sometimes a fine line – over which one should not cross when representing the Commonwealth in official meetings with a citizen. Grievant's conversation crossed that line. Discussion of a tattoo showing on an already bared arm is not inappropriate. However, when one asks to see tattoos that are covered by clothes, one has crossed the line into a very personal area. Repeatedly asking to see a tattoo in a private area (such as underneath panties) is totally inappropriate. Such a request is heavily laden with sexual innuendo and has absolutely no place during an official discussion with a citizen.

Grievant is at least twice the age of the salon operator and knows, or reasonably should know, that his repeated request to a young female might not be appreciated. If grievant's daughter was approached by a middle-aged man she had never met, and he asked to see a tattoo beneath her panties, it is doubtful that grievant would consider the conversation to be totally innocent. Under these circumstances, grievant's behavior was totally inappropriate and constitutes a Group III offense.

Prompt Issuance of Disciplinary Actions

One of the basic tenets of the Standards of Conduct is the requirement to promptly issue disciplinary action when an offense is committed. As soon as a supervisor becomes aware of an employee's unsatisfactory behavior or performance, or commission of an offense, the supervisor and/or management should use corrective action to address such behavior.[21] Management should issue a written notice as soon as possible after an employee's commission of an offense.[22] One purpose in acting promptly is to bring the offense to the employee's attention while it is still fresh in memory. A second purpose in disciplining promptly is to prevent a recurrence of the offense. Unless a detailed

[20] Exhibit 6. Section VII.A, *Ibid*.
[21] Exhibit 11. Section VI.A. *Ibid.*
[22] Exhibit 11. Section VII.B.1. *Ibid.*

investigation is required, most disciplinary actions are issued within one or two weeks of an offense.

In this case, the incident that initially precipitated the discipline occurred on October 20, 2000. However, the matter was almost immediately referred to the State Police and the Commonwealth's Attorney for action. As is typical in cases when a criminal action is pending against an employee, the agency will withhold taking any disciplinary action until the criminal matter is tried and resolved. In most cases, the evidence obtained in the criminal proceeding is more detailed than the agency might obtain through its own investigation. Here, grievant was suspended on March 13, 2001 and the agency elected to suspend the grievant pending court action.[23] Thus, it was reasonable and appropriate to delay disciplinary action until the court action was finalized.

Grievant argues that, following the conclusion of court action on April 25, 2001, the agency was obligated to impose disciplinary action immediately if it determined that such action was necessary. The Standards of Conduct provides that:

> Upon the conclusion of the investigation by law enforcement agencies or of the court action, the agency has the discretion to:
> (1) impose disciplinary action, including discharge; or
> (2) not to impose discipline, in which case the employee must be reinstated with full back pay.[24]

The hearing officer concludes that grievant's interpretation of this language is too restrictive. The cited language is found in the section entitled "Procedures Related to Suspension." The plain intent of the language is to prevent an agency from continuing a suspension for a prolonged period following the conclusion of court action. The agency complied with this intent by reinstating grievant with full back pay the day after court action concluded. Moreover, the grievant's more restrictive interpretation ignores the word "discretion." While the agency has the discretion to take disciplinary action or reinstate with back pay, the language does not preclude the agency from first reinstating grievant (thus ending the suspension period), and then subsequently issuing discipline.

The remaining issue is whether the agency's issuance of discipline six months after the conclusion of court action and seven months after the discovery of the computer image meets the promptness requirement. The agency has offered a reasonable and uncontraverted explanation for the five-month delay in obtaining a report from the State Police laboratory. This matter could have been bifurcated with one disciplinary action being issued in April for unprofessional conduct, and a second disciplinary action being issued in October for misuse of state property. The agency elected for unknown reasons to combine the

[23] Exhibit 11. Section VIII.B.1.b. *Ibid.*
[24] Exhibit 11. Section VIII.B.6.b. *Ibid.*

disciplinary action into one written notice. The hearing officer will not second-guess that decision.

The reason for prompt issuance is to act while the incident is fresh in the offender's mind. In this case, grievant endured a criminal trial. There is no doubt that this incident is indelibly imprinted in grievant's mind, notwithstanding the fact that approximately one year elapsed between the incident and the discipline. Therefore, it is concluded that, in this case, promptness of disciplinary action was not nearly as important a factor as it is in most disciplinary situations.

Mitigation

The Standards of Conduct policy provides for the consideration of mitigating circumstances in the implementation of disciplinary actions and states, in pertinent part:

> While the disciplinary actions imposed shall not exceed those set forth in this policy for specific offenses, agencies may reduce the disciplinary action if there are mitigating circumstances, such as:
>
> a. conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or
> b. an employee's long service or otherwise satisfactory work performance.[25]

While grievant's behavior was unprofessional and did discredit the agency, there are mitigating circumstances. Grievant has 24 years of service to the Commonwealth and has otherwise performed his work satisfactorily during that time. While there have been prior similar accusations against the grievant, he was never disciplined.[26] If grievant had been disciplined for similar inappropriate activity in the past, such prior conduct would be relevant in corroborating a long-term pattern of behavior. However, the Standards specify that even "Written Notices that are no longer active shall **not** be considered … in determining the appropriate disciplinary action for a new offense."(Emphasis added)[27] If the Standards do not permit the use of inactive Written Notices in determining the level of discipline, it is obvious that the Standards prohibit the use of unfounded allegations for which there was no discipline. Therefore, in determining the appropriate disciplinary action in this case, it is wholly inappropriate to give any weight to unfounded past allegations.

Grievant's offense does not fall directly within the examples listed in the Standards of Conduct. However, the offense is clearly behavior of such a serious nature that a first occurrence normally should warrant removal from

[25] Exhibit 9. Section VII.C.1, DHRM Policy No. 1.60, Standards of Conduct, September 16, 1993.
[26] In 24 years, grievant received only one written notice – a now inactive Group I Written Notice for making an error in recommending approval of a bar license application.
[27] Exhibit 11. Section VII.B.2.e, *Ibid.*

employment – a Group III offense. For the aforementioned reasons, the mitigating circumstances of longevity and otherwise satisfactory performance are sufficient to reduce the discipline from discharge to a 30-day suspension.

DECISION

The disciplinary action of the agency is modified.

The Group III Written Notice issued to the grievant on October 30, 2001 is AFFIRMED. However, the grievant shall be suspended for 30 working days in lieu of discharge. He shall receive back pay and credit for annual and sick leave from the date following a suspension of 30 working days until the date of reinstatement. If the grievant has had any interim earnings from other sources (including unemployment compensation) since October 30, 2001, such earnings shall be deducted from his back pay.[28]

The disciplinary action shall remain active pursuant to the guidelines in Section VII.B.2 of the Standards of Conduct.

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 three 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

[28] Exhibit 11. Section IX.B.2.b, *Ibid*. A grievance panel award of back pay shall be offset by any interim earnings that the employee received during the period of separation, including unemployment compensation received from the Virginia Employment Commission.

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.

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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David J. Latham, Esq.
Hearing Officer