Issue: Two Group II Written Notices with demotion and pay reduction (harassing/intimidating behavior, and favoritism of select staff); Hearing Date: 09/25/02; Decision Date: 09/30/02; Agency: DMHMRSAS; AHO: David J. Latham, Esq.; Case No. 5523; **Administrative Review: Hearing Officer Reconsideration Request received 10/10/02; Reconsideration Decision Date: 10/15/02; Outcome: No basis to change decision; request to reconsider denied**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5523

Hearing Date: September 25, 2002
Decision Issued: September 30, 2002

PROCEDURAL ISSUE

The agency sought to proffer evidence regarding grievant's behavior up to 20 years ago. However, the agency had never disciplined grievant for any alleged misconduct until the action taken on July 3, 2002. One of the basic tenets of the Standards of Conduct is the requirement to promptly issue disciplinary action when an offense is committed. Management should issue a written notice as soon as possible after an employee's commission of an offense.[1] 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. The relevance of past behavior to the current disciplinary actions decreases proportionately with its remoteness in time. Thus, evidence of alleged misbehavior 5, 10 or 20 years ago is virtually irrelevant, especially in view of the fact that the agency did not take any disciplinary action regarding grievant's past behavior. Accordingly,

[1] Section VII.B.1, Department of Human Resource Management, *Standards of Conduct*, effective September 16, 1993.

testimony and evidence was limited for the most part to behavior during the past two years.

APPEARANCES

Grievant
Attorney for Grievant
Legal Assistant for Attorney
Eleven witnesses for Grievant
Facility Director
Attorney for Agency
Legal Assistant Advocate for Agency
Seven witnesses for Agency
Observer from EDR

ISSUES

Did the grievant's actions warrant disciplinary action under the Commonwealth of Virginia Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely appeal from two Group II Written Notices issued for harassing and intimidating behavior, and for favoritism of select staff.[2] The grievant was demoted to a different position and his pay was reduced by five percent. Additionally, a corrective action plan was implemented and grievant was required to complete an anger management course. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[3]

The Department of Mental Health, Mental Retardation and Substance Abuse Services (MHMRSAS) (Hereinafter referred to as "agency") has employed the grievant for 32 years. At the time discipline was issued, grievant had been Principal of the Education Department since 1983. He was then demoted to Assistant Program Manager.

The Department of Human Resource Management (DHRM) has promulgated a policy on workplace harassment that provides the following definition of workplace harassment:

[2] Exhibits 2 & 3, respectively. Written Notices issued July 3, 2002.
[3] Exhibit 5. Grievance Form A, filed July 29, 2002.

> Any unwelcome verbal, written or physical conduct that either denigrates or shows hostility or aversion towards a person on the basis of race, color, national origin, age, sex, religion, disability, marital status or pregnancy that: (1) has the purpose or effect of creating an intimidating, hostile or offensive work environment; (2) has the purpose or effect of unreasonably interfering with an employee's work performance; or (3) affects an employee's employment opportunities or compensation.[4]

During the fall of 2000, a human resource analyst had occasion to visit grievant's office and his door was closed. When she entered, one of grievant's subordinates left the room. The analyst observed that the room was unusually warm and that grievant was barefoot. Grievant is diabetic, takes insulin five times daily, and had his pancreas removed in January 2001. He maintains a warm temperature in his office to help boost circulation in his lower extremities. On occasion he removes his shoes and socks due to pain in his feet.

On or about August 7, 2001, the facility director made rounds through the facility and found the grievant's office door closed. He entered the office and found grievant and one of his subordinates watching a television and eating breakfast. He also noted that the office contained a recliner easy chair, a room divider panel, opaque material on the door window, and that the office was in a general state of disarray. The facility director said nothing to grievant but shortly thereafter spoke with grievant's immediate supervisor – the Director of Program Services (DPS). The DPS sent an email message to grievant directing him to remove the television, room divider, and opaque material from his office, to clean his office to present a more professional appearance, and to keep his office door open unless conducting a confidential discussion.[5] Grievant complied with these instructions within one week.

The facility director had heard rumors that grievant and the above-mentioned subordinate were often together and there was an inference that their relationship might be inappropriate. After the August 7, 2001 incident, the director also told the DPS to have grievant cease any inappropriate conduct and keep meetings with the subordinate to the minimum necessary for the conduct of business. The DPS verbally relayed this directive to grievant.

In January 2002 a complaint was made to the Hotline that some employees of the Education Department feared retaliation. The facility conducted an internal investigation that was unable to substantiate the allegations. In February 2002, the facility director again found grievant's office in disarray. He spoke with the DPS who directed grievant to take corrective action. In May 2002 there was another complaint to the Hotline and two Education Department employees complained about alleged mismanagement directly to the facility

[4] Exhibit 6. DHRM Policy 2.30, *Workplace Harassment*, effective May 1, 2002.
[5] Exhibit 13. Email message from DPS to grievant, August 7, 2001.

director. At this point, the facility director requested a more formal investigation of the Education Department. He specifically requested that the investigation team examine various allegations made by employees and during hotline calls.[6] The grievant was suspended without pay for ten days during the investigation.

The agency's Employee Relations Manager from central office, the facility's acting training director and a second facility employee conducted an inquiry. A five-page survey was formulated and distributed to all employees of the Education Department as well as to some former employees. The human resources department provided the team with a list of 46 people who were interviewed during a four-day period in late May-early June 2002. The team did not have input into whom was selected for interviews. The investigation purported to be a review of the entire Education Department and not any one person. Among the questions on the survey were:

- Please provide information relevant to the following allegations:
  Harassment of staff by *senior* management
  Favoritism to certain staff (specifically to [*name of grievant's subordinate*])
  Misappropriation or inappropriate use of supplies by *senior* management
- How would you describe Mr. [*grievant's last name*] management style?[7]
  (Italics added)

The team reviewed the surveys submitted by employees and interviewed the list of people selected by human resources. The team did not conduct any independent investigation to ascertain whether certain allegations were substantiated. For example, one employee alleged that grievant made a religious slur against her religion, however, the team did not ask what the alleged slur was. Some employees alleged that they had to work at projects outside the facility but that they were not paid for such work, however, the team did not investigate to ascertain whether the employees had actually done such work or whether they had been paid for such work. Others alleged that they had donated money for certain causes but believed they might have been mislead about where the money was going. However, the team did not obtain specific data about the amounts of money, to whom it was given, and when it was donated.

Employee S. stated that, when she entered grievant's office on one occasion, he pointed to a jogging suit and told her that it cost $50. The grievant said nothing more, did not ask her to buy the suit, and did not state that he was selling the suit for any reason. The employee bought the suit from grievant even though she did not want it. She made the purchase because she believed that there would be repercussions if she did not. However, employee J. stated that he had bought an item from grievant several years ago but did not feel pressured to do so, and never felt pressured to make any purchases. He has not

[6] Exhibit 1. Letter from facility director to grievant and his supervisor, May 21, 2002.
[7] Exhibit 5. Attachment A to *Investigation Report*, June 14, 2002.

purchased anything from grievant for several years, and there have not been any repercussions.

During staff meetings, grievant has been heard to use the word "damn" on more than one occasion. Employee S. stated that in a meeting with her, grievant said, "Dammit, how in the hell do I get you to understand." She also complained that she made her annual contribution to the office "hospitality club" but never got anything from the club. Employee G. had performed nursing services for grievant's mother in 1994. Employee J. believed grievant showed favoritism to employee G. because she seemed to take more time off from work than others. However, no evidence was presented to show that the employee was not legitimately entitled to the time off. Employee J. was annoyed because grievant had moved the location of his office. There was a legitimate business need to move the office and grievant had told J. that he might be able to return to his old location in the future.

Another employee stated that she felt fearful when grievant asked her about a problem situation about which she had little or no information. This employee conceded that she is a very sensitive person, and more sensitive than most people are. She also acknowledged that grievant is a good person who sometimes judges more with his heart than with his head. Grievant never disciplined this employee and only counseled her on one occasion when she refused to comply with an instruction he had given her.

Grievant's immediate supervisor (the DPS) has supervised grievant for five years but has not witnessed grievant harassing or intimidating any employees and has not seen any evidence that grievant was playing favorites with any employees. Grievant's performance evaluations for 1998-2000 reflect that he met or exceeded expectations; the evaluation for 2001 rates him a "Contributor."[8] Eleven witnesses testified for grievant; all stated that they had neither observed nor experienced harassment, intimidation or favoritism. Five additional witnesses were available to testify for grievant but the agency stipulated that their testimony would be essentially the same as the first eleven.

Grievant has been in state service for 32 years. In 2001, grievant decided that he would "work toward retirement" in December 2003, and decided that he would not do anything in his last two years that would interfere with his retirement goal. Grievant is a very tall person with a naturally strong voice that some characterize as loud.

[8] Exhibit 14. Grievant's Performance Evaluations for 1998, 1999, 2000 and 2001. [NOTE: The Commonwealth completely revised the performance evaluation scheme in 2001, replacing the previous five ratings with three new ratings – Extraordinary Contributor, Contributor, and Below Contributor.]

APPLICABLE LAW AND OPINION

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

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

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

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.[9]

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 Human Resource Management 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.2 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group II offenses include acts and behavior which are more severe in nature and are such that a single Group II offense may result in a suspension of up to 10 workdays and an accumulation of two Group II offenses normally should warrant termination of employment. Violation of the State's and agency's

[9] § 5.8 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual.*

policies on Harassment may be considered a Group I, II, or III offense depending on the nature of the violation.[10]

There is no evidence to show that grievant's actions were based on any of the nine protected conditions listed in DHRM Policy 2.30 on Workplace Harassment. Moreover, the evidence does not demonstrate that grievant singled out any one person for harassment. Therefore, Policy No. 2.30 is inapplicable in the instant case. However, this is not dispositive of the matter. The Standards of Conduct provide that, "… an offense which, in the judgement of the agency head or his/her designee, although not listed in the policy, seriously undermines the effectiveness of the agency's activities or the employee's performance, is to be treated consistent with the provisions of the Standards of Conduct Policy."[11] Thus, it is not necessary to have a specific written policy prohibiting every conceivable type of offensive behavior. If a manager creates an intimidating, hostile or offensive work environment, agency management may reasonably conclude that such behavior is unacceptable and subject to appropriate discipline under the Standards of Conduct.

Harassing and Intimidating Behavior

While it is concluded that Policy 2.30 is inapplicable in this case, the definition of harassment contained therein is helpful in analyzing whether grievant harassed or intimidated employees.

Interestingly, the Investigative Report did not conclude that harassment and intimidation were substantiated. It concluded only that such behavior had been "expressed" by employees.[12] Grievant's 16 witnesses (11 who testified and 5 who would have testified the same) testified that they had not witnessed the alleged behavior. Both the facility director and grievant's immediate supervisor testified that they never witnessed any such behavior. Only three witnesses testified to aspects of grievant's behavior that displeased them.

The agency argues, correctly, that harassment and intimidation can occur even when only one employee is subjected to it. Thus, even if the overwhelming majority of employees have not witnessed such behavior, it is nonetheless possible that such behavior could have occurred with respect to a single individual who is being harassed or intimidated. However, when only three witnesses allege misbehavior while 16 witnesses deny the allegations, a close examination of the testimony is warranted.

Employee J. provided mixed testimony. On one hand he was displeased because grievant had relocated his office; on the other hand he corroborated grievant's contention that grievant never pressured employees into buying items.

[10] Exhibit 7. Chapter 14, *DMHMRSAS Employee Handbook.*
[11] Exhibit 7. *Ibid.*
[12] Exhibit 5. Summary of Findings, *Investigation Report*, June 14, 2002.

Employee J. also suspected that another employee was favored because she took more time off, but the evidence did not show that the other employee was not entitled to the time off. Thus, employee J. was not harassed and did not feel intimidated by grievant.

Employee S. was the most disgruntled employee. She was unhappy because she paid dues to the office hospitality club but did not get any return on her money. However, she failed to show that this was in any way attributable to any actions of the grievant. She was displeased that grievant had removed her from bus-driving duty for a period of time as the result of driving on the grass. When her supervisor asked her to write up an explanation for what she did, she thought she was being set up to take the fall for grievant. Grievant had suggested employee S drive to a specific entrance but did not tell her to drive on the grass.

In an unrelated incident at a different time, Employee S. believed that if she didn't purchase a jogging suit from grievant, there would be some unspoken and unknown repercussion. However, this employee failed to articulate any concrete reason(s) that would support her belief. Employee S. did credibly testify that grievant used the words "dammit" and "hell" while expressing his frustration at getting her to understand a point during a discussion with her. Given the grievant's imposing physical stature, his naturally loud voice, his position as principal, and his anger during the conversation, it is credible that employee S. felt intimidated in this circumstance.

A third employee expressed a somewhat indeterminate fear because she didn't like grievant speaking to her in a loud voice, particularly when she did not fully understand what was going on. However, this employee admitted that she is a very sensitive individual and acknowledged that grievant never disciplined her or did anything to her that would be a basis for fear. Nonetheless, given this employee's more introspective nature vis-à-vis grievant's loudness, position and imposing stature, it is credible that the employee felt intimidated at times.

The investigators cited as an example of grievant's behavior that one employee made an allegation that grievant voiced a slur against her religion. However, the investigators did not ask what the alleged slur was. The complaining employee did not testify at the hearing and no corroborating witness testified as to whether the incident actually occurred. However, assuming for the sake of argument that there was such an incident, the evidence is insufficient to conclude that grievant acted improperly. Without knowing what was said, it is impossible to decide whether the words were truly a religious slur, whether the employee misunderstood what was said, or whether the employee misinterpreted grievant's statement. An uncorroborated allegation of an unknown statement carries no evidentiary weight.

The investigators identified three additional employees who felt intimidated by grievant's loud voice, and by being criticized in front of others. None of these employees testified and no specific anecdotal evidence was proffered.

The evidence presented is insufficient to support a finding of harassment. However, a small number of employees expressed feelings of intimidation and their testimony was credible and undisputed. The intimidation was not directed at any protected class of employees and, therefore, does not appear to support a finding of "workplace harassment" as that term is used in Policy 2.30. However, as noted above, even non-Title VII intimidation constitutes an offense subject to discipline pursuant to the Standards of Conduct. The grievant knew, or reasonably should have known that his behavior was intimidating. When a manager attempts to sell items to subordinates, many will feel coerced to buy even if the item being sold is as innocuous as Girl Scout cookies. Using one's position to get a subordinate to purchase something they might otherwise not buy is a form of intimidation. Accordingly, the discipline for this offense is affirmed.

Favoritism

The agency did not proffer a statutory or policy definition of the term "favoritism." One could rely on the dictionary definition, to wit, "the showing of special favor," with favor defined as, "friendly regard shown toward another especially by a superior."[13] However, in the context of this grievance, the hearing officer finds more helpful the definition codified in the law of our sister state to the west, "Unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."[14] West Virginia law provides a test to establish a prima facie case of favoritism. One must establish (i) that one is similarly situated in a pertinent way to one or more employees; (ii) that one has been treated to their detriment by their employer in a manner that the other employee(s) have not, in a significant particular, and; (iii) that such differences were unrelated to actual job responsibilities of both the aggrieved and the other employees, and were not agreed to by the aggrieved in writing.[15] While this tribunal is not bound by West Virginia law, the definition and test provide a useful framework for analysis of the instant case.

The evidence established that grievant was friendlier with one of his three direct subordinates than with the other two. She was in his office more frequently, sometimes ate meals with him, and over a several-year period had received rides to work on four or five occasions when her automobile was being serviced. Grievant readily acknowledges these facts. He states he found this subordinate to be particularly competent and found her input on issues helpful. Other than innuendo, there is no evidence that there was an "inappropriate

[13] Webster's Ninth New Collegiate Dictionary.
[14] Definition of favoritism, W. Va. Code § 18-29-2(o).
[15] See Connor v. Barbour County Bd. Of Educ., Docket no. 94-01-1051 (May 31, 1995); citing Steele v. Wayne County Bd of Educ., Docket No. 89-50-260 (Oct 19, 1989).

relationship" between grievant and this subordinate, as that term is commonly used.[16] Further, there is no evidence that the subordinate received any tangible benefits (pay increases, promotion) or even any intangible benefits from her friendship with grievant. Thus, there is no objective or substantive evidence to support the allegation of favoritism.

The investigative team concluded that favoritism was substantiated. However, their report treats the issue of favoritism in only one brief paragraph. The report concludes that the relationship between grievant and his subordinate was "inappropriate" but provides no evidence to support this conclusion. The report states only that some employees had a "perception" of favoritism because (1) grievant and the subordinate spent more time together and (2) the subordinate's staff allegedly received special privileges, assignments, training and supplies. No evidence was presented during the hearing to substantiate the allegation of preferential privileges, training or supplies. The staff supervised by this subordinate does work with higher-functioning clients, however, there is no evidence that this division of clients is wrong, inappropriate or unjustified by legitimate operational needs of the facility.

While the agency has not shown actual favoritism by a preponderance of the evidence, it has demonstrated that a minority of employees perceived favoritism. The perception of favoritism in an organization can be almost as damaging to morale as actual favoritism. Therefore, managers should always take reasonable steps to avoid even the appearance of favoritism by treating employees equally to the extent possible. Grievant knew, or reasonably should have known, that frequent meetings with a female subordinate behind a closed door could, over time, foster employee suspicions of an "inappropriate" relationship.

Grievant's failure to prevent the appearance of an improper relationship is a failure to fulfill his responsibility as a manager. His failure, however, was more an act of omission than commission. Grievant did not consciously decide to meet more frequently with the subordinate knowing that some employees would become suspicious. Rather, he performed his job inadequately or unsatisfactorily by failing to recognize the consequences of his actions. To this extent, his relationship with the subordinate was inappropriate (although only in the non-sexual sense of the word). Such a failure to perform one's job is typically dealt with as a performance issue through the performance evaluation process although, the agency does have the option to utilize the disciplinary process if it so chooses. The hearing officer will not second-guess the agency's call to use the latter process. However, because this is the first time this issue has been brought to grievant's attention, the appropriate level of discipline is a Group I Written Notice for unsatisfactory or inadequate job performance. If grievant were to fail to properly address the issue after being warned through either an

[16] The unspoken inference from employee comments was that the "inappropriateness" of the relationship was sexual, however, there was no proof or allegation of this during the hearing.

evaluation or through a Group I Written Notice, a Group II Written Notice for failure to follow supervisory instructions would then be the appropriate level of discipline.

Relief

As part of his request for relief, grievant seeks removal of the Investigation Report from his personnel file. This is an official report that must remain a part of the record and, therefore, it would be inappropriate to remove that report from the record. Grievant also seeks reimbursement for vacation time used. The use of annual leave for vacation is purely voluntary; there is no authority to reimburse grievant for his use of vacation. The agency may suspend an employee during an investigation. Reinstatement of back pay for the period of suspension is made only when the employee is cleared of all misconduct.[17] Since this decision concludes that some discipline was warranted, the agency is not required to reinstate back pay during the period of suspension. The grievant is required to complete an anger management course, if he has not already done so.

In this particular case, restoration of grievant to his prior position could be problematical because the agency is contemplating a reorganization that may result in elimination of the position of principal of the Education Department. However, when an agency transfers an individual as part of a disciplinary action, the agency must anticipate that such action might be grieved and possibly reversed. Therefore, the facility's possible future reorganization may not be used to bar restoration of an employee to his prior position. In this case, grievant has performed his previous job for several years, earning satisfactory or better evaluations. Therefore, it is apparent that grievant is qualified to perform his previous job and, but for this disciplinary action, there was no basis to transfer him to another position. Accordingly, since the position of principal exists as of this date, grievant must be reinstated to that position.

However, following reinstatement or at some point in the near future, it is possible that the agency could decide to abolish the position of principal. If the position is abolished for legitimate funding or operational requirements, the grievant will be considered for alternate placement pursuant to DHRM Policy 1.30. The agency may not abolish any position for disciplinary or retaliatory reasons.

DECISION

The disciplinary action of the agency is modified.

The Group II Written Notice for intimidation issued on July 3, 2002 is hereby AFFIRMED.

[17] Section VIII.B.5.b, DHRM Policy 1.60, *Ibid.*

The Group II Written Notice issued on July 3, 2002 for favoritism is reduced to a Group I Written Notice for unsatisfactory or inadequate job performance. The agency shall prepare a revised Written Notice consistent with this Decision.

An employee may be demoted, transferred and given a salary reduction when he incurs a second active Group II Written Notice. However, because this Decision has reduced the level of discipline, grievant now has only one Group II Written Notice and one Group I Written Notice. Accordingly, these forms of discipline are no longer applicable. Therefore, the grievant is reinstated to his former position and rate of pay. The agency shall reimburse grievant the amount by which his salary was reduced retroactive to July 3, 2002.

APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. 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.

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for 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.[18]

[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]

_____
David J. Latham, Esq.
Hearing Officer

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

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5523

Hearing Date:	September 25, 2002
Decision Issued:	September 30, 2002
Reconsideration Received:	October 10, 2002
Reconsideration Response:	October 15, 2002

APPLICABLE LAW

A hearing officer's original decision is subject to administrative review. A request 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. A request to reconsider a decision 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. A copy of all requests must be provided to the other party and to the Director of the Department of Employment Dispute Resolution.[19]

FINDINGS OF FACT

[19] § 7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

The agency submitted a request for reconsideration and provided a copy to the other party. The agency seeks reconsideration only of that portion of the decision that reinstates grievant to his position.

The agency, in its restatement of the procedural posture of this case, misstates the tribunal's decision. First, the Group II Written Notice that charged grievant with the offenses of intimidation and harassment was not affirmed in toto. As reflected in the first full paragraph of the Decision, the hearing officer concluded that the charge of harassment was not substantiated. Therefore, this Group II Notice was affirmed only as to the offense of intimidation. Second, the Group II Written Notice originally issued for favoritism was not affirmed. Rather, it was reduced to a Group I Written Notice, and the offense was changed to *unsatisfactory or inadequate job performance*. This is a significant difference because the hearing officer concluded that the agency did not prove its allegation of favoritism.

OPINION

The agency offers a two-pronged argument in support of its contention that grievant should not be reinstated to his position.

A. The agency argues first that a hearing officer does not have the right to reinstate an employee to his former position in all circumstances and that reinstatement of grievant in the instant case is contrary to law.

The law, which was referred to by the agency but not cited, states in pertinent part:

> C. Hearing officers shall have the following powers and duties:
> 6. For those issues qualified for a hearing, order appropriate remedies. Relief may include *reinstatement*, back pay, full reinstatement of fringe benefits and seniority rights, or any combinations of these remedies;…[20] (Italics added)

A primary principle of statutory construction dictates that statutes are to be read in accordance with their plain meaning and intent. Statutes may be construed only where there is an ambiguity.[21] Otherwise, the clear and unambiguous words of the statute must be accorded their plain meaning.[22] The law does not state that reinstatement can occur only when it suits the agency's purpose. In fact, the law does not include any qualifying language; it simply gives the hearing officer the power to reinstate. The word "reinstate" means, "To reinstall; to reestablish; to place again in a former state, condition, or office; to

[20] Code of Virginia, § 2.2-3005.C.6
[21] *Cf.* Ambrogi v. Koontz, 224 Va. 381, 386, 297 S.E.2d 660, 662 (1982).
[22] *See* Diggs v. Commonwealth, 6 Va. App. 300, 302, 369 S.E.2d 199, 200 (1988).

restore to a state or position from which the object or person had been removed."[23] The agency has not proffered any evidence that the General Assembly intended the word "reinstatement" to mean anything other than its accepted definition.

The Rules for Conducting Grievance Hearings recognize that a circumstance might arise in which it is impossible to reinstate an employee to his position. Where the position has been formally abolished, reinstatement would necessarily have to be to an objectively similar position. However, in the instant case, grievant's position has not been abolished. In fact, as the agency notes, the grievant's supervisor is currently serving as the Acting Principal. Since the position remains available and the person filling it is only in an acting capacity, there is no impediment preventing grievant from returning to his former position.

The agency cites a Virginia Supreme Court case that decided two grievance matters. In the first – Virginia Department of Taxation v. Daughtry – a grievance panel recommended reinstatement to the same or similar position. The department reinstated Daughtry as an employee but transferred her to another location because she had made a threat to kill her supervisor. The department argued that the grievant's transfer to another location was "within management's prerogative [under former Code § 2.1-114.5:1(B) – now Va. Code § 2.2-3004.B] and consistent with its duty to provide a safe working environment for all employees."[24] The Supreme Court agreed with the department because "the record provides uncontradicted evidence of a *compelling necessity* to transfer Daughtry from the office in which she had made threats to kill her supervisor."[25] (Italics added). This factor distinguishes Daughtry from the instant case. The agency has not made a case that there is a *compelling necessity* to transfer grievant to another position. While the agency discusses "managerial deficiencies," these deficiencies do not rise to the compelling and necessitous level of a death threat.

The second grievance matter decided by the Virginia Supreme Court involved the companion case of Dillon v. Virginia Department of Corrections. Upon reinstatement in that case, the department assigned Dillon to a different position for, inter alia, "compelling reasons related to his job performance."[26] The Supreme Court agreed that, "the grievance panel had no authority to transfer him to another position." *See* Jones v. Carter 234 Va. 621, 625-26, 363 S.E.2d 921, 924 (1988). However, the Court then discussed the compelling reasons that warranted transferring Dillon and concluded that, "the evidence amply justified the *Department's* exercise of responsibilities reserved to employers under former Code § 2.1-114.5:1(B) to reassign Dillon…"[27] (Italics added). Thus, the Court

[23] Black's Law Dictionary, revised 4th edition.
[24] Virginia Department of Taxation v. Daughtry, 250 Va. 542, 463 S.E.2d 847 (1995).
[25] *Ibid*.
[26] *Ibid.*
[27] *Ibid.*

affirmed that a hearing officer may not transfer an employee, but an agency may transfer an employee for compelling reasons. This principle is reflected in the *Grievance Procedure Manual*, which provides examples of the types of relief not available to a hearing officer; one example is transfer of an employee.[28]

The agency cites a previous Decision of Hearing Officer (Case No. 5302) in which the hearing officer directed grievant be reinstated to her position, subject to a determination of whether that position was still available. In that case, due to a set of unusual circumstances, the grievance hearing was conducted more than 1½ years after the grievant had last worked. At the conclusion of the hearing, the available witnesses could not state with certainty that the grievant's former position as a budget analyst was still available, however, other virtually equivalent positions were available. For reasons discussed in the decision, it was deemed appropriate to make a prompt decision rather than to hold another hearing to resolve position availability and other pay issues. Since the functions of the grievant's former position were virtually identical to the functions of equivalent available positions, the hearing officer left to the agency the determination of which precise position the grievant would be placed in. The unusual circumstances of that case are therefore distinguishable from the instant case. Here, the grievant's position is unique; there is no other functionally equivalent position to the position of Principal.

B. The second prong of the agency's argument is that grievant's managerial deficiencies demand that he no longer supervise Education Department staff.

The offenses sustained by the Decision of Hearing Officer are intimidation and unsatisfactory or inadequate job performance. Both are managerial deficiencies that require correction. Generally, unsatisfactory job performance is addressed through the performance evaluation process. Intimidation, while a more serious offense, could be addressed in the same manner. Nonetheless, it is recognized that this could be a difficult process given grievant's position as principal, and given what has transpired during the grievance process. The testimony given by employees could adversely affect the relationship between grievant and some of his subordinates. Therefore, the hearing officer understands why the agency's preferred solution is to transfer grievant to another position, at the same salary in effect prior to the disciplinary action. As grievant has made known his desire to retire in December 2003 and just "work toward retirement," such a solution appears to satisfy the agency's operational goals.

Conclusion

As discussed above, a Hearing Officer does not have the authority to direct that the grievant be transferred to another position. Further, because grievant's position has not been abolished, the Hearing Officer has no authority

[28] § 5.9(b)2. EDR *Grievance Procedure Manual*, effective July 1, 2001.

under the facts of this case to direct that grievant be placed in an objectively similar position.

However, pursuant to Va. Code § 3004.B, management does have the exclusive right to manage its affairs and operations. This provision appears to give the agency the authority, sua sponte, to make a reasoned judgement about whether there are compelling reasons to transfer grievant. The hearing officer may not, and does not herein, decide whether the reasons articulated by the agency are sufficiently compelling to justify a transfer. Based on the law and the cases cited by the agency, such a decision must be made by the agency – not by the hearing officer.

DECISION

The hearing officer has carefully reconsidered the agency's arguments and concludes that there is no basis to change the Decision issued on September 30, 2002.

APPEAL RIGHTS

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.

S/David J. Latham___
David J. Latham, Esq.
Hearing Officer