Issue: Group III Written Notice with termination (unauthorized use of State property); Hearing Date: 12/02/02; Decision Date: 01/17/03; Agency: DOC: AHO: Carl Wilson Schmidt, Esq.; Case No. 5572; **Administrative Review: DHRM Ruling Requested on 01/24/03; DHRM Ruling Date: 02/17/03; Outcome: No policy violation found; no reason to interfere with decision. Judicial Review: Appealed to the Circuit Court in Buchanan County on 03/04/03; Outcome pending**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5572

Hearing Date: December 2, 2002
Decision Issued: January 17, 2003

PROCEDURAL HISTORY

On September 18, 2002, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

> *Violation of Employee Standards of Conduct 5-10.15 B.4, "theft or unauthorized removal of state records, state property or property of other persons, including but not limited to employees, supervisors, patients, offenders, visitors, volunteers, contractors, and students." Specifically, you accessed certain "word documents" from [Secretary's] computer between 12:43 a.m. and 12:49 a.m. on March 23, 2002, one of which was a letter to [Regional Director] that [Warden] had created on March 21, 2002 which requested your being reassigned to a position outside [the Institution].*

On September 19, 2002, 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 October 28, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 2, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Advocate
Special Agent
Secretary
Counselor
Sergeant
Lieutenant
Regional Director
Computer System Engineer
Wife

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:

Grievant began working for the Agency on October 1, 1993. He began working at the Institution on December 1, 1994 as a supervisor. He was promoted to Assistant Warden by the Warden in 1998.

Grievant was the trusted subordinate of the Warden for several years. This changed sometime in the late 1990s. The Warden sold a business he owned in another state. After being questioned by the Internal Revenue Service, the Warden asked Grievant to sign a statement saying Grievant had given the Warden $5,000. Sergeant notarized Grievant's signature on the letter which was given to the Internal Revenue Service. Grievant had not given the Warden any money and the Warden knew the

letter was false. Grievant did not want to write the letter but did so because he wished to remain within the Warden's group of trusted employees. Some time later, the Warden asked Grievant to sign a second letter intended for the Internal Revenue Service. This time, Grievant refused the request. Grievant's refusal caused the Warden to begin treating Grievant differently. In response, Grievant began treating the Warden differently. The conflict between Grievant and the Warden continued to increase to the point where each was attempting to damage the other's reputation and employment status.

At 12:34 a.m. on March 23, 2002, Grievant arrived at the Institution and entered the administration building and went to the Warden's center. No one else was present in the area at that time. He entered the unlocked office of the Warden's Secretary and turned on her personal computer. The computer was not password protected. From approximately 12:43 a.m. to 12:49 a.m., Grievant opened and read the word-processing documents stored on the computer's hard drive. Among those electronic documents was a draft memorandum from the Warden to the Regional Director asking that Grievant be transferred because of the ongoing conflict between the Warden and Grievant. The letter was not mailed and the only printed copy remained locked in the Warden's desk drawer. Grievant left the administration building at 12:52 a.m. and departed the Institution at 12:56 a.m. He had been inside the Institution for 22 minutes.

A counselor at the Institution informed the Agency of information suggesting Grievant knew the Warden had written a letter asking for Grievant's transfer. The Warden had not sent the letter and its existence was only known by the Warden and the Secretary, so the Warden ordered an investigation to find out how Grievant knew of the letter's existence.

As part of its investigation, the Agency asked the Sergeant to inspect the Secretary's personal computer to determine whether it had been accessed and if so when. In the evening of March 23, 2002, Sergeant accessed the Secretary's personal computer. As part of his investigation, Sergeant used a video camera to tape his accessing the computer. At approximately 7:21 p.m., Sergeant finished his first review of the computer. At approximately 7:37 p.m., Sergeant went to the Institution's telephone system out of which many of the Institution's telephone extensions pass. Grievant's telephone has buttons on it which can be programmed with telephone numbers which are automatically dialed when the button is pushed.[1] When Grievant programmed telephone numbers to buttons on his telephone at his desk, the programmed telephone number was stored in the Institution's telephone system. Sergeant caused the telephone system to display on a video monitor the telephone numbers programmed into the telephone extension used by Grievant at his desk telephone. Button number ten showed the numbers 9 18007231615. The first number, "9", allowed access to an outside line before the remaining numbers were dialed. The 800 telephone number is that of the State Employee Fraud Waste and Abuse Hotline.

[1] When Grievant entered programming information into the telephone on his desk, that information was stored in the Agency's telephone system along with similar information from other Institution telephones.

Grievant had informed his secretary that he had programmed the State's hotline telephone number onto his telephone. Grievant's secretary informed others of his comment and Sergeant knew of Grievant's comment. Sergeant was attempting to determine whether Grievant had actually programmed the Hotline telephone number into his computer. When asked why he was trying to determine what telephone numbers were on Grievant's telephone, Sergeant responded that he was just curious.

During the Agency's investigation, Grievant was transferred to another Institution. His work performance there has been without incident.

Grievant was charged with violating *Va. Code § 18.2-152.5*, Computer Invasion of Privacy, but the matter was dismissed by *Nolle Prosequi*.

Grievant asked to mediate his differences with the Warden. The Warden refused mediation.[2]

CONCLUSIONS OF POLICY

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." Department of Corrections Procedure Manual "(DOCPM") § 5-10.15. 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." DOCPM § 5-10.16. Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DOCPM § 5-10.17.

Group III Offense

By accessing the Secretary's computer in order to obtain information about the Warden's documents, Grievant engaged in behavior rising to the level of a Group III offense. Although Grievant did not engage in theft[3] or remove any documents[4], his behavior is "an offense that in the judgment of the agency head … undermines the effectiveness of the agency's activities …."[5] Grievant breached his position of trust by accessing information which he knew he was not permitted to see.

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[2] Grievant Exhibit 2.

[3] Larceny requires the actual taking or severance of goods from the possession of the owner. See, Bruhn v. Commonwealth, 35 Va. App. 339, 344 (2001). Grievant did not remove anything from the Secretary's computer.

[4] Reading a document on a computer is not the same as removing that document from an institution. The document was in electronic form and remained at all times in the Secretary's computer.

[5] DOCPM § 5-10.7(C).

Grievant contends he did not examine the contents of the Secretary's computer. The Agency has met its burden of proof because it has established that (1) Grievant was present at the Facility when the computer was accessed, (2) no one else was observed in the Warden's center of the administration building, and (3) an Institution counselor learned from the girlfriend of Grievant's brother that Grievant "found a letter from [Warden] to [former Regional Director] requesting [Grievant] to be transferred."[6] Grievant could not have known of the existence of the letter unless he had read it.

Grievant contends that the Agency altered the clock on the computer to show it was accessed during the time Grievant was in the administration building. Based on the testimony of the Agency's computer expert, the Hearing Officer concludes that the computer would have revealed if someone had altered the computer clock to show that documents were accessed at a particular time. Since the computer did not show such a change, the Hearing Officer concludes that the computer shows the actual time the Warden's draft letter was accessed and that time coincided when Grievant was in the administration building.

Mitigating Circumstances

Corrective action may be reduced based on mitigating circumstances. Mitigating circumstances include: (1) conditions related to an offense that would serve to support 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.[7]

Mitigating circumstances exist to warrant Grievant's reinstatement. Grievant's action resulted from his ongoing battle with the Warden. That feud began when the Warden asked Grievant to sign a letter falsely stating that Grievant gave $5,000 to the Warden. It was improper for the Warden to request a subordinate to falsify a documented that the Warden intended to present to the Internal Revenue Service for his personal benefit. When Grievant refused to assist the Warden a second time, the Warden altered his behavior towards Grievant. As a result, Grievant altered his behavior towards the Warden. When Grievant accessed the Secretary's computer, his behavior was consistent with his ongoing dispute with the Warden. Prior to transferring Grievant, the Agency took no action to minimize the conflict between Grievant and the Warden. The Agency's investigation reflected its negative attitude towards Grievant. It was improper[8] for the Sergeant to view the Institution's telephone system to determine

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[6] Agency Exhibit 1, Tab C.

[7] DOCPM § 5-10.13(B).

[8] The Grievance Procedure Manual defines retaliation as, "Actions taken by management or condoned by management because an employee exercised a right protected by law or reporting a violation of law to a proper authority. (e.g. 'whistleblowing.')". Whether the Agency retaliated against Grievant by

whether Grievant had the State Employee Fraud Waste and Abuse Hotline telephone number programmed onto his desk telephone. The Sergeant's explanation that he was accessing the telephone system because he was curious is essentially the same reason why Grievant was accessing the Secretary's computer. The interest of fairness and objectivity requires Grievant's reinstatement.

The Agency contends the Hearing Officer lacks the authority under the Standards of Conduct to mitigate disciplinary action because mitigation is a management function and mitigating discipline would be contrary to the Agency's exclusive right to manage.

A Hearing Officer's authority to mitigate is firmly rooted in law and policy.[9] The Agency misconstrues its "exclusive right to manage." The focus of the "exclusive right" is on qualification of grievances and not on grievance hearings.

Right to Manage. Va. Code § 2.2-3004(B) states:

> Management reserves the exclusive right to manage the affairs and operations of state government. Management shall exercise its powers with the highest degree of trust. In any employment matter that management precludes from proceeding to a grievance hearing, management's response, including any appropriate remedial actions, shall be prompt, complete, and fair.

This section does not define the word "exclusive." Black's Law Dictionary (6th Ed.) defines exclusive as:

> Appertaining to the subject alone, not including, admitting, or pertaining to any others. Sole. Shutting out; debarring from interference or participation; vested in one person alone. Apart from all others, without the admission of others to participation.

Ambiguous Interpretation. The Agency interprets *Va. Code § 2.2-3004(B)* to prevent the Hearing Officer from interfering with the discipline[10] taken against one of its

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monitoring his telephone programming is not before the Hearing Officer. The Sergeant's action was not consistent with the spirit that an agency should avoid retaliation against employees.

[9] It is important to remember that grievance hearings involve property rights protected by the United States Constitution and the Virginia Constitution. A nonprobationary classified employee has a valid property interest in continued employment as a State employee. Leftwich v. Bevilacqua, 635 F. Supp. 238, 240 (1986). Once that property interest is created, its removal is governed by the Due Process Clause of the Virginia and U.S. Constitutions, and not by Virginia statutes or regulations. Id. at 241.

"Virginia law requires four basic elements in a post-termination grievance hearing. These requirements include: (1) written notice of the termination with reasons therefor; (2) a hearing before an impartial three-member panel; (3) an opportunity to present, examine, and cross-examine witnesses; and (4) a panel decision that adheres to 'law and written policies.'" Id. at 242.

employees. If the Agency's interpretation is correct, then *Va. Code § 2.2-3004(B)* is ambiguous.[11] On the one hand, the General Assembly has created a grievance procedure providing for review by a Hearing Officer. On the other hand, the General Assembly has reserved to management the exclusive right to manage thereby precluding review by a Hearing Officer. These two concepts appear to conflict, if one adopts the Agency's view.

Origins of the Exclusive Right. In 1978, the General Assembly passed *Va. Code § 2.1-114.5:1*[12] which set forth a grievance procedure. Section B of that statute stated:

> Nothing in this procedure is intended to circumscribe or modify the existing management right of any State agency to do the following: (i) direct the work of its employees as well as establish and revise wages, salaries, position classifications and general employee benefits; (ii) hire, promote, transfer, assign and retain employees within the agency; (iii) maintain the efficiency of governmental operations; (iv) relieve employees from duties of the agency in emergencies; and (v) determine the methods, means and personnel by which operations are to be carried on.

In 1979, the General Assembly deleted the above language for *Va. Code § 2.1-114.5:1* and substituted:[13]

> Management reserves the **exclusive right to manage** the affairs and operations of State government. **Accordingly**, the following complaints are nongrievable: (i) establishment and revision of wages or salaries, position classifications or general benefits, (ii) work activity accepted by the employee as a condition of employment or work activity which may reasonably be expected to be a part of the job content, (iii) the contents of ordinances, statutes or established personnel policies, procedures, rules and regulations, (iv) failure to promote except where the employee can show established promotional policies or procedures were not followed or applied fairly, (v) the methods, means and personnel by which such work activities are to be carried on, (vi) termination, layoff, demotion or suspension from duties because of lack of work, reduction in work force, or job abolition, (vii) the hiring promotion, transfer, assignment and retention of employees within the agency, and (viii) the relief of employees from duties of the agency in emergencies. (Emphasis added.)

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[10] The Hearing Officer assumes without deciding that disciplinary action is the management of employees.

[11] If a statute is ambiguous, it is appropriate to use legislative history and the rules of statutory construction in order to determine Legislative intent.

[12] 1978 Acts of Assembly, Chapter 845.

[13] 1979 Acts of Assembly, Chapter 734.

Webster's New Universal Unabridged Dictionary defines "accordingly" as:

> 1. therefore; so; in due course. 2. In accordance; correspondingly.

By using the word "Accordingly" in *Va. Code § 2.1-114.5:1,* the General Assembly tied the first sentence granting an exclusive right to the second sentence listing the examples of that exclusive right. Thus, the exclusive right to manage was defined by the examples listed and an employee could not challenge those issues by filing a grievance. *Va. Code § 2.1-114.5:1* preserved the Agency's exclusive right by not permitting an employee to initiate a grievance challenging that right.

In 1995, the General Assembly removed many limitations on what matters could form the basis of a grievance, but retained prior restrictions when determining whether a grievance could qualify for a hearing. In other words, the test for whether an issue violated the Agency's exclusive right to manage was delayed from the beginning of the grievance process to the hearing qualification stage. If an employee filed a grievance listing an issue that encroached on the exclusive right to manage, the employee could take his or her grievance through the step process, but it would not qualify for a hearing before a Hearing Officer. As part of this change, the General Assembly passed *Va. Code § 2.1-116.06* which states:

> B. Management reserves the exclusive right to manage the affairs and operations of state government. Management shall exercise its powers with the highest degree of trust. In any employment matter that management precludes from proceeding to a grievance hearing, management's response, including any appropriate remedial actions, shall be prompt, complete, and fair.
>
> C. Complaints relating solely to the following issues shall not proceed to a hearing: (i) establishment and revision of wages, salaries, position classifications, or general benefits; (ii) work activity accepted by the employee as a condition of employment or which may reasonably be expected to be a part of the job content; (iii) contents of ordinances, statutes or established personnel policies, procedures, and rules and regulations; (iv) methods, means, and personnel by which work activities are to be carried on; (v) termination, layoff, demotion, or suspension from duties because of lack of work, reduction in work force, or job abolition; (vi) hiring, promotion, transfer, assignment, and retention of employees within the agency; and (vii) relief of employees from duties of the agency in emergencies.

For the most part, *Va. Code § 2.1-116.06* is the same as former *Va. Code § 2.1-114.5:1* except that it divides part of the prior statute into two subsections and adds two new sentences regarding the agency exercising trust and remedial actions. There is no reason to believe that the General Assembly intended this change to extend the

exclusive right to manage into the Hearing Officer's decision-making authority. Indeed, the third sentence to subsection B shows that that subsection addresses only matters not qualifying for a hearing. It confirms that the General Assembly intended the exclusive right to remain regarding matters not qualifying for a hearing.[14]

Although a Hearing Officer always should be mindful that an agency is responsible for managing its business, once a grievance is qualified for a hearing, the issues in that grievance do not encroach on the Agency's exclusive right.[15]

Hearing Officer Powers and Duties. Va. Code § 2.2-3005(C) states, "Hearing officers shall have the following duties and powers:

> ***
> 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 combination of these remedies; and
> 7. Take other actions as necessary or specified in the grievance procedure.

When mitigating circumstances exist, ordering the reduction of discipline is an appropriate remedy.

Recent Legislative Expansion of Powers. The General Assembly intended Hearing Officers to have broad enforceable powers regarding grievance hearings. In DEQ v. Wright, 256 Va. 236 (1998), the Supreme Court of Virginia refused to implement a hearing officer's recommendation that the employee be reinstated to his former supervisory position. The Court reasoned that a hearing officer recommendation is not a "decision" within the meaning of *Va. Code § 2.1-116.07(D)* which permitted either party to a grievance to petition the Circuit Court for an order implementing the hearing officer's decision. In 2000, the General Assembly deleted Subsection D of *Va. Code 2.1-116.07* and added *Va. Code § 2.1-116.07:1(C)*[16] stating:

> Either party may petition the circuit court having jurisdiction in the locality in which the grievance arose for an order requiring implementation of the final decision **or recommendation** of a hearing officer. (Emphasis added).

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[14] The exclusive right to manage language appears in subsection B of *Va. Code § 2.1-116.06*. Subsections A through E of that statute address qualification of grievance hearings. Subsection F addresses hearing locations. In contrast, *Va. Code § 2.1-116.07* addresses Hearing Officer decisions, duties, and costs. Isolating the exclusive right in a section dealing with hearing qualification further suggests the exclusive right does not govern Hearing Officer decision-making.

[15] One exception to this may be when an Agency mistakenly qualifies for hearing an issue that would otherwise be within its exclusive right.

[16] 2000 Act of Assembly, Chapter 947.

There are few restrictions on what a Hearing Officer can recommend. By permitting courts to enforce a Hearing Officer's recommendation, the General Assembly confirmed the broad authority given to Hearing Officers. If a Hearing Officer's recommendations are enforceable in the courts, then surely a Hearing Officer's order to mitigate would be enforceable.

State Policy Authorizes Hearing Officers to Mitigate. DHRM Policy 1.60 sets forth the *Standards of Conduct* governing employee behavior. Section IX(B) states, "A hearing officer may uphold, **modify**, or reverse disciplinary action taken by an agency so long as the [hearing officer's] decision is consistent with written policy." (Emphasis added). Mitigating discipline is a modification of discipline and is authorized by the *Standards of Conduct.*[17]

The Director of the Department of Human Resource Management (DHRM) has "the final authority to establish and interpret personnel policies and procedures and shall have the authority to ensure full compliance with such policies."[18] A court[19] may not interfere with an interpretation of personnel policies made by DHRM.[20] DHRM has confirmed a Hearing Officer's authority to mitigate in one of its annotations to the Standards of Conduct:

> A panel 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.[21] (Emphasis added).

EDR Director Authorizes Mitigation. Under the direction and control of the Governor, the Director of the Department of Employment Dispute Resolution is required to: (1) establish a grievance procedure, (2) establish a process to select hearing officers, (3) train hearing officers, and (4) adopt rules for grievance hearings. In

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[17] DOCPM § 5-10 contains the Department of Correction's Standards of Conduct. "Agencies are authorized to develop personnel policies that do not conflict with policies or procedures that are published and distributed by the [Department of Human Resource Management.]" DHRM § 1.01(III)(B). The Hearing Officer assumes for the sake of argument that DOCPM § 5-10.13(B) is consistent with DHRM Policy 1.60, Standards of Conduct.

[18] *Va. Code § 2.2-1201(13).*

[19] In Virginia Department of State Police v. Barton, 2002 Va. App. LEXIS 756, the Virginia Court of Appeals concluded a Circuit Court does not have jurisdiction to overturn a hearing officer's review of agency policy. The Court of Appeals held "the Director of the Department of Human Resource Management is to determine whether the hearing officer's decision is consistent with policy." Whether disciplinary action may be mitigated is a matter of State policy and, thus, only the DHRM may reverse a hearing officer's mitigation of disciplinary action.

[20] Murray v. Stokes, 237 Va. 653, 657 (1989).

[21] Department of Personnel and Training Interpretation, January 22, 1992.

Compliance Ruling 2001-162 (citations omitted), the EDR Director[22] discussed the role of the Hearing Officer as follows:

> 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 material issues and grounds in the record for those findings." Further, "[i]n cases involving discipline, the hearing officer reviews the facts *de novo* to determine whether the cited actions constituted misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action. If misconduct is found but the hearing officer determines that the level of discipline administered was too severe, the hearing officer may reduce the discipline." Mitigating factors include, but are not limited to, "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity" and "an employee's long service or otherwise satisfactory work performance." Thus, in disciplinary actions the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.
>
> The grievance hearing is an administrative process that envisions a more liberal admission of evidence than a court proceeding. Accordingly, the technical rules of evidence do not apply. By statute, hearing officers have the duty to "[r]eceive probative evidence" and to "exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs." Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. As long as the hearing officer's findings are based upon evidence in the record and the material issues of the case, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings.

The EDR Director's Ruling confirms that (1) a Hearing Officer's decision is based on the evidence presented to the Hearing Officer (which can be different from the evidence upon which the Agency relied in making its disciplinary decision), (2) a Hearing Officer has the authority to mitigate discipline, and (3) the EDR Director will not substitute his judgment for that of the Hearing Officer's findings. If the Agency's exclusive right to manage governed the Hearing Officer's decision-making, then the EDR Director would not have confirmed the Hearing Officer's authority to mitigate discipline differently from Agency's decision to mitigate.

Assuming for the sake of argument that the exclusive right provision applies to Hearing Officer decision-making, the decision regarding what actions constitute management functions falls within the purview of the EDR Director. For example, Policy

[22] See Rules for Conducting Grievance Hearings

1.60 authorizes agencies to involuntarily transfer employees. The GPM specifically excludes the right of a Hearing Officer to order that an employee be transferred.

Virginia Supreme Court. The Virginia Supreme Court has upheld wide discretion by hearing panels. In Angle v. Overton, 235 Va. 103 (1988), a hearing panel instructed the employer to restore a demoted employee to his former rank but with an administrative decrease in salary. Essentially, the panel mitigated the employer's discipline. The Virginia Supreme Court required implementation of the panel decision. Id. at 107.

Conclusion. The focus of an Agency's exclusive right to manage is whether an issue qualifies for a hearing. Once an issue qualifies for a hearing, the Agency no longer has an exclusive right to determine the outcome of disciplinary action. To adopt the Agency's view that its exclusive right governs Hearing Officer decision-making, would be to have the Hearing Officer serve as a "rubber stamp". A grievance hearing would be reduced to the Hearing Officer determining if the employee engaged in behavior justifying even the slightest discipline, and then affirming whatever discipline the Agency issued regardless of how outrageous the discipline may be.[23] This would be contrary to Legislative intent and serve to deny grievants procedural due process.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **upheld**. Grievant's removal is **rescinded**. The Agency is Ordered to **reinstate** Grievant to his former position or, if occupied, to an objectively similar position. The Agency is Ordered to pay Grievant **back pay** from January 1, 2003 less any interim earnings.

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

[23] The question arises regarding whether anyone could enforce the second sentence in *Va. Code § 3004(B)* stating, "Management shall exercise its powers with the highest degree of trust." The Agency contends it retains and can enforce its exclusive right; but can it also be expected to enforce on itself its obligation to exercise trust?

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.[24]

[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].

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Carl Wilson Schmidt, Esq.
Hearing Officer

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

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the matter of Michael Spradling with the
Virginia Department of Transportation
February 14, 2003

The grievant has appealed the hearing officer's January 17, 2003, decision in Grievance No. 5572. The grievant, through counsel, is challenging the length of the suspension set forth in the opinion by the hearing officer. He contends that the Department of Corrections' Procedures Manual states at 5-10.17C1 that an employee can be suspended for up to 30 days. He contends that based on the hearing officer's decision, he was effectively suspended for 3½ months. He further contends that because mitigating circumstances were found to exist, he is requesting that DHRM modify the hearing officer's decision to comply with procedure and order reinstatement with back pay except for a 30-day suspension. The agency head, Ms. Sara Redding Wilson, has requested that I respond to this appeal.

FACTS

The Virginia Department of Corrections (DOC) employed the grievant. On September 18, 2002, the agency issued to him a Group III Written Notice with removal for violating DOC's Standards of Conduct Policy 5-10.15 B.4, "theft or unauthorized removal of state records, state property or property of other persons, including but not limited to employees, supervisors, patients, offenders, visitors volunteers, contractors, and students." Specifically, you accessed certain "word documents" from [Secretary's] computer between 12:43 a.m. and 12:49 a.m. on March 23, 2002, one of which was a letter to [Regional Director] that [Warden] had created on March 21, 2002, which requested your being reassigned to a position outside [the Institution]." He grieved the disciplinary actions and the hearing officer upheld the issuance of the Group III Written Notice but reinstated him effective January 1, 2003. The grievant appealed the decision to the Department of Human Resource Management.

The relevant policies include the Department of Human Resource Management's Policy #1.60 that 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 impose to address behavior and employment problems. Section V, Unacceptable Standards of Conduct, of that policy sets forth examples of unacceptable behavior for which specific disciplinary action may be warranted. The examples are not all-inclusive. The DOC Policy 5-10 replicates DHRM Policy 1.60.

In the instant case, it is an indisputable fact that the grievant accessed another employee's computer and read information that was not intended for him to read at that time.

Based on the evidence, and mitigating circumstances, the hearing officer upheld the issuance of the Group III Written Notice but reinstated the grievant with partial back pay.

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 evidence supported that the grievant inappropriately accessed data in another employee's computer. Thus, the agency issued to him a Group III Written Notice with removal in accordance with the provisions of DHRM Policy 1.60 and DOC Policy 5-10. However, the question here is not whether DOC took the appropriate disciplinary action. Rather, the question is whether the hearing officer's decision regarding suspension is appropriate. According to DHRM Policy 1.60 at IX. B. 2.a. (1), Standards of Conduct, when a hearing officer orders an employee's reinstatement from suspension and/or discharge or demotion, he may order full, partial, or no back pay; and/or if a hearing officer reduces an employee's disciplinary record such that termination no longer could take place, the hearing officer must reinstate the employee with full back pay (minus an appropriate disciplinary suspension, if it wishes). In the present case, the hearing officer reduced the Group III Written Notice with removal to a Group III Written Notice and reinstatement with partial back pay. Because the termination still could take place (the Group III Written Notice continued to be effective), the hearing officer could impose a period of no back pay that exceeded 30 days. Thus, this Agency has determined that there was no policy violation. Absent any policy violation, DHRM has no authority to interfere with the hearing officer's decision.

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

Sincerely,

Ernest G. Spratley
Manager, Employment
Equity Services