Issue: Group III Written Notice with termination (conduct unbecoming a Corrections Lieutenant); Hearing Date: 02/12/04; Decision Issued: 02/16/04; Agency: DOC; AHO: Thomas P. Walk, Esq.; Case No. 5821; **Administrative Review: HO Reconsideration Request received 02/26/04; Reconsideration Decision issued: 03/03/04; Outcome: denied; Administrative Review: DHRM Ruling Request received 02/26/04; DHRM Ruling issued 03/19/04; Revised DHRM Ruling issued 06/02/04; HO's response to DHRM's Revised Ruling issued 07/02/04**

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS

IN THE MATTER OF DEPARTMENT OF CORRECTIONS CASE NUMBER 5821

Hearing Date: February 12, 2004
Decision Issued: February 16, 2004

PROCEDURAL BACKGROUND

This matter was delayed in being set for hearing due to difficulty arranging dates with counsel for the grievant. A prehearing conference was set for November 13, 2003 but was cancelled on that date when the agency informed counsel that it was in the process of appointing a representative. I had contact with that representative and directed her to coordinate dates with counsel for the prehearing conference. After having no contact from either side for approximately thirty days, on January 6, 2004 I set the hearing for January 26. On January 14 the parties jointly requested a postponement due to the unavailability of the Regional Director of the agency on January 16. I re-set the matter for February 12, the date on which the hearing was conducted.

APPEARANCES

Grievant

Counsel for Grievance

Agency Representative

Regional Director of Agency

Fire Witness for Agency

Five Witnesses for Grievant

ISSUES

Was the conduct of the grievant on June 27, 2002 and July 28, 2002 subject to disciplinary action under Department of Corrections Procedure Number 5-10? If so, what was the appropriate level of sanction.

FINDINGS OF FACTS

This appeal involves a Groung III Written Notice issued on January 28, 2003 for unprofessional conduct and conduct unbecoming a Corrections Lieutenant having the purpose of effect of unreasonably interfering with the grievant's effectiveness and ability to function in his role as a Supervisor and employee of the agency. The grievant filed his Form A on February 18, 2003 requesting reinstatement to employment, removal of the Written Notice, a lateral transfer to an institution of his own choice and reinstatement of back pay and benefits. He received no relief through the three resolution steps in the grievance process. The matter was qualified for a hearing on September 11, 2003 by the agency head.

The grievant was hired by the agency or on October 1, 1989. In 1991 he began working at the facility at which he was working at the time of the relevant events. No evidence was introduced to shown that he had any prior disciplinary or job performance concerns. In fact, he was described as having potential as a supervisor.

On June 27, 2002 the grievant held the rank of Lieutenant. On that day he began a work shift at around 6:30 a. m. One hour later he received permission to leave work due

to personal problems. He left the facility and later that morning went to the home of one of the Sergeants under his supervision. He and the Sergeant discussed problems between the grievant and the grievant's girlfriend. The grievant blamed the Sergeant for some of the problems because the Sergeant allegedly told the girlfriend things about the grievant to which she reacted by throwing the grievant out of their home. The Sergeant denied these accusations and the grievant left without any acts of violence taking place.

Nothing is alleged to have occurred between the grievant and the Sergeant between the date and July 28, 2002. At 10:20 p.m. on July 28 the grievant showed up unannounced and uninvited at the home of the Sergeant. They again began arguing over statements be believed that the Sergeant had made about him to the girlfriend. While the argument was ongoing, a female Corrections Officer arrived. This officer was engaged in a dating relationship with the Sergeant. She came to the house after calling the Sergeant shortly after the grievant arrived. She detected trouble in the air from the tone and statements of the Sergeant and a raised voice in the background during the call. When she entered the home the Sergeant was standing on the kitchen side of the bar or counter separating it from the living room. The grievant was in the living room. She noticed a gun or gun case protruding from the waistband in the back of his shorts. She asked was going on and the Sergeant briefly told her of the charges of the grievant.

The men continued to exchange words. The grievant began moving around the bar toward the Sergeant. As he approached him the grievant pulled a pistol out. Simultaneously or nearly simultaneously, the Sergeant grabbed his pistol off the

microwave oven behind him. The grievant and Sergeant each held his pistol on the other in the area of the head. After a stand off of undetermined length with further words or threats being spoken the men separated and put away the guns. The grievant left without any additional violence.

Over the next few days the men gave no outward appearances of problems between them. The Sergeant even asked the grievant to intervene on his behalf regarding a shift change. The intervention was not successful and the Sergeant was moved from day to night shift. The shift change had been contemplated by the supervising Major prior to July 28, 2002 but delayed pending an ACA audit scheduled for July 29. The basis for the change was the relationship between the Sergeant and the female Correctional Officer who came to his home on July 28. The Sergeant was her supervisor while on day shift.

On August 4, 2002 the Sergeant filed a criminal complaint against the grievant based on the July 28 event. Charges were issued for carrying a concealed weapon, brandishing a firearm, armed burglary, and threatening bodily harm. The grievant was administratively suspended from August 6 until October 30, 2002. The Assistant Attorney for the Commonwealth for Tazewell County was granted a nolle prosequi of the burglary charge. On October 30, 2002 the grievant was found not guilty of the brandishing offense and of threatening bodily harm. He was convicted in the General District Court for Tazewell County of carrying a concealed weapon. He has appealed that conviction to the Circuit Court for Tazewell County and that appeal remains pending. On November 12, 2002 the grievant was charged in the Circuit Court for Tazewell County by

direct indictment on an additional offense of assault and battery. That charge is also apparently still pending.

On January 28, 2003 the grievant was terminated from employment with the agency pursuant to the Group III Written Notice.

APPLICABLE LAW AND OPINION

The Virginia Personnel Act (Va. Code Sections 2.1-110 et seq.) provides to employees a procedure for the disposition of certain work-related grievances. Termination from employment is clearly one of the areas governed by the statute. The agency has developed a comprehensive policy setting out the Standards of Conduct for employees within the agency. Department of Corrections Procedure Number 5-10. The objectives are "to promote the well-being of its employees in the workplace and to maintain high standards of professional conduct and work performance" by setting out "standards for professional conduct" and "behavior that is unacceptable". Section 5-10.3.

The Written Notice given to the grievant speaks in the general terms of "unprofessional conduct" and "conduct unbecoming a Corrections Lieutenant. . ." The Notice cites the actions of the grievant as warranting termination under Section 5-10.17 (Third Group Offenses). Certain Group III offenses are listed but the list is stated to be non-exclusive. Unprofessional conduct, as a general concept, is a phrase that is undefined in the policy and can be applied to many of the Group I and Group II offenses as well. The agency has limited the "conduct unbecoming" charge to a situation which "unreasonably" interferes with the role of the grievant as an employee and Supervisor and

his effectiveness in those roles.

The grievant argues that his conduct, even if proven, can not sustain the Group III Notice because it took place while he was off-duty and away from the facility. It was not contested that the conduct took place other than when the grievant was on-duty or at the workplace.

I find that the plain wording of Procedure Number 5-10 supports the argument of the grievant in this case. Section 5-10.7 (B) says.

> Standards of Conduct serve to:
>
> (3) limit corrective actions to employee conduct occurring only when employee is at work or when otherwise representing the Commonwealth in an official or work-related capacity, unless otherwise specifically provided procedure.

Section 5-10.17 contains several offenses which are actionable regardless of the location of the offense. See sub-Sections (B), (22), (23), and (26). Other provisions expressly excuse activities while not on the job. See sub-Sections (5), (10), and (18). This scheme indicates a deliberate choice by the agency to include only certain off-duty offenses for which discipline should be imposed.

The fact that the list of offenses is non-exclusive is of no consequence. Three specific items are applicable in this situation. Neither sub-Section (6) (prohibiting acts of physical violence), sub-Section (11) (unauthorized use of a firearm), nor sub-Section (12) (threatening a state employee) contain language broadening the coverage of the policy to off-duty activities. Because of the severe consequences the grievant faces as a result of

the Group III Notice, I must construe the policy in the light most favorable to him. Therefore, I cannot find that the Group III Written Notice was proper.

I am expressing no opinion on whether the grievant may face further disciplinary action for the same conduct if he is convicted of either pending charge. See sub-Section (13).

DECISION

The disciplinary action of the agency shall be reversed. The Group III Written Notice issued on January 28, 2003 shall be removed from the grievant's personnel records. He shall be reinstated to employment with all allowable benefits and back-pay to be restored, effective as of January 28, 2003 and subject to offset for interim earnings.

APPEAL RIGHTS

Appeal Rights

As the Grievant Procedure Manual sets 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** to the Director of the Department of Human Resource Management. This request must cite to a particular mandate in the state or agency policy. The Director's authority is limited to ordering the hearing officer to review the decision to conform it to written policy.

3. **A challenge that the hearing decision does not comply with grievance procedure** to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.

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 of the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision 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 DHRM, 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.

Thomas P. Walk
Hearing Officer

DEPARTMENT OF EMPLOYMENT
DISPUTE RESOLUTION, DIVISION OF HEARINGS

IN THE MATTER OF DEPARTMENT OF CORRECTIONS

CASE NO.: 5821

Hearing Date: February 12, 2004
Decision Issued: February 16, 2004
Motion for Reconsideration Denied: March 3, 2004

ORDER UPON MOTION FOR RECONSIDERATION

This matter comes back before me on the Motion for a reconsideration filed by the agency. Having reviewed the objections and grounds cited in the Motion dated February 26, 2004 I deny the request.

The gist of the Motion is that I misapplied the Standards of Conduct in my finding that the actions of the grievant where not of the type to subject him to discipline, those activities having occurred while off-duty and away from the work site. I will not reiterate my reasoning for that conclusion. Although the interpretation of a policy or regulation by an agency should be given great deference, the plain wording of the policy must be applied if it is clear and unambiguous. Jackson v. Marshall, 19 Va. App. 638, 454 S.E.2d23 (1995). In this case, the agency chose to ignore the specific items set forth in Section 5-10.17 of the Standards of Conduct and choose instead to rely on the general language set out in Section 5-10.7. That Section, however, also states that the offence "should be treated consistent with the provisions of this procedure." I believe that my interpretation applies the plain wording of the policy in a consistent manner.

My adopting, without further consideration, the interpretation of the policy by the agency would result in my acting as a rubber stamp for the agency. That is not my function and would be an abrogation of my duties. See Tatum v. Virginia Department of Agriculture and Consumer Services, 41Va. App.110, 582 S. E. 2D 452 (2003). To allow an agency to rely extensively on the general language in Section 5-10.7 would also serve to raise substantial due process concerns as an employee would not be provided with any reasonable notice of what actions may be prohibited, unless one can refer to the more specific listing of offences for guidance. As previously stated, the specific incidents applicable to this case all require that the action take place while on the job.

The reference in my earlier decision with regard to the construction of the policy was based on two analogous situations. First, it is the well-established law in Virginia that in a criminal case a statute is to be strictly construed against the Commonwealth. Here, we are presented with allegations of criminal conduct and substantial consequences for the grievant by way of removal of employment. The second analogous situation would be in the area of contract law. Assuming that the applicable policy constitutes a term of the contract of employment between the Commonwealth and the grievant, it too must be construed in the light most favorable to the employee.

For the reasons stated, the Request for Reconsideration is denied.

ENTERED this March 2, 2004.

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Thomas P. Walk, Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of
VIRGINIA DEPARTMENT OF CORRECTIONS
March 19, 2004

The grievant has requested an administrative review of the hearing officer's January 23February 16, 2004, decision in Case No. 58485821. The grievant was issued a Group III Written Notice and terminated and filed a grievance to have the disciplinary action and termination reversed. The hearing officer nullified some of the charges placed against him but upheld others. However, he upheld the termination rescinded the Group III Written Notice and termination, and ordered the grievant to be reinstated with all allowable benefits and back pay. The agency requested the hearing officer to reconsider his decision and on March 3, 2004, he issued a ruling that sustained his original decision. The grievant agency objects to the hearing officer's decision on the basis of his refusal to apply the mitigating circumstances of the grievant's military service, longevity, and outstanding employment achievement to reduce the disciplinary action. The grievant's request was based on his position that the hearing's officer's refusal to mitigate the discipline imposed was not in compliance with the grievance procedure, that the decision and is inconsistent with state and agency policy and contrary to state law. The agency head, Ms. Sara Redding Wilson, has requested that I respond to this administrative review request.

FACTS

The Virginia Employment Commission (VEC)Department of Corrections (DOC) employed the grievant as an Assistant Commissioner for VEC Field Operations a Corrections Lieutenant. On June 27, 2002, and again on July 28, 2002, the grievant went to the home of one of the Sergeants under his supervision to confront the Sergeant about alleged conversations he (the Sergeant) had with the grievant's girlfriend. As a result of the confrontation, allegedly, in which the pistols were drawn and pointed, the Sergeant filed criminal charges against the grievant. The grievant was convicted in the General District Court for Tazewell County of carrying a concealed weapon. The grievant has appealed the conviction to the Circuit Court for Tazewell County and the appeal remains pending. Subsequently, the grievant was charged in the Circuit Court for Tazewell County by direct indictment on an additional offense of assault and battery. This charge is also still pending before the Court.

The grievant was issued a Group III Written Notice and terminated on January 28, 2003, for unprofessional conduct and conduct unbecoming a Corrections Lieutenant which has the purpose or effect of unreasonably interfering with the grievant's effectiveness and ability to function in his role as a supervisor and employee of the agency. before he was terminated. His duties encompassed administering the Job Search and Unemployment Insurance programs for the VEC. He had more than 1200 employees in his division. He

also was responsible for overseeing facility and budget formulation and execution for federal programs. He filed a grievance and in a decision dated February 16, 2004, the hearing officer rescinded the Group III Written Notice and termination.

The relevant policy, the Department of Human Resource Management's Policy No.1.60, states that it is the Commonwealth's objective to promote the well being of its employees in the workplace and to maintain high standards of professional conduct and work performance. This policy also sets forth (1) standards for professional conduct, (2) behavior that is unacceptable, and (3) corrective actions that agencies may impose to address behavior and employment problems. Section V, Unacceptable Standards of Conduct, of that policy sets forth, but is not all-inclusive, examples of unacceptable behavior for which specific disciplinary action may be warranted. DOC Procedure Number 5-10, Standards of Conduct, parallels DHRM Policy No. 1.60.

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 challenge must cite a particular mandate or provision in policy. The Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In the present case, the hearing officer determined that the Department of Corrections Procedure Number 5-10, which serves "to promote the well-being of its employees in the workplace and to maintain high standards of professional conduct and work performance" by setting forth the "standards for professional conduct" and the "behavior that is unacceptable (Section 5-10.3)", is not applicable because the grievant's alleged misconduct occurred while off-duty and away from the work site. In support of his determination, the hearing officer stated that "Neither sub-Section (6) (prohibiting acts of physical violence), sub-section (11) (unauthorized use of a firearm), nor sub-Section (12) (threatening a state employee) contain language broadening the coverage of the policy to off-duty activities." Moreover, the hearing officer asserts that law supports his decision. He states, "Although the interpretation of a policy or regulation by an agency should be given great deference, the plain wording of the policy must be applied if it is clear and unambiguous. Jackson v. Marshall. 19 Va. App. 638, 454 S.E.2d23 (1995)."

DHRM Policy No. 1.60, Standards of Conduct, provides guidance to agencies for handling workplace and non-workplace misconduct and behavior and for taking corrective action, including incidents pending court action or investigation by law enforcement agencies involving alleged criminal misconduct that occurred either on or off the job. However, DHRM does not have the authority to address the hearing officer's interpretation and application of law. Therefore, we have no basis to interfere with the execution of the hearing officer's decision.

Concerning the application of mitigating circumstances, we note that the Department of Employment Dispute Resolution has issued a ruling on this issue. We feel that this ruling adequately addresses this issue. Therefore, we have no basis to interfere with execution of 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

REVISED POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of
VIRGINIA DEPARTMENT OF CORRECTIONS
June 2, 2004

The grievant requested an administrative review of the hearing officer's February 16, 2004, decision in Case No. 5821. The grievant was issued a Group III Written Notice with termination, and he filed a grievance to have the disciplinary action and termination reversed. The hearing officer rescinded the Group III Written Notice and termination, and ordered the agency to reinstate the grievant with all allowable benefits and back pay. The agency requested the hearing officer to reconsider his decision and on March 3, 2004, the hearing officer issued a ruling that sustained his original decision. The agency objected to the hearing officer's decision on the basis that the decision is inconsistent with state policy and contrary to state law. In response to the agency's appeal, in a ruling dated March 19, 2004, DHRM sustained the hearing officer's decision. The Department of Corrections objected to DHRM's policy ruling and requested another review on the basis that other DOC employees committed similar offenses off the job, were disciplined, and the hearing officers upheld the agency's disciplinary actions. Upon further review of this matter and the various appeals submitted as examples, the Director of DHRM reverses the hearing officer's decision and the original policy ruling by DHRM and upholds the agency's Group III Written Notice and termination for reasons stated herein.

FACTS

The Virginia Department of Corrections (DOC) employed the grievant as a Corrections Lieutenant. On June 27, 2002, and again on July 28, 2002, the grievant went to the home of one of the Sergeants under his supervision to confront the Sergeant about alleged conversations he (the Sergeant) had with the grievant's girlfriend. As a result of the confrontation in which both individuals drew their pistols and pointed them at each other's heads, the Sergeant filed criminal charges against the grievant. The grievant was convicted in the General District Court for Tazewell County of carrying a concealed weapon. The grievant has appealed the conviction to the Circuit Court for Tazewell County and the appeal remains pending. Subsequently, the grievant was charged in the Circuit Court for Tazewell County of an additional offense of assault and battery. This charge is also still pending before the Court.

The grievant was issued a Group III Written Notice and terminated on January 28, 2003, for unprofessional conduct and conduct unbecoming a Corrections Lieutenant, which diminished the grievant's effectiveness and ability to function in his role as a supervisor and employee of the agency. He filed a grievance and in a decision dated February 16, 2004, the hearing officer

rescinded the Group III Written Notice and termination.

The relevant policy, the Department of Human Resource Management's Policy No.1.60, states that it is the Commonwealth's objective to promote the well being of its employees in the workplace and to maintain high standards of professional conduct and work performance. This policy also sets forth (1) standards for professional conduct, (2) behavior that is unacceptable, and (3) corrective actions that agencies may 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. These examples are not all-inclusive. DOC Procedure Number 5-10, Standards of Conduct, though customized to address DOC's operations, to a large extent parallels DHRM Policy No. 1.60.

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 challenge must cite a particular mandate or provision in policy. The Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In the present case, the hearing officer determined that the Department of Corrections Procedure Number 5-10, which serves "to promote the well-being of its employees in the workplace and to maintain high standards of professional conduct and work performance" by setting forth the "standards for professional conduct" and the "behavior that is unacceptable (Section 5-10.3)", is not applicable because the grievant's alleged misconduct occurred while off-duty and away from the work site. In support of his determination, the hearing officer stated that "Neither sub-Section (6) (prohibiting acts of physical violence), sub-section (11) (unauthorized use of a firearm), nor sub-Section (12) (threatening a state employee) contain language broadening the coverage of the policy to off-duty activities. Because of the severe consequences the grievant faces as a result of the Group III Notice, I must construe the policy in the light most favorable to him." Moreover, the hearing officer asserts that law supports his decision. He states, "Although the interpretation of a policy or regulation by an agency should be given great deference, the plain wording of the policy must be applied if it is clear and unambiguous. Jackson v. Marshall. 19 Va. App. 638, 454 S.E.2d23 (1995)."

DHRM Policy No. 1.60, Standards of Conduct, provides guidance to agencies for handling workplace and non-workplace misconduct and behavior and for taking corrective action, including incidents pending court action or investigation by law enforcement agencies involving alleged criminal misconduct that occurred either on or off the job. While DHRM does not have the authority to address the hearing officer's interpretation and application of law, it is within the

authority of this agency to address policy issues. Concerning the hearing officer's determination that DOC's Procedure Number 5-10, Section 5-10.3, is not applicable here, this Agency consistently has ruled that the provisions of the Standards of Conduct Policy, of which DOC's Procedure Number 5-10.3 is a progeny, apply to activities both on and off the job that negatively affect the ability of the employee to perform his job duties. While the hearing officer stated that "Neither sub-Section (6) (prohibiting acts of physical violence), sub-section (11) (unauthorized use of a firearm), nor sub-Section (12) (threatening a state employee) contain language broadening the coverage of the policy to off-duty activities," the policy at 5-10.17, states that Group III offenses include but are not limited to those violations listed in subtitles 1-26. To the contrary, the policy is written in a manner to be inclusive rather than limiting.

In addition, the hearing officer stated, in part, "…Because of the severe consequences the grievant faces as a result of the Group III Notice, I must construe the policy in the light most favorable to him." Because the aforementioned is not contained in either policy or the grievance procedure, it cannot be used as a factor to justify reducing the disciplinary action. This, coupled with the provision stating the list of violations is not all-inclusive, is sufficient for this Agency to conclude that the hearing officer issued an incorrect interpretation of DHRM's Standards of Conduct policy and DOC's Procedure Number 5-10. Therefore, this ruling reverses the one dated March 19, 2004, made by this Agency that concurred with the hearing officer's decision. By copy of this letter, I am directing that the hearing officer reverse his original decision and uphold the agency's disciplinary action unless there is some other basis for overturning the disciplinary action.

If you have any questions regarding this correspondence, please call me at (804) 225-2237.

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Sara R. Wilson, Director
Department of Human Resource Management

DEPARTMENT OF EMPLOYMENT DISPUTES RESOLUTION
DIVISION OF HEARINGS

IN THE MATTER OF DEPARTMENT OF CORRECTIONS CASE NO. 5821

Hearing Date: February 12, 2004
Decision issued: February 16, 2004.
Motion for reconsideration denied: March 3, 2004.
Response to directive to amend: July 2, 2004.

RESPONSE OF HEARING OFFICER TO DIRECTIVE TO AMEND PRIOR RULING

This matter is once again before me as a result of the REVISED POLICY RULING OF THE DEPARTMENT OF HUMAN RESOURCE MANAGEMENT issued by the director of the Department of Human Resource Management, Sara R. Wilson, on June 2, 2004. Her feeling was that my original decision in this matter issued on February 16, 2004 and my denial for request issued on March 2, 2004 were inconsistent with DHRM Policy No. 1.60, Standards of Conduct, and Department of Corrections Procedure No. 5-10. The June 2 decision directed that I reverse my original decision and uphold the disciplinary action of the agency absent some other basis for modifying that action despite any error in my interpretation of the subject policies, I find that the director was without jurisdiction to order me to revise my ruling and that I am without jurisdiction to do so.

The fact of the underlying grievance are of no relevance to my determination at this stage of the proceeding. My original decision was issued on February 16, 2004, setting aside the disciplinary action taken by the Department of Corrections. A request for reconsideration of my decision was made by that agency on February 26, 2004. That request was denied by me on March 2, 2004. The agency then requested that DHRM review my decision. On March 19, 2004 that agency acting through the manager of Employment Equity Services. That ruling stated that "DHRM does not have the authority to address the hearing officer's interpretation and application of law." The cover letter from that manager reflects that a copy of the ruling was sent to the director of DHRM. On April 14, the Department of Corrections requested that the director review the matter. As stated above, the ruling of June 2, 2004 is now an issue.

This matter is governed by the State Grievance Procedure, Chapter 30 of Title 2.2 of the Code of Virginia of 1950 as amended. Section 2.2-3006 of the Code sets forth the means available to an agrieved party review the decision of a hearing officer in a grievance matter. Section A of that statute requires that the Director of DHRM determine whether the hearing decision is consistent with policy within 60 days of the receipt of a request for an administrative review of the hearing decision. I have not been made aware of the date of the request by the

Department of Corrections for a review of my decision. It is obvious, however, it occurred prior to March 19, 2004, the date on which the Policy Ruling was issued by DHRM. I find that ruling to have been made in a timely manner. I further find that ruling be the decision of DHRM.

I have been directed to no statute or regulation which requires that the Director make all reviews and issue all decisions in his or her name. DHRM and the Department of Corrections have not claimed that the subordinate employee who issued the ruling on March 19, 2004 was without authority to do so. The decision issued by the Director on June 2, 2004 even goes so far as to state that it is a "revised" ruling.

Assuming without deciding that DHRM may properly revise a ruling after it has been issued, the time _____set forth in the statute bars any such revision in this case. The June 2, 2004 ruling is currently outside the time frame given for the administrative review. To hold otherwise at this point would be to ignore the prior ruling as well as the binding law. The other it is wise to impose a restriction of 60 days for an administrative review is a matter for the legislative branch of government and not for the agencies themselves to determine. See horner of the Department of Mental Health, mental retardation and substance abuse services, Western State Hospital _____VA_____purposes Record No. 0131475, (decided June 10, 2004), _____SE to D. _____, 2004 VA Lexis 83.

The grievance procedure is written to provide a prompt resolution of grievances. To rule that the 60 day limitation is not mandatory yet have the affect of placing a grievant in a state of legal and practical limbo without any recourse. If the head of an agency chooses to review all policy ruling issued in his or her name internal procedures for review of those documents prior to being issued can easily be implemented. I have been directed to and can find no provision in the operative law allows and agency to conduct in these situations in open-ended review of prior rulings.

Because I find the June 2, 2004 ruling from DHRM was not made in a timely manner, I find that it has no effect and will respectfully decline to revise my prior decision.

RENDERED this July 2, 2004.

_____
Thomas P. Walk
Hearing Officer