Issue: Group II Written Notice (engaging in actions that might be perceived as a conflict of interest); Hearing Date: 10/20/03; Decision Issued: 10/21/03; Agency: DOLI; AHO: David J. Latham, Esq.; Case No. 5819; **Administrative Review: HO Reconsideration Request received 10/30/03; Reconsideration Decision issued 11/03/03; Outcome: No newly discovered evidence or incorrect legal conclusions. No basis to change original decision.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5819

Hearing Date: October 20, 2003
Decision Issued: October 21, 2003

APPEARANCES

Grievant
One witness for Grievant
Director of Labor and Employment Law
Attorney for Agency
Three witnesses for Agency

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 timely filed a grievance from a Group II Written Notice issued for engaging in actions that might be perceived as a conflict of interest.[1] Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[2] The Department of Labor and Industry (Hereinafter referred to as "agency") employed the grievant as a labor law representative for less than four years.[3]

At the time of hire, grievant received a copy of the Employee Handbook.[4] A section on gifts, gratuities or rewards provides that the acceptance of a favor or reward for services performed in connection with state employment is a conflict of interest. Violation of the policy may result in disciplinary action.[5] As one of the requirements of his position, grievant has been required to complete a Statement of Economic Interests on an annual basis.[6] This document addresses, among other things, acceptance of gifts that exceed $50 in value. Gifts are defined to include favors, discounts, forbearance, or any item having monetary value.

One of grievant's responsibilities was the investigation of wage complaints. In August 2002, grievant was assigned to investigate the complaint of a claimant who left his employment and claimed that the employer owed him wages. Grievant investigated the matter, spoke with the claimant by telephone, and then consulted his supervisor about the case in early October 2002. It was agreed that the former employer did, indeed, owe wages to the claimant in the approximate amount of $900-1,000. Grievant's supervisor instructed him to issue a determination letter to the former employer advising it that wages should be paid to the claimant. Grievant issued the letter on October 11, 2002. At some point thereafter, the former employer appealed the initial determination and requested a conference with the agency. The conference was scheduled for May 28, 2003.

Between October 2002 and the May 2003 conference, grievant retained physical possession of the claimant's file but was not involved in any activity in the matter. During this period, grievant did not conduct any investigation and had no contact with the claimant about his case. The May 28, 2003 conference was conducted by grievant's supervisor with grievant in attendance. Because

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[1] Agency Exhibit 2. Written Notice, issued July 7, 2003.
[2] Agency Exhibit 1. Grievance Form A, filed July 30, 2003.
[3] Grievant resigned from the agency in August 2003 to work for another state agency.
[4] Agency Exhibit 1. *Checklist* signed by grievant, November 30, 1999.
[5] Agency Exhibit 5. Commonwealth of Virginia *Employee Handbook*, 1998, states: "A state employee is in a position of public trust, and it would prea in a position

the former employer failed to appear for the conference, it was continued to June 11, 2003. No conclusions were drawn at the end of the May 28th meeting.[7]

On April 22, 2003, grievant decided to purchase an automobile. Having purchased four cars from the same dealership in the past, grievant went to that dealership to look for a new vehicle. The salesman who greeted him was the same claimant whose wage claim he had investigated in the fall of 2002. The salesman recognized grievant's name and asked grievant if he was the person with whom he had spoken on the telephone in October 2002. Grievant did not purchase a vehicle during that visit. The following day at work, grievant mentioned to his supervisor that he had encountered the wage claimant while looking for an automobile.

On June 1, 2003, grievant returned to the dealership and spoke with the wage claimant. As salesman, the wage claimant does not have final authority to approve the sales price of the car. Grievant made an offer for the car, which the salesman took to the general manager. The general manager made a counteroffer that the salesman relayed back to grievant. Grievant made another offer that the general manager accepted, and grievant purchased the car that day. The wage claimant did not have any influence on the general manager's determination of the sale price. On June 2, 2003, grievant advised his supervisor that he had purchased a car from the wage claimant. Just before the continued conference with the former employer on June 11, 2003, grievant and his supervisor were discussing the wage claimant's demeanor. Grievant mentioned that the wage claimant appeared somewhat disorganized, having temporarily misplaced the window sticker from the car grievant purchased.

On four previous occasions, grievant has consulted with his supervisor about assignments that he felt might present the potential for a conflict of interest. In each case, the potential conflict of interest existed because of grievant's relationship with the employers. However, the relationships were essentially arm's length resulting from grievant being a customer of the companies involved.[8] In each case, the supervisor advised grievant that the situations did not present a sufficient conflict to necessitate reassigning the case to a different employee. In the instant case, the relationship creating the potential for conflict was a transaction between grievant and the wage claimant rather than the wage claimant's former employer. Thus, the relationship was much more personal than the previous arm's-length situations.

No complaints about this matter have been received from the wage claimant's former employer and, as far as can be determined, no one outside of the agency has knowledge of the matter.

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[7] Following the June 11, 2003 conference, grievant's supervisor affirmed grievant's initial determination upholding the employer's liability to pay wages to the wage claimant.

[8] Exhibit 1. Letter to agency from grievant's attorney, August 4, 2003.

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 Standards of Conduct policy provides that Group II offenses include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal from employment.[10] The offenses listed in the Unacceptable Standards of Conduct are not all-inclusive but are intended as examples of unacceptable

[9] § 5.8 EDR *Grievance Procedure Manual,* effective July 1, 2001.

[10] Agency Exhibit 3. Department of Human Resource Management (DHRM) Policy 1.60, *Standards of Conduct*, September 16, 1993.

behavior for which specific disciplinary actions may be warranted. Accordingly, any offense that, in the judgment of the department head, undermines the effectiveness of the departmental activities, may be considered unacceptable and treated in a manner consistent with the provisions of the Standards of Conduct policy.[11]

State law addresses conflicts of interest by prohibiting state employees from accepting any business or professional opportunity that may influence him in the performance of his office duties. The law also prohibits acceptance of gifts where the timing would cause a reasonable person to question the employee's impartiality.[12]

The agency did not allege that grievant accepted a favor, service or opportunity that influenced him in the performance of his duties. The agency maintains that grievant engaged in conduct that could be *perceived* as a conflict of interest. Further, the agency maintains that if the wage claimant's employer became aware of grievant's conduct, it might conclude that grievant's decision in the case had been affected by the vehicle purchase transaction. Thus, the issue herein is not an actual impropriety but rather the potential for the *appearance* of impropriety.

There can be no doubt that the agency has a legitimate and reasonable interest in assuring that its employees conduct themselves in a manner that reflects positively upon the agency and the Commonwealth. Both the law and the Commonwealth's Employee Handbook prohibit employees from accepting gifts, favors, and discounts. The appearance of impropriety is not specifically addressed in writing. However, grievant knows, or reasonably should know, that an appearance of impropriety can sometimes do as much damage as an actual impropriety. Thus, grievant is obligated not only to reject gifts or favors that might influence him, but also to avoid situations where it might appear that he might have accepted a favor or opportunity that could influence him.

Grievant asserts that he advised his supervisor in April about his visit to the automobile dealership and that she understood that the wage claimant was the salesman to whom he spoke. He also avers that he told his supervisor on June 2, 2003 that he had purchased a vehicle from the same dealership. The supervisor maintains that she was unaware that grievant had purchased a vehicle from the wage claimant until just before the June 11, 2003 conference.

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[11] Agency Exhibit 3. *Ibid*. Section V.A,.

[12] Va. Code § 2.2-3103.5 states: "No officer or employee of a state or local governmental or advisory agency shall accept any money, loan, gift, favor, service, or business or professional opportunity that reasonably tends to influence him in the performance of his official duties." § 2.2-3103-8 states: "No officer or employee of a state or local governmental or advisory agency shall accept a gift from a person who has interests that may be substantially affected by the performance of the officer's or employee's official duties under circumstances where the timing and nature of the gift would cause a reasonable person to question the officer's or employee's impartiality in the matter affecting the donor."

Both grievant and his supervisor testified credibly; there is no other evidence to resolve just when the supervisor became aware that grievant actually purchased his vehicle from the wage claimant. It is possible that the supervisor is reluctant to admit her knowledge prior to June 11, 2003. It is also possible that she was not fully attentive to grievant's earlier comments and it didn't register that grievant was actually dealing with the wage claimant. It is just as possible that grievant's earlier comments were not sufficiently direct to make clear that he was purchasing the car from the wage claimant. Of course, it is also possible that grievant's version of his statements is designed to elude responsibility by contending that his supervisor knew what he was doing and failed to caution him.

Whatever the truth, grievant bears the ultimate responsibility for his actions. The testimony of the wage claimant established that he did not give grievant "a good deal" on the vehicle purchase. In fact, his undisputed testimony established that the dealership's general manager is the only person authorized to establish the final selling price of an automobile. However, grievant knew, or reasonably should have known, that purchasing a vehicle from the wage claimant could look suspicious to the former employer. If the former employer became aware of the transaction, it could reasonably harbor a suspicion that the wage claimant gave grievant a good deal in return for a favorable decision on his claim for back wages.

Grievant correctly notes that it was his supervisor who made the final decision in June 2003 to uphold the wage claimant's claim for back wages. While this is true, the former employer is not intimately familiar with the agency's inner workings. Thus, the former employer could perceive that grievant might have been improperly influenced and that he might have affected the agency's decision. Whether the employer's perception is correct or not is irrelevant; the damage is done when the employer first perceives that the process may have been biased. Accordingly, it must be concluded that grievant did create the potential for an apparent conflict of interest when he purchased a vehicle from a wage claimant whose case he had investigated and whose case was still open.

During the hearing, agency witnesses referred to the Written Notice as merely a "warning" to the grievant.[13] The agency contended that it had not taken any disciplinary action against grievant because he was not suspended. In fact, the agency stated on the Written Notice that "No disciplinary action will be taken because this is your first offense."[14] In fact, a Written Notice (with or without suspension) is a serious, formal disciplinary action. Not only does the Standards of Conduct so categorize a written notice,[15] but also the written notice remains

[13] Typically when agencies elect to issue warnings for a first-time offender, they counsel the employee, usually in writing to document the counseling session.
[14] Agency Exhibit 2. *Ibid.*
[15] Agency Exhibit 3. Section II.C., DHRM Policy 1.60, *Standards of Conduct*, September 16, 1993.

active for a specified number of years.[16] The practical effect of a written notice is to place an employee on probation for the active life of the notice. In this case, a Group II Written Notice will remain active for three years from date of issuance.

To assist in determining an appropriate corrective action, the Standards of Conduct provide examples of various offenses. The offense herein is not included among the examples listed and therefore, one must be guided by the definitions of the three Groups of offenses. As noted above, Group II offenses are considered sufficiently severe that a second such offense should warrant removal from employment. Here, the offense was not that severe. Grievant had previously demonstrated an awareness of conflicts of interest and questioned his supervisor about four possible conflict situations. There is no evidence in this case that grievant received any advantage in purchasing his vehicle. Moreover, there is no evidence that he attempted to conceal from the agency his purchase of the automobile from the wage claimant. In fact, he acted somewhat matter-of-factly in discussing with his supervisor the new car and its purchase from the wage claimant.

On the other hand, grievant did make a serious error in judgement when he purchased the vehicle from the wage claimant. He should have recognized that doing so created the potential for the perception of impropriety. In view of the claimant's position in the agency, the offense is equivalent in severity to Group I offenses such as unsatisfactory work performance.

DECISION

The disciplinary action of the agency is modified.

The Group II Written Notice issued on July 7, 2003 is hereby REDUCED to a Group I Written Notice.

The Written Notice shall remain in grievant's personnel file for the length of time specified in Section VII.B.2 of the Standards of Conduct.

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,

[16] Agency Exhibit 3. Section VII.B.2, *Ibid.*

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.[17] 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]

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David J. Latham, Esq.
Hearing Officer

[17] An appeal to circuit court may be made only on the basis that the decision was *contradictory to law,* and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

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

DECISION OF HEARING OFFICER

In re:

Case No: 5819

Hearing Date:	October 20, 2003
Decision Issued:	October 21, 2003
Reconsideration Received:	October 31, 2003
Reconsideration Response:	November 3, 2003

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. A copy of all requests must be provided to the other party and to the EDR Director. The 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.[19]

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

OPINION

Grievant failed to indicate in his request for reconsideration that he had provided a copy to the agency. The agency filed its own independent request for reconsideration, properly noting that it had provided a copy to grievant. Notwithstanding grievant's apparent failure to comply with the procedural requirements of a request for reconsideration, the hearing officer will respond to both requests in this reconsideration decision.

Grievant's Request

Grievant enumerated seven issues in his request for reconsideration. For the benefit of the reader, this response is in the same order as grievant's request.

1. Grievant takes issue with the decision's mention that the amount of wages owed to the wage claimant was approximately $900–1000. This amount was derived from witness testimony during the hearing. Grievant contends the correct figure is $3,820. However, the exact amount is irrelevant, tangential to the central issue in this case, and moot. The relevant point is that the agency concluded that the employer owed a significant amount of back wages to the wage claimant. Therefore, even if grievant had submitted documentary evidence substantiating the higher dollar figure, it would not change the decision in this case. If anything, a higher dollar amount would infer that the wage claimant had more reason to be indebted to grievant.

   Grievant also argues that the agency's representation that the wage claimant's case is "pending adjudication" is misleading. During the hearing, the agency presented testimony that the wage claimant's case is pending adjudication. Grievant failed to rebut the agency's statement either by his own testimony, or through direct examination of his own witness – the wage claimant. Grievant contends that, *subsequent to the hearing*, the wage claimant told him that the employer made a settlement offer of $900 in late September 2003. However, to date, nothing has been finalized regarding that settlement offer. Until the wage claimant accepts the offer and signs a release, the matter could be adjudicated. Therefore, the agency's representation was not misleading.

2. Grievant disputes the decision's statement that he retained possession of the wage claimant's file between October 2002 and May 2003. He suggests that his supervisor initially made this statement during the hearing but then corrected herself in subsequent testimony. Grievant also proffers three memoranda to support his position.[20] Assuming, arguendo, that grievant is

[20] The memoranda proffered by grievant are inadmissible because they do not constitute newly discovered evidence. Grievant has not demonstrated that he could not have produced the memoranda during the hearing. Therefore, the hearing officer will not consider the memoranda as part of the reconsideration.

correct on this point, it is nevertheless irrelevant and moot. The entire point of the hearing officer's statement regarding the file is that grievant "was not involved in any activity in the matter" between October 2002 and May 2003. Thus, whether or not grievant had physical possession of the file, the hearing officer found as fact that grievant was not actively involved in deciding the wage claimant's case during the eight-month period. Grievant apparently fails to recognize that the hearing officer's statement is favorable to him because his lack of activity in the case distances him from the wage claimant.

3. Grievant similarly takes issue with the decision's statement that he had no contact with the wage claimant during the October-May period. Again, it appears that grievant misunderstands the statement's meaning. The facts established that grievant did not talk with the wage claimant or conduct any investigation of his case during the eight-month period. The import of this is that grievant was distanced from the wage claimant and therefore, the wage claimant had no reason to feel beholden to grievant. In other words, it is favorable to grievant that he had no contact with the wage claimant and did not make any decisions about his case during this period of time. This was one of the factors that resulted in the *reduction* of the level of discipline in this case.

4. Grievant correctly notes that, of the four potential conflicts of interest discussed previously with his supervisor, one presented more of a potential conflict than the other three. In that case, grievant was assigned to investigate a wage complaint involving a physician employer who had treated his wife. Grievant's supervisor allowed him to continue investigating the case notwithstanding the connection.[21] The connection between grievant and employer in that situation was indirect. Moreover, neither the employer nor the wage claimant was aware of grievant's indirect connection. In the instant case, however, the connection between grievant and the wage claimant was not only direct, but also the wage claimant was fully aware of grievant's involvement in the case. Accordingly, the instant case is distinguishable from the physician example.

   From his military background, grievant is aware that the appearance of impropriety is a concern to employers. In fact, grievant had previously questioned his supervisor on four prior occasions in order to assure that he did not become involved in an appearance of impropriety. In this case, the potential for an appearance of impropriety was much more likely but grievant did not discuss it with his supervisor.

5. Grievant seeks through obfuscation to contend that the agency disciplined him for an actual impropriety when, in fact, it disciplined him for the *appearance* of impropriety. In the attachment to the Written Notice, the

[21] Without having all the facts of that situation, it is not possible to judge whether the supervisor made the correct decision in that case.

agency quoted, for foundational purposes, relevant portions of the statute that addresses conflicts of interest. It then addressed, in the fourth paragraph, the offense for which it disciplined grievant, i.e., the *appearance* of impropriety (potential conflict of interest):

> In this particular situation, the claimant could have perceived that if he did not give you a good deal that you would not find in his favor on the wage complaint or that you would delay the process. Additionally if the employer were to become aware of your action, he could perceive that you only pursued the case because the employee had given you a good deal.[22]

Grievant correctly observes that there is no statute, written regulation or policy that proscribes an "appearance standard." However, it is not necessary for every offense to be in writing to constitute a violation of the Standards of Conduct. Section V.A. of the Standards (cited in the Decision) explains that "any offense that … undermines the effectiveness of agencies' activities" is subject to discipline (Underscoring added).

6. Grievant suggests that issuance of any written notice is contraindicated by the agency's statement on his Written Notice that, "No disciplinary action will be taken because this is your first offense." It is self-evident that the entry in Section IV was a misstatement because, as the hearing officer noted in the Decision, a Written Notice is by definition a disciplinary action.

   However, it was apparent from testimony elicited during the hearing that the agency expressly intended to issue a Group II Written Notice as discipline. The issuance of discipline was discussed, in advance, by Human Resources and by the agency head, both of whom are well aware that written notices constitute disciplinary action pursuant to the Standards of Conduct. Testimony further revealed that the agency's intent in making the above statement was to inform grievant that it was giving him the minimum discipline possible at the Group II level.[23]

7. Grievant argues that, because his supervisor had allowed him to continue his assignments in four situations he thought might have potential for conflict of interest, perceptions and appearances were irrelevant. There is no evidence that the supervisor told grievant that perceptions and appearances are irrelevant; grievant apparently made this assumption on his own. Grievant's repeated references to his federal government service make clear that he was more aware than most employees that perceptions and appearances of impropriety are very relevant in an employment situation. State government, local government, and private sector employers all have concerns about appearances of impropriety because they can lead to damaged reputations.

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[22] Exhibit 2. Attachment to Written Notice.

[23] The agency could also have suspended grievant for up to ten workdays without pay.

It is common knowledge that the federal government creates far more regulations and written policies than any other employer – private or governmental. There is little about federal government operations that is not covered by written regulations, rules, procedures, policies, interpretations, rulings, and bulletins. However, the fact that state government does not have written rules to cover every possible offense does not mean that certain types of behavior are permissible.

Grievant avers that he had no intent to gain an advantage when purchasing a vehicle from the wage claimant. The agency has not contradicted grievant's assertion and therefore, the hearing officer accepts as fact that grievant did not attempt to gain an advantage. However, as pointed out in the decision, the issue is whether his actions could be perceived otherwise. Despite grievant's assertion, the wage claimant's employer could nonetheless reasonably harbor a suspicion that grievant and the wage claimant might have colluded. It is this *suspicion* (even though unfounded) that can adversely affect the agency's effectiveness.

Grievant rhetorically asks why his supervisor waited 19 days before reporting grievant's vehicle purchase to her supervisor. While this is a legitimate question, grievant had the opportunity to cross-examine his supervisor during the hearing about this point but failed to do so.

Finally, grievant requests that he be given a written warning in lieu of the Group II Written Notice. The fact is that a Written Notice constitutes a written warning to the employee.[24] The intent of the corrective action/warning is to inform the employee, in unambiguous terms, that the behavior cited is unacceptable and to assure that there is no repetition of the behavior.

Agency's Request

The agency believes that the decision contains an incorrect legal conclusion. However, the agency has not cited any constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts.

The agency correctly cites the catchall language of the Standards of Conduct that allows discipline action for any offense that, in the judgment of the agency head, undermines the effectiveness of departmental activities. The agency goes on to correctly quote the hearing officer's conclusion that, in effect, grievant's actions did constitute an offense that merited discipline pursuant to the catchall language. However, from its use of italics to highlight the phrase *in the judgment of the agency head*, the agency apparently infers that only the agency head can determine the appropriate level of discipline.

[24] It is also disciplinary in nature because it effectively places the employee in a probationary status for a limited period of time.

The grievance procedure was enacted by the General Assembly for the express purpose of affording state employees a *fair* method for the resolution of grievances.[25] To that end, the legislature granted to hearing officers the express power and duty, inter alia, to order appropriate remedies including reinstatement, back pay, full reinstatement of fringe benefits and seniority rights, or any combination of these remedies; *and any other actions as necessary or specified in the grievance procedure*.[26] The grievance procedure gives hearing officers the authority to provide various forms of relief including upholding, reducing or rescinding disciplinary actions.[27] Accordingly, a hearing officer may overrule the agency, and may either rescind or reduce the disciplinary action.

In the instant case, the hearing officer agreed with the agency that discipline was warranted. However, based upon the totality of the circumstances, and for the reasons stated in the decision, the hearing officer concluded that the severity of discipline should be reduced by one level from Group II to Group I. Although not stated in the decision, the hearing officer also considered the fact that the grievant has a satisfactory or better performance record and no previous disciplinary actions. Therefore, given the particular circumstances of this case, it is concluded that grievant's offense warranted a Group I Written Notice.

DECISION

Neither grievant nor the agency has proffered any newly discovered evidence, or any evidence of incorrect legal conclusions. The hearing officer has carefully considered both the grievant's and the agency's arguments and concludes that there is no basis to change the Decision issued on October 23, 2003.

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[25] Va. Code § 2.2-3000.A states: "It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management. 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 that may arise between state agencies and those employees who have access to the [grievance] procedure under § 2.2-3001.

[26] Va. Code § 2.2-3005.C. provides: "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 combination of these remedies; and 7. Take other actions as necessary or specified in the grievance procedure.

[27] § 5.9(a) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001, states: "Examples of relief which may be available: 2. Upholding, reducing, or rescinding disciplinary actions."

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.[28]

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David J. Latham, Esq.
Hearing Officer

[28] An appeal to circuit court may be made only on the basis that the decision was *contradictory to law,* and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

§7.3(a) EDR *Grievance Procedure Manual*, effective July 1, 2001, provides that an agency must request and receive prior approval from the Director of EDR before filing a notice of appeal to circuit court.