Issue: Misapplication of policy; Hearing Date: 01/17/06; Decision Issued: 01/20/06; Agency: DRS; AHO: David J. Latham, Esq.; Case No. 8232; Outcome: Agency upheld in full (no evidence of misapplication of policy); **Administrative Review: HO Reconsideration Request received 02/02/06; Reconsideration Decision issued 02/03/06; Outcome: Original decision affirmed (agency upheld in full); Administrative Review: EDR Ruling Request received 02/02/06; EDR Ruling issued 03/20/06 [2006-1269]; Outcome: Original decision affirmed (Agency upheld in full); Administrative Review: DHRM Ruling Request received 02/02/06; DHRM Ruling issued 03/29/06; Outcome: HO's decision affirmed**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8232

Hearing Date: January 17, 2006
Decision Issued: January 20, 2006

PROCEDURAL ISSUES

Grievant requested as part of her relief that she be awarded journey status, a salary increase, and a transfer out of her unit. A hearing officer does not have authority to award journey status, to grant a salary increase, or to transfer an employee.[1] In a case such as this, the authority of the hearing officer is limited to issuing an order that the agency comply with applicable law or policy, if it is determined that the agency unfairly applied or misapplied law or a policy.[2]

Subsequent to the filing of her grievance but prior to this hearing, grievant resigned from her position.[3] Therefore, as a practical matter, there is little if any practical relief that can be afforded to grievant. Nonetheless, the following decision addresses the concerns raised by her grievance.

APPEARANCES

Grievant

[1] § 5.9(b)3 & 4. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, August 30, 2004.
[2] § 5.9(a)5. *Ibid.*
[3] Grievant resigned from the agency on January 3, 2006.

Regional Director
Representative for Agency
Two witnesses for Agency

ISSUES

Did the agency unfairly apply or misapply policy either to deny grievant journey status or in the preparation of her journey plan?

FINDINGS OF FACT

The grievant filed a timely grievance asserting, in effect, that the agency unfairly applied or misapplied policy in denying her journey status and in developing a performance plan.[4] The Department of Rehabilitative Services (Hereinafter referred to as agency) employed grievant for three years as a program administrative specialist.[5]

In February 2004, the agency implemented a competency-based program to advance disability analysts from trainee status to journey status to senior analyst.[6] The program requires that trainees, including those with previous departmental experience, must successfully demonstrate mastery of specified competencies within 24 months of completing centralized training.[7] Failure to master competencies within the 24-month period requires the supervisor to develop a work plan to assist the employee in successfully meeting performance expectations and outlining consequences (including discipline) should performance not improve. Grievant was hired in October 2002 and completed centralized training in January 2003. Therefore, pursuant to the program, grievant should have demonstrated mastery of the competencies not later than January 2005.

During the first quarter of performance year 2005 (October - December 2004), grievant's performance had been deteriorating. She had difficulty in managing her caseload, failed to achieve the SPAR accuracy goal, and failed to process claims within the acceptable range of processing times.[8] Grievant asked to transfer to a different office and was allowed to do so on January 3, 2005.

Before grievant transferred to the new office, she had acquired experience in many types of cases including initial, reconsideration, child, and continuing

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[4] Agency Exhibit 1. Grievance Form A, filed March 17, 2005.
[5] Agency Exhibit 3. Grievant's Employee Work Profile Work Description, January 2005.
[6] Grievant Exhibit 1. Standard Operating Procedure, *Case Assignment*, February 2004. This procedure was subsequently revised and renamed: See Agency Exhibit 4. Standard Operating Procedure, *Competency Based Advancement from Trainee to Journey to Senior Disability Determination Analyst*, May 16, 2005.
[7] In May 2005, the program was revised to allow trainees 30 months to demonstrate mastery of the required competencies.
[8] Agency Exhibit 5. Quarterly review, October – December 2004.

disability cases.[9] Nonetheless, because the new office had minor variances in procedure, grievant's supervisor gave her several months to settle in before measuring competency levels even though grievant had passed the 24-month deadline. As grievant's backlog of cases gradually increased, her supervisor regularly (approximately every other week) reminded grievant that she had to address her steadily increasing backlog of work. New initial and reconsideration cases are assigned to analysts by a computer program so that everyone receives a random selection of cases. Competency levels are measured during a three-month period and the employee knows beforehand when the period will begin and end.

In May 2005, grievant's supervisor asked her if she was ready to begin the competency measuring period; grievant agreed that she was. The competency period was designated as the months of June through August 2005. During that period, grievant failed to achieve one of the five required competency levels.[10] The supervisor observed that grievant had failed to take timely actions on cases, in some cases took no action for weeks at a time, and was unable to maintain her total caseload at a manageable level. As a result, the supervisor gave grievant a Notice of Improvement Needed/Substandard Performance and a three-month work plan designed to help her achieve a successful competency evaluation.[11]

As a result of grievant's failure to achieve journey status, and because her she had not maintained her caseload at a manageable level during the year, grievant's annual performance evaluation was Below Contributor overall.[12] After grievant pointed out numerical errors in the evaluation, the rating of one core responsibility was changed but the overall rating remained the same.[13] Subsequently, the Human Resources office directed the supervisor to again revise the evaluation and change the overall rating to Contributor.[14] Human Resources determined that the work plan given to grievant in early October prevented the supervisor from giving a rating lower than Contributor.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state

[9] Agency Exhibit 1, p.8. Attachment to grievance form. Grievant affirmed this in her testimony.
[10] Agency Exhibit 7. *Competency Inventory Form – Journey Analyst*, October 11, 2005. See also Agency Exhibit 8. *Supervisory Case Reviews* for the evaluation period.
[11] Agency Exhibit 10. *Notice of Improvement Needed/Substandard Performance,* October 11, 2005 and, memorandum of work plan from supervisor to grievant, undated.
[12] Grievant Exhibit 2. Grievant's annual performance evaluation, October 20, 2005.
[13] Grievant Exhibit 2. Grievant's revised performance evaluation, November 7, 2005.
[14] Grievant Exhibit 2. Grievant's second revised performance evaluation, November 21, 2005.

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. In all other actions, such as a claim of unfair application or misapplication of policy, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.[15]

The grievance identifies as issues that grievant failed to achieve journey status and that the work plan contains an error.

Grievant alleged that at some unknown time, an unnamed coworker had received special treatment that gave her an edge in achieving the competency levels.[16] However, grievant did not present any evidence or witnesses to corroborate this allegation. Grievant asserted that because a significant portion of her caseload included reconsideration cases, she was disadvantaged. Grievant contends that reconsideration cases are more difficult and time-consuming than initial cases. However, a preponderance of testimony from multiple agency witnesses established that, in fact, reconsideration claims require less time per case and a shorter mean processing time than initial claims. Therefore, it is concluded that the large number of reconsideration cases given to grievant was an advantage to her – not a disadvantage.

Grievant argued that she was not given sufficient time before being evaluated for journey status. In fact, according to the policy, grievant should have achieved the required competency levels not later than January 2005. The agency allowed grievant many extra months before beginning to evaluate her in June 2005. Even after she did not achieve the required competency levels by

[15] § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective August 30, 2004.
[16] Agency Exhibit 1, p.3. Attachment to grievance form.

September 2005, the agency did not discipline her. Rather, she was given an improvement plan designed to help her achieve journey status.

Grievant also complained that some reconsideration cases she received had been reassigned from another analyst and were old when grievant received them. However, unrebutted testimony from agency witnesses established that when cases are reassigned from one analyst to another, the processing time charged to the receiving analyst starts again at day one. Therefore, grievant was not held accountable for any delays that were attributable to the previous analyst.

Grievant attempted to shift responsibility for her problems to her supervisors. She alleges that her supervisor in the prior office lied to her and nitpicked.[17] She claims that her supervisor in the new office is not objective and attempted to make grievant a scapegoat for other people's shortcomings.[18] However, grievant did not provide any documentation or witnesses to corroborate these allegations. During the year, whenever grievant's supervisor discussed the need for grievant to address her increasing backlog of work, grievant said that the "system was against her;" she also asserted that physicians were holding up cases she had referred to them. The supervisor checked grievant's complaints and found that grievant was not receiving any more difficult cases than anyone else, and that physicians reviewed her cases in the order received along with every other analyst's cases.

Grievant objected to two aspects of the work plan. First, she disagreed with the third standard which requires 15 dispositions per week. However, the supervisor promptly agreed to change the standard to 173 dispositions for the three-month period. Accordingly, that issue was resolved well before this case was qualified for hearing. Second, grievant objected to the requirement that her work area be maintained in a manner that permits easy locations of cases when they are needed. When an employee is unexpectedly absent, or when a supervisor needs a case immediately, the employee's work area must be maintained in a sufficient semblance of order that cases can be located when needed. This is a reasonable requirement in work sites at any agency. Accordingly, grievant's objection to this requirement is without merit.

DECISION

Grievant has not borne the burden of proof to show either unfair application or misapplication of policy. Grievant's requests for relief are DENIED.

[17] Agency Exhibit 1, p.4. Attachment to grievance form.
[18] Agency Exhibit 1, p.10. Attachment to grievance form.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar days** from the date the decision was issued, if any of the following apply:

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

2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 400
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 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 15-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.[19] You must file a notice of appeal with the clerk of the circuit court in the

[19] 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).

jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[20]

[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]

S/David J. Latham

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David J. Latham, Esq.
Hearing Officer

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

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8232

Hearing Date:	January 17, 2006
Decision Issued:	January 20, 2006
Reconsideration Request Received:	February 2, 2006
Response to Reconsideration:	February 3, 2006

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 15 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. 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.[21]

OPINION

Grievant contends that she was not ready for the "journey process" and that she would have to "train for journey." In fact, the preponderance of testimony and evidence, and in particular, the standard operating procedure for competency based advancement[22] makes clear that advancement to the journey level is a matter of achieving certain specified competency levels in one's daily work. The "training" is simply learning to perform one's work in a sufficiently efficient and accurate manner such that the employee can achieve the numeric and quality competency levels cited in the policy. Moreover, the competency policy does not specify a minimum time period to achieve journey competency levels. Thus, an employee who applies herself could

[21] § 7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

[22] Agency Exhibit 4. Standard Operating Procedure *Competency Based Advancement from Trainee to Journey to Senior Disability Determination Analyst*, May 16, 2005.

achieve journey status well before the 24-month (now 30-month) period that has been established as a deadline for achieving the competency requirements. The policy provides that trainees will be evaluated quarterly; those who do not achieve expected developmental performance levels may be handled in accordance with the *Standards of Conduct*.[23]

Although not required by the policy, supervisors have developed a practice of telling employees that their competency levels would be scrutinized during a particular three-month period to determine whether they have achieved journey status. This gives the employee adequate notice that she should be particularly diligent in her work during those three months if she wants to achieve journey status. Grievant's supervisor advised grievant in February that the journey evaluation was coming, and then in May told grievant that three-month evaluation period would be June through August 2005. Grievant agreed to be evaluated during that time period.

Grievant argues that her supervisor gave her several of a certain type of reconsideration case during the evaluation period and that this affected her adversely. However, the fact is that grievant achieved four of the five required competency levels during the evaluation period. She achieved or exceeded the requirements for cases cleared, Group I accuracy percentage, mean processing time, and independence expectations. The only element not achieved was accuracy in supervisory case reviews and this was attributable to grievant not performing work on a few cases for several weeks at a time.

Grievant also argues that 50 cases transferred from another analyst were seriously delayed when she received them. While this is correct, it is not relevant for two reasons. First, grievant was not held accountable for any of the delay attributable to the previous analyst. The time grievant was held accountable for started with the day they were assigned to grievant. Second, grievant received those cases in January 2005 – some five months before the June-August evaluation period.

Grievant again raises her objection to reconsideration cases assigned to her during the three-month evaluation period. However, as noted in the Decision, a preponderance of testimony from agency witnesses establish that *new* reconsideration claims require less processing time than initial claims. With cases that had previously been worked by another analyst, less processing time would be required. However, even if the previous analyst had performed no work on the reconsiderations, transferring them to grievant would be no different from assigning them to her as *new* reconsiderations. Thus, the evidence does not show that the reconsideration claims adversely affected grievant's ability to perform work on some of them more frequently than every six to eight weeks.

Grievant asserts that the hearing officer "deduced" that cases were randomly assigned. This conclusion was not based on deduction but rather on the unrebutted testimony of agency witnesses that a computer system is used to assure that cases are assigned to analysts on a random basis. Grievant has not demonstrated specifically what alleged information would have proven otherwise. The testimony of the hearing manager that a supervisor could be investigated if she were found to assign cases in a biased manner was considered. However, grievant failed to present any evidence to prove that her supervisor had committed such an offense.

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[23] *Ibid.*

Grievant alleges that another analyst was allowed to achieve journey status without having to meet one of the policy criteria. The agency presented extensive testimony to explain that the other analyst was involved in a new project utilizing a different software system to perform her work. Because the type and methods of work were significantly different, evaluation of that analyst's performance did not strictly fit the policy. That analyst had been chosen for that pilot project because she was more experienced and had demonstrated her ability to perform the work. Moreover, whether another analyst was given journey status for performing a different type of work in a new system is not directly relevant to grievant's case. Grievant failed to present evidence of any employee performing the same type of work on the same system as grievant who did not meet journey standards before being given journey status.

Grievant maintains that some of the 2004 performance figures from her prior office were subsequently changed in her favor. Assuming that is so, grievant's work in a prior office is not directly relevant to whether she performed at journey level in her new office during the summer of 2005.

Grievant's reference to "a section of HR manual" in the performance plan is unclear. The grievant's performance plan[24] makes no mention of a section of HR manual. With regard to the weekly feedback provided by grievant's supervisor, the supervisor's credible testimony established that such training and feedback was given. Grievant did not rebut this testimony during the hearing. Grievant's contention that, because such feedback was not documented in writing it did not happen, is not sufficient to conclude that it did not occur. There is no requirement that occasional feedback be documented in writing.

Grievant has not identified any constitutional provision, statute, regulation, or judicial decision as a basis to challenge the hearing officer's conclusions of law. Grievant takes issue with certain Findings of Fact, and with the hearing officer's Opinion. Her disagreements, when examined, simply contest the weight and credibility that the hearing officer accorded to the testimony of the various witnesses at the hearing, the resulting inferences that he drew, the characterizations that he made, or the facts he chose to include in his decision. Such determinations are entirely within the hearing officer's authority.

DECISION

Grievant has not proffered either any newly discovered evidence or any evidence of incorrect legal conclusions. The hearing officer has carefully considered grievant's arguments and concludes that there is no basis to change the Decision issued on January 20, 2006.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

[24] Agency Exhibit 10.

1. The 15 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.[25]

S/David J. Latham

David J. Latham, Esq.
Hearing Officer

[25] 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).