Issues: Group II Written Notice with suspension (failure to follow supervisory instructions) and Group II Written Notice with termination (due to accumulation) (failure to follow supervisory instructions and failure to perform assigned work); Hearing Date: 03/08/06; Decision Issued: 03/10/06; Agency: NSU; AHO: David J. Latham, Esq.; Case No. 8274,8281; Outcome: Agency upheld in full; **Administrative Review: HO Reconsideration Request received 03/27/06; Reconsideration Decision issued 03/30/06; Outcome: Original decision affirmed; Administrative Review: DHRM Ruling Request received 03/27/06; DHRM Ruling issued 06/13/06; Outcome: HO's decision affirmed.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Nos: 8274 & 8281

Hearing Date: March 8, 2006
Decision Issued: March 10, 2006

PROCEDURAL ISSUES

Grievant did not submit any documentary evidence, did not call any witnesses, and declined to testify on her own behalf.

Grievant retired from state employment and began to receive benefits on March 1, 2006. At hearing, grievant indicated (through her representative) that she is pursuing this grievance only to clear her record and that she had no desire to be reinstated. Subsequent to the hearing, grievant's representative left a voice mail message for the hearing officer indicating that grievant had changed her mind and now desires to be reinstated in her position. Once an employee has retired, the employee has relinquished her right to reinstatement. Even if the hearing decision were in grievant's favor, reinstatement is precluded because the agency is under no obligation to reinstate an employee who has left employment of her own accord, whether by resignation or by retirement.

APPEARANCES

Grievant
Representative for Grievant

Associate Vice President
Attorney for Agency
Two witnesses for Agency

ISSUES

Was the grievant's conduct such as to warrant action under the *Standards of Conduct*? What is the appropriate level of discipline?

FINDINGS OF FACT

The grievant filed timely grievances from two disciplinary actions. Grievant first challenged a Group II Written Notice with 10-day suspension for failure to follow a supervisor's instructions.[1] Second, grievant challenged a Group II Written Notice with termination of employment effective November 11, 2005 for failure to follow supervisory instructions and failure to perform assigned work.[2] Following failure of the parties to resolve the grievances at the third resolution step, the agency head qualified the grievances for a hearing.[3] The Department of Employment Dispute Resolution determined that the grievances should be consolidated for a joint hearing. Norfolk State University (Hereinafter referred to as "agency") employed grievant as a general administration supervisor.

Grievant began work in her current position in April 2004. Her performance from the beginning was substandard in several respects. During the period from April through September 2004, grievant made so many errors in her work such that it was anticipated that her annual performance evaluation would be below contributor. The agency made a decision to exclude grievant's performance from April through September from her annual performance evaluation in October 2004; the evaluation covered only the one-month period from September to October 2004. On June 6, 2005, grievant's supervisor verbally counseled her about substandard performance.

A major function of grievant's responsibilities included the processing and preparation of contracts for the agency's entire instructional faculty. During the period of May 12 through June 9, 2005, grievant issued a large number of contracts with significant problems.[4] Three faculty members received contracts that extended their contract period for three years even though their current period had not expired. In other cases, grievant issued twelve-month contracts to faculty who were supposed to receive only nine-month contracts. In still other cases, grievant issued nine-month contracts to faculty members who were

[1] Exhibit 3. Group II Written Notice, issued June 16, 2005. [NOTE: The second-step respondent in the grievance process rescinded the 10-day suspension. Grievant was reimbursed for the 10 days salary and given leave credit for two days of annual leave.]
[2] Exhibit 11. Group II Written Notice, issued November 14, 2005.
[3] Exhibit 2. Grievance Forms A, filed July 16, 2005, and Exhibit 11, filed December 11, 2005..
[4] Exhibit 7. 91 pages with examples of the errors described above.

supposed to receive twelve-month contracts. Several contracts were issued with incorrect academic ranks. Grievant also issued contracts for faculty members who had not yet gone through the tenure process or been promoted. In addition, grievant mailed some contracts in envelopes addressed to different faculty members resulting in faculty receiving contracts for their colleagues. In some cases, grievant entered incorrect salary amounts on the contracts. As a result of grievant's substandard performance, her supervisor issued a Group II Written Notice to grievant on June 16, 2005.

Grievant's supervisor gave her an interim evaluation in July 2005.[5] The Associate Vice President noted in the evaluation that grievant's work on contracts would have to be reviewed by another knowledgeable person in order to assure accuracy. Grievant was again verbally counseled on September 14, 2005 and then, in October 2005, she was given a formal Notice of Substandard Performance.[6]

Following the first Written Notice and throughout the summer and early fall of 2005, grievant's performance continued to be substandard. She continued to make the same types of mistakes cited above in support of the first written notice.[7] In one case, the agency had to pay an employee $1,000 more than the intended salary because of a contract grievant prepared with an erroneous salary amount. In another case, grievant's failure to properly process paperwork required the agency to take money from a different budget area to cover salary funding. In addition, grievant continued to mail contracts to faculty in envelopes addressed to different faculty, make elementary typing errors, make errors of omission, mischaracterize department names, misspell faculty names, and fail to proofread her work. Because of grievant's continued substandard performance and the lack of any demonstrable improvement or effort to improve, the agency determined that grievant should be issued a second Written Notice and removed from employment.

The agency notified grievant on November 4, 2005 of its intent to remove her from employment.[8] Grievant was suspended *with pay* for a period of one week during which time she was given a due process opportunity to provide any evidence as to why the proposed action should not be taken. On November 8, 2005, grievant submitted an application for retirement to the Virginia Retirement System.[9] She stated on the application that she wanted her "retirement date" to be November 1, 2005. She also stated that she was "terminating all full-time employment with employers participating in VRS as of her retirement date." This statement was incorrect because grievant was still working for the agency and continued to be paid by the agency through November 11, 2005. The agency met with grievant and her attorney on November 11, 2005 but grievant was

[5] Exhibit 4. Interim Evaluation Form, July 15, 2005.
[6] Exhibit 4. Notice of Improvement Needed/Substandard Performance, October 12, 2005.
[7] Exhibit 11. 90 pages of examples of errors.
[8] Exhibit 13. Letter from Human Resource Director to grievant, November 4, 2005.
[9] Exhibit 18. Application for Service Retirement.

unable to provide a satisfactory explanation for her substandard performance. Grievant was terminated effective November 11, 2005.[10]

The Virginia Retirement System (VRS) subsequently processed grievant's application for retirement. In January 2006, VRS approved the application and notified grievant that she would begin to receive a monthly retirement benefit on March 1, 2006, which represented payment for the month of February 2006.[11] The VRS, apparently relying on grievant's incorrect statement that she ceased work as of her retirement date, also approved a retroactive payment of $4,529.07 for the period of November 1, 2005 through January 31, 2006. Thus, grievant received both retirement pay from VRS, and salary from the university for the same time period - the first 11 days of November 2005.[12]

Subsequent to the termination of grievant's employment, the agency discovered that grievant had, on November 1, 2005, disclosed confidential information about 285 faculty members to a private sector company.[13] The information grievant disclosed included names, Social Security numbers, gender, race, birth dates, salary information, faculty rank, and emergency contact information.

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

[10] However, the agency took the weekend to evaluate the entire case again, and then met briefly with grievant on Monday, November 14, 2005 at which time she signed the written notice.
[11] Exhibit 19. VRS Retirement Certificate, January 25, 2006.
[12] VRS has confirmed that an employee may not receive retirement benefits for any month in which that employee continues to be employed by the agency from which they are putatively retiring.
[13] Exhibit 16. Letter from Human Resources Director to grievant, December 5, 2005.

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, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.[14]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management (DHRM) promulgated *Standards of Conduct* Policy No. 1.60 effective September 16, 1993. The policy provides 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 of Policy 1.60 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.[15] Failure to follow a supervisor's instructions and, failure to perform assigned work are two examples of a Group II offense.

The agency has shown by a preponderance of evidence that grievant failed to follow supervisory instructions and perform assigned work repeatedly over a long period of time. The agency presented extensive testimony and documentary evidence of grievant's work and the problems caused by her substandard performance. It also demonstrated that grievant had, in violation of multiple state policies[16] and the right of privacy of faculty members, disclosed confidential personal information about 285 faculty members to a private sector company. Grievant failed to offer any testimony or evidence to explain her performance, or her egregious disclosure of personal information. Because grievant declined to testify, she failed to rebut any of the agency's evidence. Therefore, the agency's evidence is presumed to be an accurate reflection of grievant's performance.

Grievant alleges that grievant was not allowed to articulate the reasons for her substandard performance during the meeting on November 11, 2005. However agency witnesses testified that grievant was represented by an attorney during the two-hour meeting, that grievant had ample time to offer explanations, and that grievant's defense consisted primarily of repeated plaints that what the agency was doing was unfair.

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[14] § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, effective August 30, 2004.

[15] Agency Exhibit 26. Section V.B.3, DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

[16] Agency Exhibit 16. DHRM Policy 6.05, *Personnel Records Disclosure*, updated July 1, 2005 and, DHRM Policy 6.10, *Personnel Records Management*, revised December 1999.

Grievant's sole defense is that agency erred in removing her from employment because she asserts that she had "retired" before the agency issued the Written Notice. The agency gave grievant a due process letter on November 4, 2005 advising that she would be given a disciplinary action and removed from employment the following week. Grievant then filed an application for retirement and requested that the retirement date be made retroactive to November 1, 2005. Grievant's application for retirement does not mean that she was "retired." In fact, the evidence reflects that grievant had not retired because she continued to work during the first part of November and was paid her regular salary through November 11, 2005. Accordingly, grievant was employed by the agency before and after she filed her retirement application.

The fact that VRS relied on grievant's false statement that she ceased work as of the requested retirement date is not probative. Had VRS known that grievant continued to work for a portion of the month of November, it would not have approved her application for retirement to be effective until December 1, 2005. Therefore, grievant's argument that she was "retired" before the date of her removal from employment is unpersuasive and without merit. The salient fact is that grievant was continuously employed and paid her regular salary through November 11, 2005. As long as she remained so employed, the agency had the authority to terminate her employment.

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice for failure to follow a supervisor's instructions and perform assigned work issued June 16, 2005 is hereby UPHELD.

The Group II Written Notice for failure to follow a supervisor's instructions and perform assigned work issued November 14, 2005, and grievant's removal from employment due to accumulation of disciplinary actions effective November 11, 2005 are hereby UPHELD.

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.[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]

_____
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.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Nos: 8274 & 8281

Hearing Date:	March 8, 2006
Decision Issued:	March 10, 2006
Reconsideration Request Received:	March 27, 2006
Response to Reconsideration:	March 28, 2006

ISSUE

Has the grievant submitted a timely request for reconsideration pursuant to Section 7.2 of the Grievance Procedure Manual?

FINDINGS OF FACT

On March 27, 2006, the hearing officer received from the grievant a request for reconsideration of a Decision of Hearing Officer issued on March 10, 2006. The grievant was represented by a friend during the grievance hearing but has now elected to proceed on a *pro se* basis.

APPLICABLE LAW

A hearing officer's original decision is subject to administrative review. The Grievance Procedure Manual addresses administrative review of Hearing Decisions and states, in pertinent part:

> However, all requests 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 copy of all requests must be provided to the other party and to the EDR Director. A request to reconsider or reopen a

decision is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.[19]

The Grievance Procedure Manual further provides that a hearing officer's decision becomes final as follows:

> A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of administrative review, when:
>
> 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.[20]

OPINION

In order to be a timely request, a request for reconsideration must be ***received*** by the Hearing Officer within 15 calendar days of the date of the original hearing decision. The date of the original hearing decision was March 10, 2006; the decision was mailed to the grievant on March 10, 2006. The final date by which a request for reconsideration must be received was March 25, 2006. The grievant's request for reconsideration was received by the Department of Employment Dispute Resolution on March 27, 2006.

The grievant has provided no explanation for having submitted her request for reconsideration after the 15-day period mandated by the Grievance Procedure Manual. However, in this case, March 25, 2006 fell on a Saturday; the next business day was Monday, March 27, 2006. Since grievant's request was received on March 27, 2006, her request is hereby deemed timely received.

The balance of this Opinion will address grievant's concerns in the same order as presented in her request. Grievant complains that the agency did not address her request for a transfer. However, grievant did not grieve this issue and therefore it was not qualified for hearing.

Grievant cites the Administrative Process Act (APA). Grievance hearings are governed by the State Grievance Procedure, Va. Code § 2.2-3000ff – not by the APA. In any case, EDR hearing officers hear cases fairly and impartially and, when appropriate, recuse themselves from hearing cases in which they are unable to do so. Here, the hearing officer found, and still finds, no basis for recusal. Furthermore, grievant had the opportunity to request recusal at the hearing but did not do so. The three binders to which grievant refers were submitted by the agency at the time it requested a hearing; such submissions by state agencies are not unusual. No information submitted by either party is considered by the hearing officer until it has been formally admitted into evidence at the hearing and made a part of the hearing record. In

[19] § 7.2(a) Department of Employment Dispute Resolution *Grievance Procedure Manual*, effective August 30, 2004.
[20] § 7.2(d) Ibid.

this case, the information in the three binders was essentially duplicative of the two binders submitted by the agency and admitted into the record. The hearing officer did not review the information contained in the three binders because the agency's attorney stated during the prehearing conference that he would reorganize the information for presentation in the two binders that were ultimately submitted as evidence.

Grievant again asserts that the agency vacated the Group II Written Notice issued June 16, 2005. However, the undisputed testimony of agency witnesses established that the Written Notice was not vacated and remains in force. While the suspension was removed at the second step of the resolution process, the Group II notice was not vacated and remains in effect. At the hearing, grievant failed to offer any testimony or documentary evidence to support her assertion.

Grievant alleges that she was "forced to retire." At the hearing, grievant did not testify to any such coercion and did not present any evidence to support such an allegation. The undisputed evidence established that grievant voluntarily submitted a request to retire. While grievant is now retired, she was an employee up to, and at the time of, her removal from employment on November 11, 2005.

Grievant states that "There was no written notice issued to the grievant on November 14, 2005." However, in the third sentence following this statement, grievant completely contradicts herself by stating, "A signed copy of the written notice was provided to the grievant."

Grievant alleges that the Human Resource Director perjured herself at the hearing. Grievant had the opportunity to testify and present evidence to support this allegation but failed to do so. There is more to proving such a serious charge than merely making an unsupported allegation.

Grievant contends that she did not receive due process during her termination meeting on November 11, 2005. The uncontested evidence at the hearing reflects that the grievant had an attorney representing her during this hearing and that she received ample due process. In any case, this hearing conducted on March 8, 2006 gave grievant full opportunity to present her case; she chose not to present any testimony or evidence in her own defense.

What grievant characterizes as "new evidence" is not newly discovered evidence. Grievant could, with due diligence, have presented testimony and evidence during the hearing on any of the items mentioned in her reconsideration request. Grievant failed to offer any evidence to rebut the agency's testimony and evidence that she was reimbursed for the vacated period of suspension. Grievant refers to agency publications (Faculty Handbook, Handbook for Classified Employees) in her request but failed to submit copies with her request for reconsideration. Moreover, grievant could have presented these publications during the hearing but failed to do so. Therefore, these publications do not constitute newly discovered evidence.

Contrary to grievant's assertion, the Hearing Officer did not order the agency to pay grievant for reporting to work on November 14, 2005. During the hearing, the agency's attorney directed the agency to pay grievant for this day.

Grievant asserts that she did not give written consent to disclose her performance evaluations and disciplinary actions to "third parties." She has failed to explain why she made this statement. There was no evidence presented at the hearing to suggest that the agency had disclosed such information to any third parties. If grievant is referring to the hearing officer, a hearing officer in his role as the adjudicator functions *in loco agentia* (in place of the agency) for purposes of reviewing evidence and making a decision.

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. The grievant's 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 March 10, 2006.

APPEAL RIGHTS

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

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.[21]

David J. Latham, Esq.
Hearing Officer

[21] 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).

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Norfolk State University
June 13, 2006

The grievant has requested an administrative review of the hearing officer's decision in Cases Nos. 8274 and 8281. The grievant is challenging the decision through the Department of Human Resource Management because she contends that it is inconsistent with state policy. The agency head, Ms. Sara Redding Wilson, has requested that I respond to this appeal.

FACTS

The Norfolk State University employed the grievant as a general administration supervisor II/coordinator II until she was terminated. Among other things, her job duties included preparing faculty contracts. Initially, her job performance was satisfactory, having earned an overall rating of "contributor" for the 2004 evaluation year. However, shortly thereafter management officials became displeased with her work because she committed numerous errors. On June 9, 2005, her supervisor issued to her a Group II Written Notice that charged her, in part, with "Failure to follow a supervisor's instructions and perform assigned work. Unfortunately, (grievant's name)[*] has been and continues to make numerous errors while processing teaching faculty contracts, which accounts for 30 percent of her job function as defined by the current Employment Work Profile (EWP)… " She was put on a corrective action plan and monitored during the next several months.

She filled a grievance to have the disciplinary action rescinded. On September 14, 2005, she was issued a Notice for Improvement/Substandard document. On October 27, 2005, she was given her annual performance evaluation on which she was rated "Below Contributor." On November 4, 2005, University officials notified the grievant of their intention to remove her from employment. She was put on leave with pay, effective November 7 through November 11. She was instructed to return on November 11 and submit reasons as to why she should not be removed. Her reasons were not accepted, so her supervisor issued to her a second Group II Written Notice with termination. This Written Notice charged her with a second instance of "Failure to follow supervisor's instruction and perform assigned work. Employee has consistently and repeatedly completed inaccurate work products, even after written and verbal instructions have been given multiple times. (See supporting documentation.) Employee's failure to follow instructions with assigned work is

[*] Edited to protect the privacy of the grievant.

undermining the effectiveness of the office's activities. Also, as of November 4, employee has not completed "Approval for Time Off " Form as requested. (See email dated October 21, 2005, at 3:23 p.m. re: Appropriate Protocol for Notification for Work Delay or Absence)." Her removal was effective November 11, 2005. She filed a second grievance to have the disciplinary action rescinded, though initially she did not seek reinstatement. The Department of Employment Dispute Resolution determined that the grievances should be consolidated so that the same hearing officer could hear both grievances at a joint hearing.

In his decision, the hearing officer upheld the University's disciplinary action. The grievant requested that the hearing officer reconsider his decision, but the hearing officer did not make any modifications.

The relevant policy, the Department of Human Resource Management's Policy No. 1.60, Standards of Conduct, states as its objective, "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 guides and are not all-inclusive.

DISCUSSION

A hearing officer is authorized to make "findings of fact as to the material issues in the case" and to determine the grievance based "on the material issues and grounds in the record for those findings". In cases involving discipline, the hearing officer reviews the facts to determine if the cited actions constituted misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action. By statute, the Department of Human Resource Management (DHRM) has been given the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by the DHRM 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.

The evidence supports that on November 8, 2005, she applied for service retirement through the VRS. The evidence shows that she was granted retirement status in January 2006, retroactive to November 1, 2005. The grievant remained on the University's payroll through November 11, 2005. She was paid all monies she was due for accrued leave and she returned the money that was not rightfully hers.

In her request for an administrative review, the grievant contends that the actions taken against her were unwarranted and inappropriate. She further stated that the wrong offenses were applied in the Written Notices issued on June 9, 2005, and on November 11, 2005, respectively. Finally, she states that the issuance of the Written Notice of November 11, 2005 and the termination letter was inappropriate because she was no longer an employee, having retired effective November 1, 2005.

Concerning whether or not the wrong offense was applied in either Written Notice, our review of the evidence reveals that the University charged her with "Failure to follow supervisor's instructions and perform assigned work", in both instances a Group II Written Notice. Whether or not the violations are properly categorized is based on the evidence and the hearing officer has the authority to make that determination. In addition, as related to the second Group II Written Notice, the University also added that the grievant improperly had released personal information on certain employees to a private vendor.

Concerning her belief that University officials disciplined her after she had retired from employment, the evidence supports otherwise. Rather, the evidence supports that University officials expressed their intentions to remove her from employment before she submitted her Application for Retirement. Summarily, the evidence supports that University officials informed the grievant on November 4, 2005, that they intended to discipline her by issuing her another Group II Written Notice with termination if she could not offer reason while she should not be disciplined. She was suspended with pay from November 7 – 11, and met with officials on November 11, 2005 but did not offer a suitable reason why she should not be terminated. She was terminated that day. She applied for service retirement on November 8, 2005, and her request was approved in January 2006. The approved retroactive date was November 1, 2005. Thus, the evidence does not support her contention.

In the instant case, this Agency finds no evidence that the hearing officer's decision in upholding the University's disciplinary and removal of the grievant is inconsistent with the relevant state policy. Rather, it appears that the grievant is contesting the hearing officer's assessment of the evidence and the conclusions he drew based on that evidence. While the grievant may not agree with the hearing officer's decision, the Department of Human Resource Management has no authority to substitute its judgment for that of the hearing officer with respect to these findings. In light of this, there is no basis for this Department to interfere with the hearing officer's decision.

_____

Ernest G. Spratley, Manager
Employment Equity Services