Issues: Group II Written Notice (unsatisfactory work performance and failure to follow supervisor's instructions), Group II Written Notice (unsatisfactory attendance), Group II Written Notice with termination (due to accumulation) (failure to perform assigned work), and arbitrary and capricious performance evaluation; Hearing Date: 03/29 & 03/30/06; Decision Issued: 04/21/06; AHO: Carl Wilson Schmidt, Esq.; Case No. 8299, 8300, 8301, 8302; Outcome: Employee granted partial relief; **Administrative Review: HO Reconsideration Request received 05/05/06; Reconsideration Decision issued 05/10/06; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 05/05/06; EDR Ruling No. 2006-1341, 2006-1374 issued 07/19/06; Outcome: Affirmed HO's decision; Administrative Review: DHRM Ruling request received 05/05/06; DHRM Ruling issued 11/29/06; Outcome: HO's decision affirmed; Addendum addressing attorney's fees issued 01/05/07; Judicial Appeal: Request to appeal to Circuit Court received 01/16/07; EDR Ruling No. 2007-1534 issued 01/19/07 granting permission; Outcome pending.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8299 / 8300 / 8301 / 8302

Hearing Date: March 30, 2006
Decision Issued: April 21, 2006

PROCEDURAL HISTORY

Grievant received three Group Written Notices. Grievant filed grievances to challenge these disciplinary actions. She also filed a grievance to challenge the Agency's evaluation of her work performance. The four grievances were consolidated and assigned to the Hearing Officer on March 6, 2006. On March 29, 2006 and March 30, 2006, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel
Witnesses

ISSUE

1. Whether Grievant engaged in the behavior described in the Written Notices?

2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?

4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

5. Whether the Agency complied with applicable policy when evaluating Grievant's work performance.

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant were warranted and appropriate under the circumstances. Grievant has the burden of proof to show that the Agency failed to comply with policy when evaluating her work performance. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Virginia Community College System employed Grievant as a Human Resource Manager at one of its colleges until her removal effective December 19, 2005. She was hired by the Agency on August 14, 2000 as the Team Leader of the Classified Team. Her duties included supervising two full time employees and a part-time employee. She was responsible for the daily administration and implementation of all aspects of classification functions. Her duties included: establishing employee starting salaries, setting internal salary ranges, conducting salary and equity studies, creating new positions, and conducting desk audits.[1]

In July 2003, Grievant filed a charge with the U.S. Equal Employment Opportunity Commission alleging racial discrimination by the Agency. She received a right-to-sue letter from the EEOC but did not pursue the matter further.

On June 16, 2005, Grievant and the Supervisor met for an Interim Evaluation. The Supervisor informed Grievant that her work was substandard and her unit was

[1] Grievant Exhibit 30.

disorganized. The Supervisor told Grievant that she needed to pay more attention to detail. The Supervisor did not provide Grievant with any written comments regarding their meeting.

In September 2005, the Supervisor removed several duties from Grievant. Grievant retained responsibility for compensation.

The College President was considering whether to grant an increase in pay for a particular type of position within the Agency. The Supervisor contacted Grievant and asked her to calculate the employee's compensation to reflect a ten percent pay increase. Grievant reported a salary to the Supervisor but the dollar amount was incorrect. The Supervisor reported the incorrect information to the President who discovered that the calculation was incorrect.

New Campus Centers

The Agency intended to create new educational facilities, called Centers, as part of two existing colleges. Students were to begin attending the Centers on January 9, 2006. In order to make sure adequate staff were hired, the Agency needed to have positions posted for advertisement within the State Recruit System and with local newspapers. Because of the Agency's holiday school break, the positions to be advertised needed to be fully developed, entered into the Agency's computer systems, and properly advertised on or before December 15, 2005.

In November 2005, Agency managers discussed the need for the positions. The Supervisor presented Grievant with the task of establishing the positions on a timely basis. On or before December 2, 2005, the Business Manager at the campus where one of the Centers would be located, called Grievant and spoke with her about the positions for his Center. Grievant told the Business Manager that everything was taken care of and the positions were moving ahead on track for completion. She added that the positions would be advertised on the website by December 11, 2005. Based on this conversation, the Business Manager informed the College President that establishment of the positions was moving ahead as scheduled. On December 15, 2005, when Grievant did not come to work, the Supervisor reviewed the status of the positions and concluded that they were incorrectly established and that original documents were missing. The Supervisor assumed responsibility for completing the establishment of the positions.

December 15, 2005

On December 15, 2005, Grievant was scheduled to work to finalize the advertisement of several positions for new Centers on two of the College's campuses. December 15, 2005 was a critical deadline for publication of the positions. If publication of the positions occurred after this date, the College would be unable to obtain employees to fill the positions by the time the Centers were open to accept students on January 9, 2006.

At 6:22 a.m., Grievant sent the Supervisor an email from her home saying, "I will not be in the office today, Thursday, December 15th due to the road conditions and the weather." At the time of the email, the roads surrounding the campus were clear. The weather was not yet inclement. The College had not established a liberal leave policy for December 15, 2005. The College concluded that only after 4 p.m. would employees be permitted to leave work early because of inclement weather. Because Grievant did not arrive at work on December 15, 2005, the Supervisor had to complete Grievant's duties with respect to making sure the Center's positions were advertised by the close of the work day.

Performance Evaluation

The Agency's work performance cycle was from October 25, 2004 to October 24, 2005. On October 25, 2005, the Agency issued Grievant a Notice of Improvement Needed/Substandard Performance. Grievant received her evaluation on December 7, 2005. It showed an overall rating of Below Contributor.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." DHRM § 1.60(V)(B).[2] Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DHRM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DHRM § 1.60(V)(B)(3).

October 25, 2005 Written Notice -- Unsatisfactory Work Performance

"Inadequate or unsatisfactory work performance" is a Group I offense. In order to prove inadequate or unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant was asked by the Supervisor to calculate a ten percent salary increase for a particular employee. Grievant informed the Supervisor of what Grievant considered to be the correct salary, but Grievant's calculation was wrong. Grievant's work performance was inadequate because she was expected to correctly calculate the salary increase but made an incorrect calculation. The Agency also presented evidence of Grievant's typographical errors on documents including documents she drafted for

[2] The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

the Supervisor's signature. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

The Agency contends Grievant should receive a Group II Written Notice because the Supervisor instructed Grievant to improve the accuracy of her work product. Before violating a supervisor's instruction may constitute a Group II offense, the Agency must show that the instruction was expressed with sufficient specificity for the employee to know the precise task to be accomplished. A general instruction from a supervisor to a subordinate that the subordinate should improve his or her work performance is not sufficient to elevate a Group I Written Notice for unsatisfactory work performance into a Group II Written Notice for failure to follow a supervisor's instruction. To conclude that a general instruction to "do your job better" justifies issuance of a Group II Written Notice, would render the Group I offense of unsatisfactory work performance as meaningless. This is because many supervisors, as a matter of routine, instruct subordinates to perform their jobs as expected. Thus, when the Supervisor told Grievant to perform her job better during the interim evaluation, that instruction lacked sufficient specificity to justify issuance of a Group II Written Notice.[3]

Grievant did not fail to follow the Supervisor's instruction regarding calculating the ten percent salary increase. Grievant attempted to perform the request; she simply did not do so adequately.

The Agency presented evidence of several separate and unrelated deficiencies in Grievant's work performance. The Agency could have treated these errors separately and issued separate Group Notices for the various offenses. Instead, the Agency aggregated separate behavior into one group notice. An agency may not take separate actions otherwise constituting Group I offenses and combine them into a single Group II offense. An agency may not do so for two reasons.

First, DHRM Policy 1.60 does not authorize this practice. DHRM Policy 1.60 authorizes discipline based on the accumulation of separate active written notices. However, it does not authorize accumulation of separate behavior into a single written notice with a higher level of discipline than would otherwise be permitted by policy.

Second, aggregating behavior in order to elevate the level of the disciplinary action results in an extension of the active life of the disciplinary action. For example, if an employee were to receive two Group II Written Notices on a particular day, those notices would expire after three years. If the employee received a Group I Written Notice in the fourth year, the employee could not be removed based on the accumulation of active disciplinary action. On the other hand, if an agency aggregated two Group II Written Notices into a single Group III Written Notice[4], and the employee

[3] Another difficulty with the evidence presented is that the Agency failed to document Grievant's interim evaluation. Although the Agency was not required to do so, its failure to do so reduced the quality of the evidence establishing what specific instructions were given to Grievant.

[4] This illustration assumes the agency chose not to terminate the employee because of receiving two Group II Written Notices or receiving one Group III Written Notice.

received a Group I Written Notice in the fourth year, the employee could be removed from employment based on the accumulation of disciplinary action. In short, an employee receiving two or more Group II Written Notices is not in the same position as an employee receiving one Group III Written Notice.

December 19, 2005 Written Notice -- Unsatisfactory Attendance

"Unsatisfactory attendance" is a Group I offense.[5] December 15, 2005 was a key deadline to ensure that positions for the Center would be finalized and submitted to the local newspapers for advertisement. Grievant knew or should have known that December 15, 2005 would be a crucial date for the Agency. She decided to stay at home because of the possibility of inclement weather. The Agency did not have its liberal leave policy in effect. The possibility of inclement weather did not become realistic until the very end of Grievant's work shift. She could have come to work and accomplished her tasks during the work day as did her co-workers. The Agency has established that Grievant's attendance on December 15, 2005 was unsatisfactory.[6]

The Agency contends Grievant should receive a Group II Written Notice instead of a Group I Written Notice. DHRM Policy 1.60 lists unsatisfactory attendance as a Group I offense, not as a Group II offense.[7] To the extent Grievant's behavior on an especially important day was an aggravating factor, the Agency's failure to call Grievant early in the morning is a mitigating factor. Once the Supervisor read Grievant's email stating that Grievant would not be at work, the Supervisor could have called Grievant and instructed her to come to work.

The Agency presented evidence that Grievant was frequently late and/or absent from work. The Agency failed to present specific dates of absence or times of arrival and departure. Grievant denies the allegation. It is unclear to what extent Grievant was notified of the Agency's concerns about her attendance or tardiness.[8] Within this context, it is unclear whether Grievant was late or absent on dates other than December 15, 2005.

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[5] DHRM Policy 1.60(V)(B)(1)(a).

[6] The first page of the Written Notice also mentions recurring unscheduled absences, unscheduled early departures, etc. The attachment to the Written Notice focuses on Grievant's failure to work on the December 15, 2005.

[7] Grievant did not violate any written leave policy because the Agency did not require pre-approval for unplanned leave. By sending an email to the Supervisor, Grievant complied with the Agency's expectation for notice of absence.

[8] The Supervisor contends that during the June 2005 verbal evaluation, the Supervisor told Grievant her attendance was terrible and should be improved. Yet, the Supervisor did not inform Grievant on what dates she was absent or late prior to the June 2005 evaluation and did not attempt to monitor Grievant's attendance after June 2005. There is no way to verify the Agency's opinion that Grievant's attendance did not improve.

December 19, 2005 Written Notice -- New Facility Center

"Failure to … perform assigned work" is a Group II offense.[9] Grievant was assigned the task of managing the establishment of new positions at two newly created Centers. Grievant disregarded so many of the tasks necessary to complete the project that she effectively abandoned it. The Agency has presented sufficient evidence to support its issuance of a Group II Written Notice for failure to perform assigned work.

This is not a case where Grievant gave her best efforts to complete the task and simply could not do the work. In this instance, Grievant misplaced key documents. She failed to monitor the work of her subordinates. She misrepresented the status of the assignment to other key employees. She disregarded the deadline for having the positions submitted for advertisement.

Performance Evaluation

DHRM Policy 1.40 governs Performance Planning and Evaluation. State agencies use this policy to evaluate the work performance of employees. Each evaluation should include an overall performance rating that may be Below Contributor, Contributor, or Extraordinary Contributor. An employee whose work "fails to meet performance measures" should receive a Below Contributor rating. "To receive this rating, an employee must have received at least one documented Notice of Improvement Needed/Substandard Performance form within the performance cycle." A performance cycle is "[t]he annual cycle during which an employee's supervisor documents performance, usually beginning October 25th of each year."

The Agency's performance evaluation cycle was from October to October of each year. Grievant's 2004-2005 performance cycle began October 25, 2004 and ended October 24, 2005.[10] Grievant received a Notice of Improvement Needed on October 25, 2005 which would be the first day of the subsequent performance cycle (i.e. 2005-2006). Thus, the Agency did not provide Grievant with a Notice of Improvement Needed during the 2004-2005 performance cycle and may not issue her an evaluation with a Below Contributor rating. The Agency must revise Grievant's performance evaluation to show an overall rating of Contributor for the 2004-2005 performance period.

[9] DHRM § 1.60(V)(B)(2)(a).

[10] The Agency did not present any documents or testimony showing that Grievant was notified that the date of her performance cycle was being extended or would otherwise vary from beginning on October 25th. The Agency was well aware of Grievant's poor performance on June 15, 2005 when the Supervisor gave Grievant a verbal interim evaluation. Grievant's poor performance was ongoing and, thus, there is no reason to believe the Agency could not have provided Grievant with the Notice of Improvement Needed in July or August. Providing Grievant with notice prior to the end of the performance cycle would have afforded her some opportunity to improve her performance prior to the conclusion of the performance cycle. By waiting to the last minute to issue the Notice, the Agency denied Grievant an opportunity to salvage her work performance.

Retaliation

An Agency may not retaliate against its employees. Retaliation is defined by Section 9 of the Grievance Procedure Manual as: "Actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority (e.g. 'whistleblowing')." To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;[11] (2) suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity.

Grievant contends the Agency retaliated against her because she filed a compliant with the U.S. Equal Employment Opportunity agency. Grievant filed her complaint in the latter part of 2003. Grievant's argument fails because the decision to take disciplinary action and the level of discipline issued was determined by the Supervisor. The Supervisor did not begin employment with the Agency until August 10, 2004. The Supervisor was not aware of Grievant's prior EEO claim. Grievant brought the matter to the Supervisor's attention as part of this grievance process. Managers within the Agency (e.g. the Vice President for Finance and Administration) who knew of Grievant's prior EEO claim did not cause or exacerbate the disciplinary actions against Grievant. There is no basis to conclude that the Agency retaliated against Grievant for engaging in the protected activity of filing and EEO claim.

Grievant contends the Agency retaliated against her because the Controller believed Grievant had assisted another employee who had filed a claim accusing the Controller of improper behavior. Grievant did not assist the co-worker. Grievant's argument fails because the Controller had little, if any, involvement in the disciplinary action against Grievant. There is no reason to believe the Controller's opinion of Grievant regarding assistance to a co-worker had any influence on the issuance of disciplinary action or level of disciplinary action taken against Grievant.

The evidence presented showed that the Agency took disciplinary action against Grievant because its managers believed Grievant had acted contrary to the Standards of Conduct.

Mitigation

Grievant contends the disciplinary action should be mitigated. *Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with

[11] *See* Va. Code § 2.2-3004(A)(v*)*. Only the following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

rules established by the Department of Employment Dispute Resolution…."[12] Under the EDR Director's *Rules for Conducting Grievance Hearings*, the Hearing Officer may mitigate based on considerations including whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action, and (3) the disciplinary action was free of improper motive. The *Rules* further require the Hearing Officer to "consider management's right to exercise its good faith business judgement in employee matters. The agency's right to manage its operations should be given due consideration when the contested management action is consistent with law and policy." In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

In conclusion, the Agency was slow to take disciplinary action against Grievant. For example, on May 5, 2005, an employee complained about Grievant's "unprofessional and down right rude behavior towards me". The Agency took no disciplinary action against Grievant. Once the Agency concluded it could no longer tolerate Grievant's work performance, it took disciplinary action, but overstated the level of disciplinary action for two of the offenses. Grievant should take notice that upon the issuance of another Written Notice while the three prior notices remain active would provide the Agency with the opportunity to remove her from employment.

Attorney's Fees

Grievant was removed from employment based on the accumulation of disciplinary action. The hearing decision reduces Grievant's disciplinary action to two Group I and one Group II Written Notices. Grievant has accumulated sufficient disciplinary action for the issuance of a five workday suspension but not for removal from employment. Grievant must be reinstated.

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, "In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because he is to be re-instated. There are no special circumstances making an award of attorney's fees unjust.[13] Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

DECISION

[12] *Va. Code § 2.2-3005.*

[13] The EDR Rules do not define when special circumstances exist.

For the reasons stated herein, the Agency's issuance on October 25, 2005 to the Grievant of a Group II Written Notice of disciplinary action is **reduced** to a Group I Written Notice. The Agency's issuance on December 19, 2005 of a Group II Written Notice for unsatisfactory attendance is **reduced** to a Group I Written Notice. The Agency's issuance on December 19, 2005 of a Group II Written Notice for failure to perform assigned work is **upheld**. Grievant is **suspended** for five workdays. The Agency is ordered to reinstate Grievant to her former position, or if occupied, to an objectively similar position. The Agency is directed to provide the Grievant with **back pay** after completion of a five workday suspension less any interim earnings that the employee received during the period of removal and credit for annual and sick leave that the employee did not otherwise accrue.

Grievant's request for relief regarding her performance evaluation is **granted**. The Agency is ordered to revise Grievant's recent performance evaluation so that she receives a rating of "Contributor" for her overall work performance.

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. Please address your request to:

   Director
   Department of Human Resource Management
   101 North 14th St., 12th Floor
   Richmond, VA 23219

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. Please address your request to:

   Director
   Department of Employment Dispute Resolution
   830 East Main St. STE 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. 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.[14]

[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/Carl Wilson Schmidt

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Carl Wilson Schmidt, Esq.
Hearing Officer

[14] 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: 8299 / 8300 / 8301 / 8302 -R

Reconsideration Decision Issued: May 10, 2006

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. "[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis …" to grant the request. The Agency, by counsel, submitted a request for reconsideration.

The Agency argues it was justified in issuing Grievant a Group II Written Notice when she failed to come to work on December 15, 2005 because of DHRM Policy 1.60(V)(A) which states:

> The offenses set forth below are not all-inclusive, but are intended as examples of unacceptable behavior for which specific disciplinary actions may be warranted. Accordingly, any offense that, in the judgment of agency heads, undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of this section.

The Agency did not initially proceed with this theory of discipline. They Agency cannot rely on this basis of discipline as an afterthought, given that the hearing has ended and original hearing decision has been issued. In addition, this policy states that the employee's alleged offense must be "treated in a manner consistent with the provisions of this section." Under Section V of DHRM Policy 1.60, Grievant's behavior on December 15, 2005 rose no higher than a Group I offense. Thus, DHRM Policy 1.60(V)(A) would not authorize the College President to elevate an offense that would otherwise be a Group I offense into a Group II offense.

The Agency argues Grievant failed to report for work as scheduled without proper notice to her supervisor. This argument fails. Grievant notified the Supervisor by email prior to the beginning of her scheduled work time. Grievant's method of notification was consistent with the Agency's customary employee practice of notifying supervisors of unexpected absences. In addition, Grievant notified the Supervisor prior to the time Grievant's leave actually began.

The Agency misinterprets the Hearing Officers comments regarding mitigation. The Agency failed to meet its burden of proof regarding Grievant's absence on December 15, 2005. The Agency did not prove Grievant's behavior was anything other than a Group I offense for unsatisfactory attendance. The decision-making process stops at this point.[15] It is not necessary to address whether mitigation applies since the Agency has not met its burden of proof to show a Group II offense occurred.[16] The Hearing Officer's comment was for the purpose of emphasis and to address a possible, but untenable, argument of the Agency. In particular, the Agency might argue (as it has done in this request for reconsideration) that Grievant's absence was of such significance so as to create an aggravating circumstance that would warrant issuance of a Group II Written Notice. Assuming for the sake of argument that the Hearing Officer were to agree with this argument (the Hearing Officer does not actually agree with the argument), then the Hearing Officer would find mitigating circumstances that would reverse the aggravating circumstances. Those mitigating circumstances would be that the Supervisor failed to inform Grievant that December 15, 2005 was a very important day and that Grievant needed to be at work. The Supervisor could have sent a reply email or made a telephone call, but chose to proceed without Grievant.

The Agency argues DHRM Policy 4.30 would not authorize an employee to send an email to her supervisor notifying the supervisor of an unscheduled absence. Nothing in DHRM Policy 4.30 prohibits an employee from sending an email to establish notice of an unscheduled absence. Grievant's email was successful in notifying the Supervisor that Grievant planned to be absent from work on December 15, 2005. The Supervisor had actual notice that Grievant would be absent on December 15, 2005. One of the objectives of DHRM Policy 4.30 is to ensure that supervisors are aware of when their employees may not be at work. Grievant satisfied that objective by sending an email to the Supervisor. Grievant's email was consistent with how the Agency permitted its employees to notify the Agency of unscheduled absences.

The Agency took several instances of poor behavior by the Grievant and instead of giving her Group I Written Notices immediately after the behavior occurred, the Agency waited for several months and then grouped the independent behavior into a single Group

[15] There is no shift of the burden as the Agency alleges.

[16] If the Agency had met its burden of proof to show that Grievant engaged in a Group II offense, then the question would arise as to whether that Group II should be mitigated to a Group I or removed altogether.

II Offense.[17] The Agency argues the Hearing Officer erred by "not treating each of these separate unrelated deficiencies as Group I offenses." This argument fails because the Hearing Officer does not have the authority to divide a Group II Written Notice into several Group I Written Notices. Agencies issue written notices. Hearing Officers do not issue written notices. In addition, Hearing Officers lack the authority to correct the mistakes of agencies who fail to properly interpret and apply the Standards of Conduct.

The Agency attempted to introduce evidence that Grievant had falsified her application(s) for employment at the College. The Hearing Officer rejected this evidence because Grievant had not been disciplined for falsification of documents. Grievant had not been issued a written notice for falsifying documents. Grievant had not received notice that the Agency intended to present evidence relating to falsification of documents.[18] The purpose of a hearing is not to try every sin of the employer or every sin of the employee. The issue before the Hearing Officer did not include whether Grievant falsified employment documents, and, thus, evidence regarding that issue was not relevant. Furthermore, the evidence offered by the Agency was not relevant to Grievant's credibility. The Hearing Officer assessed Grievant's credibility while Grievant testified. To the extent Grievant's testimony differed from the testimony of Agency witnesses, the Hearing Officer resolved the conflict in favor of the Agency. To be sure, if the Hearing Officer had resolved the conflict in favor of the Grievant, then no disciplinary action whatsoever would have been upheld. In this case, the Agency correctly concluded that Grievant's behavior justified taking disciplinary action, but the Agency failed to properly utilize the Standards of Conduct to assign an appropriate level of disciplinary action.

The Agency's request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, the Agency's request for reconsideration is **denied.**[19]

APPEAL RIGHTS

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

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[17] One of the benefits of issuing a Written Notice immediately after the behavior occurs is that the employee may become aware of a problem and change her behavior to avoid further written notices for the same behavior. In this instance, the Agency denied Grievant the opportunity to learn the seriousness of the Agency's concern about her behavior and then improve her behavior to avoid further disciplinary action.

[18] In addition, the Agency failed to comply with the Hearing Officer's order to exchange documents four workdays prior to the hearing. One purpose of that order is to avoid surprises at hearings. Grievant was clearly surprised when the Agency made it allegation for the first time at the conclusion of the hearing.

[19] The Agency asked the DHRM Director and the EDR Director to stay the Hearing Officer's decision. Neither Director has the authority to stay the Hearing Officer's decision. Nothing in statue or in the Grievance Procedure Manual authorizes the Hearing Officer to stay his hearing decision. The Agency's request cannot be granted.

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 DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

S/Carl Wilson Schmidt

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Carl Wilson Schmidt, Esq.
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of
The Northern Virginia Community College
November 27, 2006

The agency has requested an administrative review of the hearing officer's decision in Cases Nos. 8299, 8300, 8301 and 8302. The agency objects to the hearing decision because the hearing officer reduced the level of disciplinary action against the grievant. The agency contends, "DHRM Policy 1.60 provides that agency heads have the prerogative to decide whether employee misconduct undermines the agency's effectiveness. Because the hearing officer's opinion in this case effectively second-guessed the President's judgment as to the deleterious effects of the Grievant's absence of December 15, the opinion does not conform to written policy. The opinion also fails to apply the provisions of DHRM Policy 1.60 and DHRM Policy 4.30, Section III. In addition, the hearing and decision invited and relied on mitigating evidence offered by Grievant while rejecting aggravating evidence from NVCC…" The agency head has asked that I respond to this administrative review request.

FACTS

The Northern Virginia Community College (NVCC) employed the grievant as a Human Resource Manager until she was terminated effective December 19, 2005. NVCC officials issued to her three separate disciplinary actions. She challenged the disciplinary actions by filing three grievances. In addition, she filed a fourth grievance in which she challenged her performance evaluation. The Department of Employment Dispute Resolution (EDR) consolidated the four grievances so the same hearing officer could hear them at one hearing.

In a decision dated April 21, 2006, the hearing officer reduced the October 25, 2005 Group II Written Notice for unsatisfactory work performance and failure to follow her supervisor's instructions to a Group I Written Notice. In addition, he reduced the December 19, 2005 Group II Written Notice for unsatisfactory attendance to a Group I Written Notice. He upheld the December 19, 2005 Group II Written Notice for failure to perform assigned work and imposed a five-workday suspension. Summarily, the hearing officer modified the disciplinary action such that the grievant could not remain terminated. Thus, he ordered that NVCC reinstate the grievant and awarded her backpay. Finally, the hearing officer ordered that NVCC revise the grievant's performance evaluation to reflect an overall rating of "Contributor."

The agency requested that the EDR temporarily issue a stay order on the hearing officer's decision. In addition, the agency sought a reconsideration decision from the hearing officer as well as administrative reviews from the Department of Human Resource Management (DHRM) and from the EDR. The hearing officer denied

the agency's request to modify his decision in his reconsideration decision. In addition, EDR refused to issue a stay order on the hearing officer's decision.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found but the hearing officer determines that the disciplinary action is too severe, he may reduce the discipline. By statute, this Department has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This 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.

One issue before DHRM is whether agency heads have the prerogative to decide if employee misconduct undermines the agency's effectiveness. In addition, the agency raised concerns that the hearing officer failed to apply the provisions of DHRM Policy 1.60 and DHRM Policy 4.30, Section III. Finally, the agency states that the decision relied on mitigating evidence presented by the grievant but rejected aggravating evidence presented by NVCC.

DHRM Policy 1.60 gives agency heads the prerogative to determine if an employee's behavior undermines the agency's effectiveness. However, as stated above, hearing officers are authorized to make findings as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. Finally, if misconduct is found but the hearing officer determines that the disciplinary action is too severe, he may reduce the discipline.

Concerning the October 25, 2005, Group II Written Notice, the hearing officer determined that the agency improperly applied the Standards of Conduct and therefore reduced that Group II Written Notice to a Group I Written Notice. Specifically, the hearing officer emphasized that the grievant did not refuse to follow her supervisor's instructions; rather she performed her work poorly. In accordance with the Standards of Conduct, that is a Group I Written Notice. Agencies are not permitted to aggregate multiple Group I level violations in order to issue a Group II Written Notice. Concerning the second Group II Written Notice, the hearing officer determined that the evidence did

not support that the grievant had violated call-in procedures and therefore reduced the disciplinary action to a Group I Written Notice. Concerning the third Group II Written Notice, the hearing officer determined that the evidence supported the case against the grievant and upheld that disciplinary action. Since the grievant could not remain terminated, she was reinstated. This Agency has determined that the hearing officer was within the authority granted to him and did not err when he granted the above relief. He violated neither DHRM Policy 1.60 nor DHRM Policy 4.30, Section III, when he granted that relief. Concerning the hearing officer's inclusion of mitigating factors, the ruling issued by the EDR properly addressed that issue so this Agency will not revisit that matter.

Based on the above, DHRM finds no basis to interfere with the application of the hearing officer's decision.

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Ernest G. Spratley, Manager
Employment Equity Services

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

ADDENDUM TO DECISION OF HEARING OFFICER

In re:

Case No: 8299,8300,8301,8302-A

Addendum Issued: January 5, 2007

DISCUSSION

The grievance statute provides that for those issues qualified for a hearing, the Hearing Officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the Hearing Officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.[20] For an employee to "substantially prevail" in a discharge grievance, the Hearing Officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.[21]

Grievant's petition includes attorneys' fees for services rendered by his attorney prior to the qualification of the grievance for hearing. Not all grievances proceed to a hearing; only grievances that challenge certain actions qualify for a hearing.[22] The hearing officer may award relief only for those issues that qualify for hearing. Further, the statute provides that an agency is required to bear only the expense for the hearing officer and other associated *hearing* expenses including grievant's attorneys' fees.[23] Attorney fees incurred during the grievance procedure's Management Resolution Step stage are not expenses arising from the hearing. Accordingly, a hearing officer may award only those attorney fees incurred subsequent to qualification of the grievance for hearing and as a direct result of the hearing process.

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[20] Va. Code § 2.2-3005.1.A.

[21] § 7.2(e) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004. § VI(D) EDR *Rules for Conducting Grievance Hearings*, effective August 30, 2004.

[22] Va. Code § 2.2-3004.A. *See also* §4, Qualification for a Hearing, *Grievance Procedure Manual*, August 30, 2004.

[23] Va. Code § 2.2-3005.1.B.

Grievant's petition includes a request for attorney travel time. When an attorney travels to a hearing, he or she is not providing legal advice and counsel. Accordingly, travel time may not be reimbursed.

Grievant's petition reflects an inaccurate hourly rate. In August 2005, EDR increased the available hourly rate to $123 per hour which represents an increase consistent with the cost of living adjustment adopted by the Virginia Retirement System. Accordingly, grievant is awarded fees at the above rate.

AWARD

The grievant is awarded $5,289.00 (43 hours x $123 per hour) for attorney's fees incurred after the qualification date of February 14, 2006. The petition for travel time and for fees for services prior to the qualification date is denied.

APPEAL RIGHTS

If neither party petitions the EDR Director for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the EDR Director issues a ruling on the propriety of the fees addendum, and if ordered by EDR, the hearing officer has issued a revised fees addendum, the original hearing decision becomes "final" as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

S/Carl Wilson Schmidt

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Carl Wilson Schmidt, Esq.
Hearing Officer