Issue: Two Group III Written Notices with suspension (falsification of state documents, falsifying an annual leave record, falsifying a leave activity reporting form, and failing to sign out); Hearing Date: 10/10/06; Decision Issued: 10/17/06; Agency: DCE; AHO: David J. Latham, Esq.; Case No. 8429; Outcome: Employee granted partial relief; **Administrative Review: DHRM Ruling Request received 10/31/06; DHRM Ruling issued 03/29/07; Outcome: HO's decision affirmed.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8429

Hearing Date: October 10, 2006
Decision Issued: October 17, 2006

PROCEDURAL ISSUES

On the evening prior to the hearing, grievant's attorney requested that the hearing be postponed for three days to obtain additional documents from the agency. The hearing officer denied the request because it appeared that the document issue could be resolved at the hearing and through the admission of the rest of the evidence. At the hearing, it was determined that grievant sought documents relating to dates that were not part of the disciplinary actions. The hearing officer concluded that the evidence submitted during the hearing was sufficient to render a decision without additional documentation.

At the hearing, the agency agreed to remove from one written notice both the offense date of December 12, 2005, and the charges that: 1) grievant failed to sign out on eight different times and; 2) failed to record leave.

APPEARANCES

Grievant
Attorney for Grievant
One witness for Grievant

Attorney for Agency
Five witnesses for Agency

ISSUES

Did grievant's conduct warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue? Did the agency retaliate against grievant?

FINDINGS OF FACT

Grievant filed a timely grievance from two Group III Written Notices for falsification of state documents, falsifying an annual leave record, falsifying a leave activity reporting form, and failing to sign out on eight occasions.[1] As part of the disciplinary action, grievant was suspended from work for four days.[2] The grievance proceeded through the resolution steps; when the parties failed to resolve the grievance at the third step, the agency head qualified the grievance for a hearing.[3] The Virginia Department of Correctional Education (DCE) (Hereinafter referred to as agency) has employed grievant for 28 years as a teacher. His record as a teacher is good; he has been rated a "Contributor" on his most recent three performance evaluations and was commended for keeping accurate and neat records.[4] For purposes of the Fair Labor Standards Act (FLSA), grievant is an exempt employee and is excluded from the overtime provisions of the Act.[5] The standard work schedule for DCE personnel at the facility where grievant is employed is 7:45 a.m. to 4:15 p.m.[6]

Agency policy requires maintenance of an accurate log of DCE employees' presence within a facility in order to provide notification to the Department of Corrections or the Department of Juvenile Justice for safety procedures. The stated purpose of the policy is "to ensure that the DCE staff's presence and time spent at a facility is properly accounted [for]."[7] The log sheets are official records and are to be kept for five years. State policy provides that the regular workweek for full-time positions consists of a five-day, 40-hour per week schedule.[8] Agency policy is slightly more restrictive stating that, "It is the

[1] Agency Exhibit 7. Group III Written Notices, issued June 29, 2006.
[2] Although each written notice cites a four-day suspension, the dates of the suspension are the same and, therefore, the practical effect is that there was one four-day suspension.
[3] Agency Exhibit 9. *Grievance Form A*, filed July 24, 2006.
[4] Grievant Exhibit 3. Performance evaluations for 2005, 2004, and 2003.
[5] Grievant Exhibit 3. Employee Work Profile, effective October 2004.
[6] Agency Exhibit 3. Arrival Procedures.
[7] Agency Exhibit 1. Policy 6-1.17, *Documentation for Entering/Exiting Facilities*, October 17, 2003.
[8] Agency Exhibit 5. Department of Human Resource Management (DHRM) Policy 1.25, *Hours of Work*, revised April 2004.

policy of the Department of Correctional Education that all classified employees work a 40-hour week and an 8-hour day, exclusive of lunch and other breaks."[9]

During a staff meeting in November 2004 at which grievant was present, the principal reviewed agency policy 6-1.17 and reminded staff of the requirement to record their arrival and departure on the log.[10] In August 2005, these topics were again discussed and each staff member was given a copy of policy 6-1.17.[11] In October 2005, the principal sent an e-mail to all DCE staff again reminding them of the policy requirements and pointing out that the official time to use on the log is the clock in the warden's reception area. In January 2006, the principal required each staff person to initial a memorandum regarding the state *Hours of Work* policy.[12]

The dates of offense and relevant details for one of the written notices are:

- On July 28, 2005, grievant recorded his departure time as 3:56 p.m.; the next employee to sign out recorded his time as 4:00 p.m.
- On August 5, 2005, grievant logged his departure time as 4:00 p.m.; the next two employees logged their departure times as 3:50 p.m. and 3:55 p.m.
- On August 17, 2005, grievant logged out at 3:25 p.m.; the next person to leave was the principal who recorded his own departure at 3:15 p.m.
- On August 18, 2005, grievant recorded his departure at 3:50 p.m.; the next employee to leave logged out at 3:45 p.m.
- On October 19, 2005, grievant logged out at 4:00 p.m. while the next employee to leave logged out at 3:56 p.m.
- On March 13, 2006, grievant logged out at 4:00 p.m.; the next employee logged out at 3:50 p.m.
- On February 9, 2006, grievant certified that his leave record from December 20, 2004 through January 15, 2006 was correct. The agency asserts that the record was incorrect because grievant did not take leave on many of the days when he failed to sign out or logged in less than eight hours of work.

The dates of offense and relevant details for the second written notice are:

- On October 14, 2005, the institutional investigator observed grievant arriving at 8:07 a.m. but grievant recorded his arrival time as 7:50 a.m.

[9] Agency Exhibit 4. DCE Policy 1-7, *Uniform Work Week*, December 18, 1997.
[10] Agency Exhibit 2. Staff Meeting notes, Attachment 16 to Investigative Report, November 10, 2004.
[11] Agency Exhibit 2. Staff meeting notes, Attachment 17 to Investigative Report, August 24, 2005.
[12] Agency Exhibit 2. Memorandum from principal to staff, January 10, 2006.

- On October 27, 2005, the investigator saw grievant leave at 3:10 p.m. but grievant recorded his departure time as 3:30 p.m.
- At 8:05 a.m. on November 14, 2005, an employee observed grievant record his arrival time as 7:35 a.m.[13]

Over time, several employees including the principal, two vocational teachers, a program support technician (timekeeper), a transition specialist, and a Department of Corrections (DOC) sergeant (the institutional investigator) had noticed grievant signing in or out at incorrect times.[14] The principal first learned that grievant was entering incorrect times as early as 2003. The DOC sergeant had reported in writing to the principal the October 13 and 27, 2005 incidents.[15] The principal confronted grievant about this report; grievant became upset and stated that it was not the sergeant's business. The transition specialist sent an e-mail to the principal in November 2005 regarding grievant's falsification of the entry log.[16] The timekeeper had sent three e-mails to the principal reporting grievant's falsifications of the time logs.[17] After the last of these e-mails, the principal contacted the department's Legal and Internal Affairs Director and requested an investigation.

The investigation was conducted in May 2006 and completed on June 1, 2006. Grievant was given a due process letter and a chance to explain his position. While grievant was able to successfully explain several of the discrepancies found, there remained 10 dates for which he did not have a good explanation. Accordingly, discipline was issued on June 29, 2006.

Prior to the hearing, grievant's attorney had requested certain time logs from the agency from 2002, 2003, 2004, and 2005. The agency provided some time logs for 2005 but did not provide the logs from prior years. The agency advised grievant's counsel that the older logs had been destroyed, despite the policy requirement to retain such logs for five years.

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

[13] Agency Exhibit 2. Investigative report, with statements and logs, June 1, 2006.
[14] Agency Exhibit 2. Investigative report and witness statements contained therein.
[15] Agency Exhibit 2. Memorandum from sergeant to principal, October 27, 2005.
[16] Agency Exhibit 2. E-mail from specialist to principal, November 14, 2005.
[17] Agency Exhibit 2. Emails from timekeeper to principal, June 9, 2005, October 25, 2005, and March 15, 2006.

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 retaliation, the employee must present his evidence first and must prove his claim by a preponderance of the evidence.[18]

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. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Section V.B of Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.[19]

The agency has demonstrated, by a preponderance of evidence, that grievant falsified entries on the sign-in/out log sheet.

Grievant contends that the aggregate amount of time discrepancies is relatively small. Grievant reckons the aggregate time to be no more than 48 minutes; the agency's dates of offense amount to a total of 110 minutes. Even if the higher figure is more accurate, it amounts to less than two hours over the six months of records reviewed by the agency. However, the amount of time is not the issue in this case. The issue is whether grievant falsified official state documents. *Black's Law Dictionary* defines "falsify" as, "To counterfeit or forge;

[18] § 5.8, EDR *Grievance Procedure Manual*, Effective August 30, 2004.
[19] Agency Exhibit 8, Department of Human Resource Management (DHRM) Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

to make something false; to give a false appearance to anything." The word "falsify" means being intentionally or knowingly untrue. The element of intent may be inferred when a misrepresentation is made with reckless disregard for the truth.[20] There are no categories in the *Standards of Conduct* to differentiate smaller or greater falsification. Whether large or small, falsification in any degree is a Group III offense.

Grievant suggests that the differences in log times can be accounted for by possible carelessness in recording times or, forgetfulness when he failed to record sign-out times. Certainly, one instance of an incorrect entry could easily be attributed to carelessness, inadvertent error, or forgetfulness. However, the evidence in this case demonstrates that grievant had repeated discrepancies in recording his arrival and departure times. An examination of the pattern of these discrepancies reveals that, in every case, *the discrepancy made it appear that grievant worked more time than he actually had*. Either he arrived later than the time he recorded, or he left earlier than his actual departure time. If grievant had simply misread the clock, at least some of the erroneous times should have been after his actual arrival time or prior to his departure time. The fact that there were no such discrepancies leads to the unavoidable conclusion that grievant knowingly and deliberately misstated times in such a way as to inure in his favor. Grievant contends that he had nothing to gain from doing this because he is an exempt employee. However, as a state employee, grievant is required to work an eight-hour day and 40-hour week. The pattern demonstrates that grievant attempted to make it appear that he had worked more time than he actually had worked.

Grievant correctly observes that there are similar discrepancies on the log sheets for other employees.[21] Although only three such discrepancies were pointed out by grievant on the time sheets entered as evidence, it may reasonably be concluded that there are more such discrepancies on the six-month quantity of time logs reviewed by the agency. The agency has not disciplined any other employees for their discrepancies.

Grievant also argues that, on occasion, he performed work-related duties after he had left the facility. He contends that between his time at the facility and his off-facility tasks, he works at least 40 or more hours per week, thereby satisfying the requirements of state and agency policies on hours of work. Grievant did not present any evidence to corroborate his contention. The principal agreed that grievant does sometimes perform work-related duties after leaving the facility. However, there is no evidence as to how often this occurs and whether in any given week, grievant actually works 40 or more hours.

Grievant argues that the time log's purpose is one of safety, i.e., in the event of an inmate disturbance at the facility, DOC personnel will be able to quickly determine which employees are in the facility at the time the disturbance

[20] *Haebe v. Department of Justice,* 288 F.3d 1288, 1306 Fn. 35 (Fed. Cir. 2002).
[21] Grievant Exhibits 1 & 2. Log sheets for June 3, 2005 and June 14, 2005, respectively.

begins. Based on the language in the policy, grievant's interpretation appears to be correct. However, this does not mean that the document cannot be used for other legitimate purposes. In this case, DCE used the log to assure that employees were actually present eight hours per day. DCE management is responsible for assuring that its employees comply with the aforementioned work hours policies. The time log is a convenient method of checking compliance with those policies. In fact, grievant was well aware from staff meetings and the principal's October 27, 2005 e-mail that the logs were being used for this purpose.

Moreover, even if the logs were not being used for timekeeping purposes, the fact remains that grievant is responsible to complete his log entries accurately. In the event of an inmate disturbance, DOC would rely on the times of entry/departure to ascertain whether an employee is inside or outside the facility. When grievant logs times that are up to 30 minutes different from the actual time, DOC personnel would have to assume he was inside the facility when, in fact, grievant was outside. This would cause unnecessary confusion and difficulty if inmates took hostages. This possibility is the *raison d'être* of the documentation policy. In addition, official state records are subject to use in litigation unrelated to grievant. It is essential that the records be accurate and not subject to impeachment because of either sloppy recordkeeping or deliberate falsification.

Grievant asserts that the DOC investigator who reported grievant does not like him and has been uncooperative regarding grievant's use of a DCE camera. The preponderance of evidence as well as the investigator's demeanor supports grievant's assertion. The investigator also gave grievant a "hard time" when grievant sought to obtain the camera for valid business reasons. About three years ago, the investigator falsely accused grievant of bringing contraband into the facility. However, the investigator's reporting of discrepancies on two dates in October 2005 is generally consistent with the discrepancies reported on other dates by different employees. Thus, even if one discounts the investigator's testimony, the preponderance of evidence shows that grievant falsified entries on the log sheets.

During his testimony, grievant noted that he is the only minority teacher in his region of the state. Grievant did not allege racial discrimination in his grievance but inferred that his race could be a factor in the disciplinary action. Other than inference, grievant presented no testimony or evidence to support the suggestion that race could be a factor in this case. He also acknowledged that the last time he heard a racial remark by a DCE employee was seven or eight years ago.

Finally, the agency contends that grievant falsified his annual leave record when he certified on February 9, 2006 that his leave record from 2004-2006 was correct. Grievant has acknowledged that on some dates he may have forgotten to sign in and out. However, the agency has not proven by a preponderance of evidence that grievant did not work on those days. In fact, the agency did not

require grievant to use leave time for the dates in question, and withdrew this charge during the hearing. Under these circumstances, grievant cannot be held accountable for *deliberate falsification* of the leave record summary form.

Retaliation

Grievant asserts that the agency retaliated against him because, in 2004, grievant was the lone dissenter on an interview panel's hiring decision, and because he reported inappropriate remarks by other panel members. Retaliation is defined 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.[22] To prove a claim of retaliation, grievant must prove that: (i) he engaged in a protected activity; (ii) he suffered an adverse employment action; and (iii) a nexus or causal link exists between the protected activity and the adverse employment action. Grievant meets the first two prongs of this test because reporting of inappropriate remarks by an interview panel is a protected activity, and, a disciplinary action is an adverse employment action. However, in order to establish retaliation, grievant must show a nexus between his reporting of remarks and the disciplinary action two years later. Grievant has not established any such connection between the two events. However, even if such a nexus could be found, the agency has established nonretaliatory reasons for the disciplinary action. For the reasons stated previously, grievant has not shown that the agency's reasons for issuing discipline were pretextual in nature.

Mitigation

The normal disciplinary action for a Group III offense is a Written Notice and removal from state employment. The policy provides for reduction of discipline if there are mitigating circumstances such as (1) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or (2) an employee's long service or otherwise satisfactory work performance. In this case, grievant has both long service and otherwise satisfactory work performance. There are other mitigating conditions in this case. First, the agency failed to comply with its own policy when it destroyed records prior to the end of the five-year retention period. Some of these records could have helped bolster grievant's contention that other employees had erroneous time entries. Second, the agency has neither disciplined any other employees for their erroneous entries nor investigated the log sheet entries of other employees to determine whether discipline is warranted.

Third, the agency has been aware of grievant's erroneous entries for at least three years but did not counsel him until October 2005 when the principal directly confronted him about entries during that month. Thus, the agency knew of grievant's offenses for several years but failed to take any corrective action. One of the basic tenets of the *Standards of Conduct* is the requirement to promptly issue disciplinary action when an offense is committed. As soon as a

[22] § 9, EDR *Grievance Procedure Manual*, effective August 30, 2004.

supervisor becomes aware of an employee's unsatisfactory behavior or performance, or commission of an offense, the supervisor and/or management should use corrective action to address such behavior.[23] Management should issue a written notice as soon as possible after an employee's commission of an offense.[24] One purpose in acting promptly is to bring the offense to the employee's attention while it is still fresh in memory. A second purpose in disciplining promptly is to prevent a recurrence of the offense.

The agency took grievant's length of service and otherwise satisfactory performance into account when it suspended him in lieu of terminating his employment. However, in view of the additional mitigating circumstances discussed *supra* (agency destruction of official records and failure to discipline promptly), grievant should receive additional relief. Because of the failure to discipline promptly, the written notice that includes the earliest dates of offense is deemed to have been issued too far after the fact. This is not to say that grievant's falsifications on those dates are excused – they are not. However, in fairness to grievant, it is concluded that the Group III Written Notice for the earlier dates must be rescinded.

DECISION

The decision of the agency is modified.

The first Group III Written Notice issued on June 29, 2006 is hereby RESCINDED.[25]

The second Group III Written Notice issued on June 29, 2006 and the four-day suspension are hereby AFFIRMED.[26]

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.

[23] Agency Exhibit 8. Section VI.A.
[24] Section VII.B.1. *Id.*
[25] This written notice is for dates of offense: 7/28/05; 8/5/05; 8/17/05; 8/18/05; 8/19/05; 3/13/06; 12/12/05; and 2/9/06.
[26] This written notice is for dates of offense: 10/14/05; 10/27/05; and 11/14/05.

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 one copy of any appeal to the other party and one copy to the Director of the Department of Employment Dispute Resolution. 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.[27] 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.[28] You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution.

[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]

[27] 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).

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

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David J. Latham, Esq.
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of
The Virginia Department Correctional Education
March 29, 2007

The grievant has requested an administrative review of the hearing officer's Case No. 8429. The grievant objects to the hearing decision on the basis that he believes that the decision results in disparate treatment towards him. The agency head of the Department of Human Resource Management has requested that I respond to this administrative review request. This agency (DHRM) will not disturb this ruling for the following reasons.

FACTS

The Department of Correctional Education (DCE) employs the grievant as a teacher for more than 28 years in one of the Correctional Institutions. For safety purposes, he and other DCE employees must sign in and sign out of whichever institution they are working. By all accounts, his record as a teacher was good. He had been commended on his evaluations for keeping accurate and neat records. For purposes of the Fair Labor Standards Act, he is an exempt employee and is excluded form the overtime provisions of the Act. The DCE policy requires that employees work a 40-hour week and an 8-hour day, exclusive of lunch and other breaks.

At a November 2004 staff meeting at which the grievant was present, the principal of the school reviewed agency policy that spelled out the work hours stipulations and the need to record the arrival and departure times on the log. In August 2005, these same topics were discussed. In October 2005, the principal sent an email to all DCE staff again reminding them of the policy requirements and pointing out that the official time to use was based on the clock in the warden's reception area. In January 2006, the principal required each staff person to initial a memo regarding the state *Hours of Work* policy.

Based on an examination of the logbook and through observation by other employees, DCE officials concluded that the grievant was falsifying his sign in and sign out times and failing to complete properly leave records. More specifically, he entered times in the logbook that were earlier than the times he actually entered the institution and times which were actually later than the times he actually left the institution. An investigation was conducted and as a result, it was confirmed that he did enter inaccurate times on at least ten occasions. Based on that information, agency officials issued to him two Group III Written Notices for falsification of state documents, falsifying an annual leave record, falsifying a leave activity reporting form, and failing to sign out on eight occasions. He was also suspended from work for four workdays.

The relevant policy, the Department of Human Resource Management's Policy No.1.60, states that it is the Commonwealth's objective to promote the well-being of its employees in the workplace and to maintain high standards of professional conduct and

work performance. This policy also sets forth (1) standards for professional conduct, (2) behavior that is unacceptable, and (3) corrective actions that agencies may impose to address behavior and employment problems. Section V, Unacceptable Standards of Conduct, of that policy sets forth, but is not all-inclusive, examples of unacceptable behavior for which specific disciplinary action may be warranted. In instances of disciplinary action, the hearing may sustain, reduce or rescind in total the disciplinary action. In addition, agencies may supplement this policy to address issues specific to the operation of their agencies.

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, the Department of Human Resource Management 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.

In the instant case, the evidence supports that the grievant entered times on the log- book that did not reflect the times he actually signed in and signed out. In addition, the evidence shows that he did not always complete leave forms to account for the times when he was not working. He filed a grievance challenging the disciplinary action, but the agency did not change its disciplinary action. In his decision, the hearing officer rescinded one of the Group III Written Notices but let the other one stand with the four workday suspension.

Regarding the decision to reduce the disciplinary action, the hearing officer stated, in part, the following:

> First, the agency failed to comply with its own policy when it destroyed records prior to the end of the five-year retention period. Some of these records could have bolstered the grievant's contention that other employees had erroneous time entries. Second, the agency has neither disciplined any other employees for erroneous entries nor investigated the log sheet entries of other employees to determine whether discipline is warranted. Third, the agency has been aware of grievant's erroneous entries for at least three years but did not counsel him until October 2005 when the principal directly confronted him about the entries during that month. Thus, the agency knew of grievant's offenses for several years but failed to take any corrective

> action. One of the basic tenets of the Standards of Conduct is the requirement to promptly issue disciplinary action when an offense is committed….

Thus, due to the three mitigating factors, the hearing officer rescinded the Group III Written Notice associated with falsifying sign in and sign out times but upheld the Group III Written Notice associated with falsifying leave forms. It is the opinion of this Department that DHRM Policy No. 1.60 provides sufficient guidance regarding applying disciplinary action. Given that the hearing officer has the authority to decide a grievance based on the evidence, this Department has determined that the he properly applied the provisions of Policy 1.60 when he rescinded one Group III Written Notice and let stand the other one with the four-day suspension. Thus, this Department has no basis to interfere with the execution of this decision.

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Ernest G. Spratley
Manager, Employment Equity Services