Issue: Group III Written Notice with termination (failure to follow policy); Hearing Date: 03/26/08; Decision Issued: 04/08/08; Agency: DCE; AHO: Carl Wilson Schmidt, Esq.; Case No. 8797; Outcome: No Relief – Agency Upheld in Full; **Administrative Review: Reconsideration Request received 04/22/08; Reconsideration Decision issued 04/30/08; Outcome: Original decision affirmed; Administrative Review: DHRM Admin Review request received 04/22/08; DHRM Admin Review issued 05/12/08; Outcome: AHO's decision affirmed.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8797

Hearing Date: March 26, 2008
Decision Issued: April 8, 2008

PROCEDURAL HISTORY

On October 16, 2007, Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to follow a supervisor's instructions and failure to follow Agency policy.

On October 29, 2007, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On February 28, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 26, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Counsel
Witnesses

ISSUES

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

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 retaliated against Grievant?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. 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 Department of Correctional Education employed Grievant as a Teacher at one of its Facilities. He had been employed by the Agency for over 17 years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Grievant worked in a classroom. He had a desk with a computer on top of the desk and a printer connected to the computer ("teacher's computer"). Also in the classroom were two large tables that would accommodate students sitting in a group. Along the side of one wall were approximately six computers. The computers along the wall were designated for use by student inmates ("student computers"). The student computers did not have printers attached to them for security reasons. For example, if printers were attached to the student computers, inmates could print off gambling ballots and circulate those within the Facility.

On March 22, 2007, the Regional Principal spoke with Grievant regarding Grievant's military orders and DCE computer policy. The Regional Principal informed Grievant that inmates were not allowed to use the teacher's computer for any reason. Grievant said that he had let an inmate use his computer but he sat right next to the inmate as the inmate used his computer. The Regional Principal told Grievant that this

was not acceptable, against policy, and should never happen again. Grievant acknowledged the Regional Principal's instruction and wrote a reminder note to himself on the topic.

On April 11, 2007, Grievant's computer stopped working. Grievant lost the information he had on that computer.

On April 25, 2007, Grievant wrote a note to the Assistant Regional Principal stating:

> Help! Just a reminder that my computer will not do the monthly report. Any help would be appreciated.[1]

On July 16, 2007, Grievant wrote a memorandum to the Regional Principal asking that his email account be re-established. Grievant also wrote:

> If that isn't enough, our computers are in bad shape. We can use some help here, as all of my files were lost back in April. I do not want to pour information into another computer that's about to die.[2]

At some point, the computer on Grievant's desk stopped working. He asked for a replacement. Grievant was instructed to designate one of the student's computers to serve as his computer until a new computer could be obtained. Grievant selected one of the six student computers located along the wall and moved it to his desk. He was unable to have that computer connected when it was located on his desk. He sought assistance from others, but no one was able to connect computer to make it work. Grievant moved the computer back to its original location as one of six computers along the wall. Grievant attached the printer to the student's computer and began using it as the "teacher's" computer. He attempted to protect the computer's access with a password but because of the age of computer, the password could be circumvented.

On October 16, 2007, Grievant had eight students in his classroom. Several of Grievant's students had finished their book reports. The Inmate finished all of her assignments for the class. She had finished her book report and was ready to graduate from the class.[3] At approximately 1:45 p.m., the Inmate approached Grievant with a handwritten letter she had drafted to a State Senator about a pending Bill regarding prison literacy. She wanted Grievant to look at the letter. Grievant told her to type the letter and then he would look at it.[4]

---

[1] Grievant Exhibit 1.

[2] Grievant Exhibit 1.

[3] The class was scheduled to end at 2:45 p.m. that day.

[4] The Inmate knew she was not to use the teacher's computer. On July 12, 2007, she signed a form entitled Computer Usage Rules for Inmates in All DCE Settings" stating, "I will not use any staff computer without permission."

Grievant was sitting at one of the tables helping three students solve math problems. He was sitting with his back to the entrance doorway and his right shoulder was in the direction of the teacher's computer located along the wall. He was not facing the teacher's computer.

The Inmate took her handwritten letter to the teacher's computer and began typing the letter using that computer. The Regional Principal walked into Grievant's classroom and noticed the Inmate working on the teacher's computer contrary to DCE policy.

Typing a letter to a State Senator was not part of the Inmate's Personal Learning Plan or assignment sheet.

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."[5] 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." Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal."

DCE Policy 4-1 (VI) (G) provides:

> DCE teachers shall be responsible for the student use of computers in the classroom setting.
>
> 1. Students shall be limited to using computers for instructional purposes that are stated in the student's learning plan or assignment sheets. Inmates who have been designated as "instructional aides" can only perform instructional tasks. Other inmate aides cannot perform administrative tasks that would allow the inmate aides access to sensitive or personal information of employees and/or other inmates. Furthermore, inmate aides may not use a computer that has been restricted in its use to DCE employees or is located in the school administrative offices.
>
> 2. A DCE teacher or other appropriate DCE staff shall be present at all times during a student's use of the computer.

---

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

Violation of DCE Policy 4-1 "may result in disciplinary action and may include, but not be limited to, the suspension of computer privileges, termination of employment, and/or legal action."

DCE Policy 6-12 (VI) (A) provides:

> In classrooms or computer laboratories, the use of DCE computers by students or aides is:
>
> 1. supervised at all times by a DCE teacher who is physically present at the time of use; and
>
> 2. limited to use for instructional purposes as stated in the student's learning plan or assignment sheet.

The Agency argued that Grievant engaged in inappropriate behavior because he failed to password protect the teacher's computer. This argument is unsupported by the evidence. Grievant testified that he attempted to password protect the teacher's computer but the computer would not "take" the password. Grievant's testimony is supported by the poor condition of the computers in the classroom. The Hearing Officer finds that Grievant did not engage in inappropriate behavior with respect to password protecting the teacher's computer.

The Agency argued that Grievant violated Agency policy by permitting the Inmate to use the teacher's computer. Grievant denied authorizing the Inmate to use the teacher's computer. The Agency failed to present sufficient evidence to show that Grievant knew that the Inmate was using the teacher's computer.[6] Although the Agency's policies indicate that Grievant is responsible for student use of computers in the classroom, nothing in the policies places Grievant on notice that he would be held responsible for a student's use of a computer even when Grievant was not aware that the student was using the computer. The Hearing Officer finds that Grievant did not act contrary to the Agency's policies governing inmate use of computers.

The Agency argued that Grievant failed to comply with a supervisor's instruction not to allow inmates to use the teacher's computer. Grievant did not act contrary to a supervisor's instruction because he did not knowingly permit the Inmate to use the teacher's computer.

DCE Policy 4-1 limited the use of DCE computers by students to use for instructional purposes as stated in the student's learning plan or assignment sheet. Writing and typing a letter to a State Senator was not part of the Inmate's learning plan

[6] The Agency argued Grievant admitted he had let inmates use the computer on occasion. The evidence does not support this conclusion. Grievant has not admitted permitting the Inmate to use the teacher's computer.

or assignment sheet. The Inmate had completed Grievant's course and all of her duties listed in her learning plan. By suggesting to the student that she type the letter on a computer (regardless of which computer used), Grievant acted contrary to DCE Policy 4-1 thereby justifying disciplinary action. Under that policy, disciplinary action including removal from employment is authorized. Accordingly, the Agency has presented sufficient evidence to support the issuance to Grievant of a Group III Written Notice with removal.

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 rules established by the Department of Employment Dispute Resolution…."[7] Under the *Rules for Conducting Grievance Hearings,* "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes 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 among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant contends the disciplinary action should be mitigated. He argues that the Inmate had finished all of her coursework but requested instruction. Since he is a teacher, it would be appropriate for him to provide additional instruction to a student. This argument fails. The Agency's policy authorizes student use of computers as additional instruction but only if that additional instruction is part of a student learning plan or assignment sheet. If the Hearing Officer were to mitigate the disciplinary action because Grievant was acting to provide additional instruction, the effect would be for the hearing officer to rewrite the Agency's policy to delete the requirement that the additional instruction be part of a student learning plan or assignment sheet. The Hearing Officer will not rewrite Agency policy. In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;[8] (2) suffered a

[7] *Va. Code § 2.2-3005.*

[8] *See* Va. Code § 2.2-3004(A)(v) and (vi). 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.

materially adverse action[9]; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.[10]

Grievant testified that on October 12, 2007, he told the Regional Principal that he disagreed with the Regional Principal at that he was "going to send this information to Richmond." Grievant subsequently filed a grievance against the Regional Principal. The Regional Principal first learned that Grievant had filed a grievance against him shortly before the hearing and well after the Regional Principal issued the Written Notice.

Grievant did not engage in a protected activity on October 12, 2007. Grievant did not tell the Regional Principal that he intended to file a grievance against the Regional Principal; Grievant simply said he would complain about the Regional Principal. Grievant did not specify the nature of his complaint against the Regional Principal and did not provide a copy at the hearing of the subsequent written grievance filed. Grievant has not presented sufficient evidence to show that the disciplinary action against him was the result of retaliation.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **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.

[9] On July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, the EDR Director adopted the "materially adverse" standard for qualification decisions based on retaliation. A materially adverse action is, an action which well might have dissuaded a reasonable worker from engaging in a protected activity.

[10] This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

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 all of your appeals to the other party and to the EDR Director. 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.[11]

[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

Carl Wilson Schmidt, Esq.
Hearing Officer

[11] 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: 8797-R

Reconsideration Decision Issued: April 30, 2008

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.

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it "newly discovered." Rather, the party must show that:

> (1) the evidence is newly discovered since the date of the Hearing Decision; (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

Grievant has not offered any new evidence. Grievant has not argued that the Hearing Officer misapplied law. Grievant argues the Hearing Officer failed to properly apply the Standards of Conduct and failed to properly mitigate the disciplinary action.

Grievant argues that allowing a student to "use a computer outside the scope of the student's learning plan can hardly be considered an infraction of such a serious nature that discharge is warranted on a first occurrence." Grievant adds that "[c]harging him with a Group III under the circumstances here subjected him to disparate treatment and was excessive under the provisions of the Standards of Conduct. The Agency can

show no other situation where a long-term Agency employee was [discharged] on a first offense for such an infraction as this."

Disciplinary action may be reduced by a Hearing Officer under two theories. First, if the Agency fails to meets its burden of proof to show a Group III offense, then the discipline may be reduced to a lower offense. Second, if the Agency meets its burden of proving a Group III offense, the Hearing Officer may reduce that disciplinary action if mitigating circumstances exist.

In this case the Agency has met its burden of proof by showing that Grievant acted contrary to an Agency policy. For an agency to meet its burden of proof, it is not necessary for the Agency to show similar situations where other long-term employees were discharged. Acting contrary to an Agency policy usually is a Group II offense for failure to follow established written policy. In this case, however, the Agency has elevated failure to follow Policy 4-1 from a Group II offense to a Group III offense. The Department of Human Resource Management has recognized agencies authority to elevate the level of discipline when that level is specified in the agency's policy and is consistent with DHRM policy. The Agency's decision to elevate failure to follow Policy 4-1 to a Group III offense is not inconsistent with DHRM policy.

The Hearing Officer has the authority to mitigate disciplinary action only to the extent authorized by State statute and as specified in the *Rules for Conducting Grievance Hearings*. Under the *Rules for Conducting Grievance Hearings,* "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the Hearing Officer had unfettered discretion, the outcome of this case and many other cases may very well be different. The Hearing Officer does not have unrestricted discretion and must defer to the Agency unless the Agency's discipline exceeds the limits of reasonableness. The Hearing Officer must accept the Agency's policies as they are written and may not issue a decision which serves to re-write Agency policy. In this case, Grievant acted contrary to Policy 4-1 by teaching information that was not on the student's lesson plan or otherwise authorized by the Agency. The fact that Grievant's motive was in furtherance of his objective of teaching, does not make his actions any less contrary to Agency policy. Grievant had notice of the Agency's policy which states that violation of Policy 4-1 could result in removal from employment. In this case, Grievant's length of service is not in itself sufficient to establish a basis to mitigate disciplinary action. When these facts are considered, there is no basis in the record upon which the Hearing Officer can conclude that the discipline exceeds the limits of reasonableness.

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

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 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

_____

Carl Wilson Schmidt, Esq.
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of
Virginia Department of Correctional Education

May 12, 2008

The grievant, through his representative, has requested an administrative review of the hearing officer's decision in Case No. 8797. The grievant was issued a Group III Written Notice and separated from his employment with the Department of Correctional Education. He filed a grievance to have the disciplinary action reversed. When he did not receive the relief he was seeking during the management steps, he requested a hearing before an administrative hearing officer. In his decision, the hearing officer upheld the Group III Written Notice and the termination. The grievant presented arguments in an attempt to support his claim that the discipline is not consistent with state policy in that it upholds the penalty of discharge for an infraction which does not reach the level of a Group III offense. The grievant also feels he has been subjected to disparate treatment, in violation of the duty of fairness inherent in the Standards of Conduct. For the reasons listed below, the Department of Human Resource Management (DHRM) will not interfere with the application of this decision. The agency head of the DHRM has asked that I respond to this request for an administrative review.

FACTS

The Virginia Department of Correctional Education employed the grievant as a teacher at the Fluvanna Correctional Center for Women. According to the hearing officer's statement of facts, on March 22, 2007, the Regional Principal spoke with the grievant regarding the grievant's military orders and DCE computer policy. The grievant signed a statement which acknowledged that he understood that inmates were not permitted to use the computers designated as the teacher's computer.

On October 16, 2007, the grievant had eight students in his classroom. One inmate had finished all her assignments for the class and was ready to graduate. She was given permission by the grievant to use the teacher's computer to type a handwritten letter to a state senator. While she was working on the teacher's computer, the Regional Principal walked into the room and observed the inmate using the teacher's computer which was in violation of DCE policy. Typing such a letter was not a part of the inmate's Personal Plan or assignment sheet. Management officials issued to him a Group III Written Notice and terminated his employment.

The relevant policy, the Department of Human Resource Management's Policy No. 1.60, states, "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 not all-inclusive. Also, DCE Policy No. 4-1 and DCE Policy No. 6-12 are applicable here.

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 beyond reasonableness, he may reduce the discipline. By statute, the DHRM 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 grievant contends that a single violation of Policy 4-1 by allowing a student to use a computer outside the scope of the student's learning plan can hardly be considered an infraction of such a serious nature that discharge is warranted on a first occurrence. The grievant also contends that the agency can show no other situation where a long-term agency employee was discharged on a first offense for such an infraction.

Policy No. 4-1, Section VII. G., states, in part, "DCE teachers shall be responsible for the student use of computers in the classroom setting." Further, Section G.1. of that policy states, "Students shall be limited to using computers for instructional purposes that are stated in the student's learning plan or assignment sheet. Inmates who have been designated as "instructional aides" can only perform instructional tasks. Other inmate aides cannot perform administrative tasks that would allow inmates aides access to sensitive or personal information of employees and/or other inmates. Furthermore, inmate aides may not use a computer that has been restricted in its use to DCE employees or is located in the school administrative offices." Section VI. M. states "Violation of these polices and procedures may result in disciplinary action and may include, but not be limited to, the suspension of computer privilege, termination of employment, and/or legal action." In the instant case, the evidence clearly supported that the grievant instructed the inmate to type the letter to the state senator. This was in the absence of this being included in the student's learning plan or assignment sheet. The agency exercised the option to terminate the grievant and the hearing officer upheld the disciplinary action.

Policy No. 6-12, Section VI. A. states, "In classrooms or computer laboratories, the use of DCE computers by students or aides are: (1) supervised by a DCE teacher who is physically present at the time of use; and (2) limited to use for instructional purposes as stated in the student's learning plan or assignment sheet." Concerning this part of the allegation, the hearing officer determined that nothing in the policies places the grievant on notice that he would be

held responsible for a student's use of a computer even when the grievant was not aware that the student was using the computer. Therefore, that part of the violation was dismissed by the hearing officer.

Concerning the grievant's issue that no other long-term employee has been treated in similar fashion, the hearing officer took into consideration mitigating circumstances in making his decision. Therefore, that issue will not be addressed here.

It is the hearing officer's role to assess the evidence and to decide the grievance based on the weight of the evidence. In the present case, he determined that the violation did occur and the agency took the appropriate corrective action regarding the termination. Thus, it is the opinion of this Agency that the hearing officer properly interpreted the referenced policy. Because it appears that the grievant is challenging the hearing officer's consideration of the evidence and how he assessed that evidence rather than identifying misapplication of policy, this Agency will not interfere with the application of the decision.

_____

Ernest G. Spratley