

Issues: Group II Written Notice (patient abuse) and Suspension; Hearing Date: 08/12/08; Decision Issued: 08/21/08; Agency: DMHMRSAS; AHO: John V. Robinson, Esq.; Case No. 8913; Outcome: No Relief – Agency Upheld in Full. **(Corrected Decision issued 08/22/08).**

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 8913

Hearing Officer Appointment: July 17, 2008

Hearing Date: August 12, 2008

Decision Issued: August 21, 2008

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge a Group II Written Notice issued by Management of the Department of Mental Health, Mental Retardation and Substance Abuse Services (the “Department” or “Agency”), as described in the Grievance Form A dated May 2, 2008.

The hearing officer was appointed on July 17, 2008. The hearing officer scheduled a pre-hearing telephone conference call at 10:00 a.m. on July 22, 2008. The Grievant, the Department’s advocate (the “Advocate”) and the hearing officer participated in the pre-hearing conference call. The Scheduling Order entered July 22, 2008 following such conference call is incorporated herein by this reference.

The Grievant is challenging the issuance of the Group II Written Notice for the reasons provided in his Grievance From A and is seeking the following relief: the Group II written notice rescinded, the three (3) days suspension reinstated with restoration of any lost pay and benefits.

In this proceeding the agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances.

At the hearing, the agency was represented by the Advocate. The Grievant represented himself. Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing, namely Agency documentary exhibits 1 through 5 and in addition, Agency exhibit 6, a video recording of the incident which has been retained by the Facility for confidentiality and security purposes.¹ The Agency undertook to preserve the recording at least until any decision concerning this proceeding becomes final and non-appealable. The hearing officer issued three (3) orders for

¹ References to the agency’s exhibits will be designated AE followed by the exhibit number.

witnesses at the Grievant's request. No open issues concerning document production or attendance of witnesses remained by the time of the hearing.

APPEARANCES

Representative for Agency
Witnesses for Agency
Grievant
Witnesses called by Grievant

FINDINGS OF FACT

1. The Grievant is a direct service associate lead worker employed by the agency at SVTC.
2. The Risk Manager at SVTC routinely reviews video recordings produced at the Facility to, amongst other things, observe antecedent behaviors and to ensure that staff are using correct Agency intervention policies and procedures instituted to promote the safety and welfare of the Facility's patients and staff. AE 2.
3. The Risk Manager conducted such a review on Monday, March 31, 2008 of events which happened on Thursday March 27, 2008 at around 5:48 p.m. at the WC quarters, Unit 2, Building 93.
4. The WC quarters is a self-contained secure living area housing five (5) adult male patients with the most challenging behaviors.
5. B, one of such patients, has a psychiatric diagnosis of Pervasive Developmental Disorder with Autism and Impulse Control Disorder, for which he receives neuroleptic medication. AE 3.
6. While B has made great progress while at SVTC, B can on occasions exhibit physical aggression toward others without provocation and without warning.
7. When B becomes aggressive, staff are required by Agency policy to strictly follow the written Behavior Treatment Plan (the "Plan") developed and refined over time for B.
8. Specifically, the Plan involves the use of specified physical restraints as a last resort to protect B's safety and the safety of others. AE 2.

9. The Plan is formulated to allow B to deal with his stress and aggression by isolating B and allowing him time to cool down before an emergency response team (“ERT”) is called and a four-point restraint is used. AE 2. The isolation is generally achieved by removing other patients from his immediate space, if necessary.
10. The cooling down period was added to the Plan in August 2007 and has been efficacious in reducing major aggressive events, in teaching B to control his behavior and in reducing the need for restraints.
11. Shortly before the incident which caused Grievant’s discipline, as portrayed on the video recording, B attempted to do something in the dayroom of WC to the food cart, an ERT was called and B was escorted out of the dayroom to his bedroom.
12. Shortly thereafter, B reentered the dayroom and without provocation or warning, B deliberately hit one of his peers with material force on the head. The peer was sitting in a chair minding his own business.
13. As staff who witnessed this episode approached B, B retreated to a corner of the dayroom and sat down.
14. Instead of calling an ERT and/or isolating B and allowing him to cool down, the Grievant and another DSA carried B out of the dayroom, the Grievant holding B’s wrists and the other DSA holding B’s ankles.
15. Grievant admits that at the time he was not as familiar with B’s Plan as he should have been, that he “may have carried the individual/client in the wrong manner,” that his “actions may have been unauthorized and incorrect” and “I now know I was wrong in my actions.” Hearing Tapes and AE 1.
16. Grievant has received significant regular, ongoing training concerning the Agency’s restraint policies and procedures. AE 4.
17. While Grievant clearly did not intend to harm B and did what Grievant and the other DSA considered best under the circumstances, Grievant’s actions or inactions might have caused harm or injury to B and, accordingly, constituted “abuse” under the definition in Section 201-3 of Departmental Instruction 201 (RTS) 03. One of the witnesses called by the Grievant, a Registered Nurse, who observed the incident admitted on cross-examination that the improper technique utilized by the Grievant and the other DSA might have caused injury to B. Hearing Tapes.
18. The Department’s actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.

19. The Department's actions concerning this grievance were reasonable and consistent with law and policy.
20. The testimony of the witnesses called by the Agency was both credible and consistent on the material issues before the hearing officer. The demeanor of the Agency witnesses at the hearing was candid and forthright.
21. The Agency has fully accounted for all mitigating factors in determining the corrective action taken concerning the Grievant.

APPLICABLE LAW AND OPINION

The General Assembly enacted the *Virginia Personnel Act, Va. Code* § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Va. Code § 2.2-3000(A) 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. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management 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.3 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct 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.

Pursuant to Developmental Instruction 201 and consistent with the Standards of Conduct, an act of abuse can clearly constitute a Group II or a Group III offense:

Section 201-1 of Departmental Instruction 201 (RTS) 03 on Reporting and Investigating Abuse and Neglect of Clients states, in pertinent part: “The Department has **zero tolerance** for acts of abuse or neglect.”

Section 201-3 defines abuse:

Abuse means any act or failure to act by an employee or other person responsible for the care of an individual in a Department facility, that was performed or was failed to be performed knowingly, recklessly or intentionally, and that caused or might have caused physical or psychological harm, injury or death to a person receiving care or treatment for mental illness, mental retardation or substance abuse.

As previously stated, the agency’s burden is to show upon a preponderance of evidence that the termination of the grievant’s employment was warranted and appropriate under the circumstances.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth’s employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a “super-personnel officer” and must be careful not to succumb to the temptation to substitute his judgment for that of an agency’s management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

In this proceeding, the Department’s actions were clearly consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer. *Id.*

As the agency argued in this proceeding, the policy requires the disciplinary action. One of the Grievant's own witnesses, a Registered Nurse, admitted on cross-examination that B might have been injured when carried in the manner used by Grievant and the other DSA, who has also been disciplined. The case is indeed sad, as stated by the Department, because this is the Grievant's first disciplinary infraction over a long career of dedicated service under extremely difficult circumstances. The Department, exercising its professional judgment through the appropriate personnel, and applying the Commonwealth's policy of progressive discipline, decided that termination of the Grievant's employment was not warranted and appropriate under the circumstances as is often, or even usually, the case in instances of "abuse". Instead the Agency mitigated the offense to a Group II with a suspension of only three (3) days. Such a decision was entirely appropriate and justified. The agency argues that the action taken by Management was entirely appropriate and that it has, in essence, already taken full account of any mitigating factors, including the Grievant's past good service, lack of disciplinary infractions and his admission of the improper technique. The gravity of the violation in the context of the facility precludes a lesser sanction. The hearing officer agrees

DECISION

The agency has sustained its burden of proof in this proceeding and the action of the agency in removing the grievant from his employment and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the agency's action concerning the grievant in this proceeding is hereby upheld, having been shown by the agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

APPEAL RIGHTS

As the *Grievance Procedure Manual* sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

- 1. A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
- 2. A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of

Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401.

- 3. A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, One Capitol Square, 830 East Main, Suite 400, Richmond, Virginia 23219 or faxed to (804) 786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days.) A copy of each appeal must be provided to the other party.

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.

ENTER:

John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by Certified Mail, Return Receipt Requested, U.S. Mail, e-mail transmission and facsimile transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).

Reissued: August 22, 2008 (to correct typographical error on page 6)

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 8913

Hearing Officer Appointment: July 17, 2008

Hearing Date: August 12, 2008

Decision Issued: August 21, 2008

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge a Group II Written Notice issued by Management of the Department of Mental Health, Mental Retardation and Substance Abuse Services (the “Department” or “Agency”), as described in the Grievance Form A dated May 2, 2008.

The hearing officer was appointed on July 17, 2008. The hearing officer scheduled a pre-hearing telephone conference call at 10:00 a.m. on July 22, 2008. The Grievant, the Department’s advocate (the “Advocate”) and the hearing officer participated in the pre-hearing conference call. The Scheduling Order entered July 22, 2008 following such conference call is incorporated herein by this reference.

The Grievant is challenging the issuance of the Group II Written Notice for the reasons provided in his Grievance From A and is seeking the following relief: the Group II written notice rescinded, the three (3) days suspension reinstated with restoration of any lost pay and benefits.

In this proceeding the agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances.

At the hearing, the agency was represented by the Advocate. The Grievant represented himself. Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing, namely Agency documentary exhibits 1 through 5 and in addition, Agency exhibit 6, a video recording of the incident which has been retained by Southside Virginia Training Center (“SVTC” or the “Facility”) for confidentiality and security purposes.² The Agency undertook to preserve the

² References to the agency’s exhibits will be designated AE followed by the exhibit number.

recording at least until any decision concerning this proceeding becomes final and non-appealable. The hearing officer issued three (3) orders for witnesses at the Grievant's request. No open issues concerning document production or attendance of witnesses remained by the time of the hearing.

APPEARANCES

Representative for Agency
Witnesses for Agency
Grievant
Witnesses called by Grievant

FINDINGS OF FACT

22. The Grievant is a direct service associate lead worker employed by the agency at SVTC.
23. The Risk Manager at SVTC routinely reviews video recordings produced at the Facility to, amongst other things, observe antecedent behaviors and to ensure that staff are using correct Agency intervention policies and procedures instituted to promote the safety and welfare of the Facility's patients and staff. AE 2.
24. The Risk Manager conducted such a review on Monday, March 31, 2008 of events which happened on Thursday March 27, 2008 at around 5:48 p.m. at the WC quarters, Unit 2, Building 93.
25. The WC quarters is a self-contained secure living area housing five (5) adult male patients with the most challenging behaviors.
26. B, one of such patients, has a psychiatric diagnosis of Pervasive Developmental Disorder with Autism and Impulse Control Disorder, for which he receives neuroleptic medication. AE 3.
27. While B has made great progress while at SVTC, B can on occasions exhibit physical aggression toward others without provocation and without warning.
28. When B becomes aggressive, staff are required by Agency policy to strictly follow the written Behavior Treatment Plan (the "Plan") developed and refined over time for B.
29. Specifically, the Plan involves the use of specified physical restraints as a last resort to protect B's safety and the safety of others. AE 2.

30. The Plan is formulated to allow B to deal with his stress and aggression by isolating B and allowing him time to cool down before an emergency response team (“ERT”) is called and a four-point restraint is used. AE 2. The isolation is generally achieved by removing other patients from his immediate space, if necessary.
31. The cooling down period was added to the Plan in August 2007 and has been efficacious in reducing major aggressive events, in teaching B to control his behavior and in reducing the need for restraints.
32. Shortly before the incident which caused Grievant’s discipline, as portrayed on the video recording, B attempted to do something in the dayroom of WC to the food cart, an ERT was called and B was escorted out of the dayroom to his bedroom.
33. Shortly thereafter, B reentered the dayroom and without provocation or warning, B deliberately hit one of his peers with material force on the head. The peer was sitting in a chair minding his own business.
34. As staff who witnessed this episode approached B, B retreated to a corner of the dayroom and sat down.
35. Instead of calling an ERT and/or isolating B and allowing him to cool down, the Grievant and another DSA carried B out of the dayroom, the Grievant holding B’s wrists and the other DSA holding B’s ankles.
36. Grievant admits that at the time he was not as familiar with B’s Plan as he should have been, that he “may have carried the individual/client in the wrong manner,” that his “actions may have been unauthorized and incorrect” and “I now know I was wrong in my actions.” Hearing Tapes and AE 1.
37. Grievant has received significant regular, ongoing training concerning the Agency’s restraint policies and procedures. AE 4.
38. While Grievant clearly did not intend to harm B and did what Grievant and the other DSA considered best under the circumstances, Grievant’s actions or inactions might have caused harm or injury to B and, accordingly, constituted “abuse” under the definition in Section 201-3 of Departmental Instruction 201 (RTS) 03. One of the witnesses called by the Grievant, a Registered Nurse, who observed the incident admitted on cross-examination that the improper technique utilized by the Grievant and the other DSA might have caused injury to B. Hearing Tapes.

39. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.
40. The Department's actions concerning this grievance were reasonable and consistent with law and policy.
41. The testimony of the witnesses called by the Agency was both credible and consistent on the material issues before the hearing officer. The demeanor of the Agency witnesses at the hearing was candid and forthright.
42. The Agency has fully accounted for all mitigating factors in determining the corrective action taken concerning the Grievant.

APPLICABLE LAW AND OPINION

The General Assembly enacted the *Virginia Personnel Act, Va. Code § 2.2-2900 et seq.*, establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Va. Code § 2.2-3000(A) 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. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management 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.3 of the Commonwealth of Virginia's *Department of*

Personnel and Training Manual Standards of Conduct 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.

Pursuant to Developmental Instruction 201 and consistent with the Standards of Conduct, an act of abuse can clearly constitute a Group II or a Group III offense:

Section 201-1 of Departmental Instruction 201 (RTS) 03 on Reporting and Investigating Abuse and Neglect of Clients states, in pertinent part: “The Department has **zero tolerance** for acts of abuse or neglect.”

Section 201-3 defines abuse:

Abuse means any act or failure to act by an employee or other person responsible for the care of an individual in a Department facility, that was performed or was failed to be performed knowingly, recklessly or intentionally, and that caused or might have caused physical or psychological harm, injury or death to a person receiving care or treatment for mental illness, mental retardation or substance abuse.

As previously stated, the agency’s burden is to show upon a preponderance of evidence that the termination of the grievant’s employment was warranted and appropriate under the circumstances.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth’s employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a “super-personnel officer” and must be careful not to succumb to the temptation to substitute his judgment for that of an agency’s management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

In this proceeding, the Department’s actions were clearly consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer. *Id.*

As the agency argued in this proceeding, the policy requires the disciplinary action. One of the Grievant's own witnesses, a Registered Nurse, admitted on cross-examination that B might have been injured when carried in the manner used by Grievant and the other DSA, who has also been disciplined. The case is indeed sad, as stated by the Department, because this is the Grievant's first disciplinary infraction over a long career of dedicated service under extremely difficult circumstances. The Department, exercising its professional judgment through the appropriate personnel, and applying the Commonwealth's policy of progressive discipline, decided that termination of the Grievant's employment was not warranted and appropriate under the circumstances as is often, or even usually, the case in instances of "abuse". Instead the Agency mitigated the offense to a Group II with a suspension of only three (3) days. Such a decision was entirely appropriate and justified. The agency argues that the action taken by Management was entirely appropriate and that it has, in essence, already taken full account of any mitigating factors, including the Grievant's past good service, lack of disciplinary infractions and his admission of the improper technique. The gravity of the violation in the context of the facility precludes a lesser sanction. The hearing officer agrees

DECISION

The agency has sustained its burden of proof in this proceeding and the action of the agency in disciplining the Grievant and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the agency's action concerning the grievant in this proceeding is hereby upheld, having been shown by the agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

APPEAL RIGHTS

As the *Grievance Procedure Manual* sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

4. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
5. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of

Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401.

6. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, One Capitol Square, 830 East Main, Suite 400, Richmond, Virginia 23219 or faxed to (804) 786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days.) A copy of each appeal must be provided to the other party.

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

3. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or
4. 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.

ENTER:

John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by Certified Mail, Return Receipt Requested, U.S. Mail, e-mail transmission and facsimile transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).