

Issues: Group III Written Notice (mismanagement), Demotion and Reassignment;
Hearing Date: 02/02/09; Decision Issued: 02/11/09; Agency: DMV; AHO: William
S. Davidson, Esq.; Case No. 9019; Outcome: Full Relief; **Administrative Review:**
AHO Reconsideration Request received 02/27/09; Reconsideration Decision
issued 03/06/09; Outcome: Original decision affirmed.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 9019

Hearing Date: February 2, 2009
Decision Issued: February 11, 2009

PROCEDURAL HISTORY

The Grievant received a Group III Written Notice on September 26, 2008 for:

The conduct in which you have engaged has impacted agency operations within the District such that to allow you to continue in the assigned position would constitute negligence with regard to DMV's duties to the public. You are a District Manager and are held to a higher standard. You are responsible for insuring funds are collected and properly managed . You also are responsible for insuring policies are followed. The policies were created to insure Commonwealth funds were protected and accounted for, and to isolate the Agency from fraudulent activities. Your failure to require policies be followed have resulted in an environment that promotes fraud and waste. This conduct is indicative of mismanagement of a severe and serious nature.¹

Pursuant to the Group III Written Notice, the Grievant was demoted to a lower pay band with a twenty percent (20%) disciplinary pay reduction effective September 29, 2008 and was assigned to a new position with the Agency. On October 20, 2008, the Grievant timely filed a grievance to challenge the Agency's actions. On January 5, 2009, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On February 2, 2009, a hearing was held at the Agency's location.

APPEARANCES

Agency Representative
Advocate for Agency
Grievant
Counsel for Grievant
Witnesses

¹ Agency Exhibit 1, Tab 1, Page 1

ISSUE

1. Did the Grievant fail to require policies to be followed and, accordingly, create an environment that promoted fraud and waste at the Agency?

AUTHORITY OF HEARING OFFICER

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs.*, 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

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 Agency provided the Hearing Officer with a notebook containing nine (9) tabbed sections and that notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant provided the Hearing Officer with a notebook containing twelve (12) tabbed sections and that notebook was accepted in its entirety as Grievant Exhibit 1.

The first issue before the Hearing Officer is to determine exactly what the Agency alleges that the Grievant has done improperly. The Agency's Group III Written Notice sets forth the offense under Section 2 and describes it in a paragraph that consists of seven (7) sentences. The first sentence of the offense description states as follows:

The conduct in which you have engaged has impacted agency operations within the District such that to allow you to continue in the assigned position would constitute negligence with regards to DMV's duties to the public.

Clearly the Agency is attempting to allege that some conduct was committed by the Grievant but it doesn't specify, either in a specific or a general way, what that conduct was.

The second sentence of the offense description states as follows:

You are a District Manager and are held to a higher standard.

While the Hearing Officer is willing to concede that District Managers ought to be held to a higher standard, being a District Manager in and of itself is not an offense under the Standards of Conducts Policy 1.60.

The third sentence of the offense description states as follows:

You are responsible for insuring funds are collected and properly managed.

Again the Hearing Officer is willing to concede that every person who works for the Agency is responsible for insuring funds are collected and properly managed. The Hearing Officer assumes that the person at the Agency who actually meets with the public and is receiving the funds is the person who has the first obligation to see to it that funds are properly managed and every manager along the chain of management, up to and including the Commissioner, is thereafter responsible to see to it that funds are properly collected and managed.

The fourth sentence of the offense description states as follows:

You are responsible for insuring policies are followed.

The Hearing Officer concedes that any member of management is responsible for seeing to it that policies are followed and the issue here is which policies.

The fifth sentence of the offense description states as follows:

The policies were created to insure Commonwealth funds were protected and accounted for, and to isolate the Agency from fraudulent activities.

This is a proper statement of philosophy regarding policies but it does not allege that the Grievant did anything improperly.

The sixth sentence of the offense description states as follows:

Your failure to require policies be followed have resulted in an environment that promotes waste and fraud.

This sentence finally alleges that the Grievant has failed to follow a policy which resulted in an event that is at least marginally quantifiable, but there still is no statement as to what policy is involved.

The seventh sentence of the offense description states as follows:

This conduct is indicative of mismanagement of a severe and serious nature.

The Hearing Officer assumes that the conduct mentioned in this sentence relates back to the failure to require policies be followed which resulted in an environment that promotes fraud and waste.

It is of interest to note that at no time in this Group III Written Notice was this Grievant charged with failing to follow policies which resulted in fraud or waste. The only allegation is that he failed to follow policies which resulted in an environment that promoted fraud and waste.

In the Second Management Step, the Agency's response to this Grievant finally attempted to specify what the Agency felt that the Grievant had done improperly, wherein the Agency stated as follows:

You were issued a Group III written notice with a demotion and 20% reduction in pay. This action was taken because certain policies created to prevent fraud were not enforced, excessive overages and shortages of cash drawers were not addressed, and there was a general lack of attention to management reports that could have pointed out potential fraud. These factors contributed to an environment that, unfortunately, facilitated fraud in your district. ²

Again, there is no specificity as to which policies the Grievant did not enforce that would prevent fraud. There is a specific reference to excess overages and shortages in cash drawers that were not addressed and then again the general statement regarding potential fraud.

² Agency Exhibit 1, Tab 1, Page 4

Prior to the issuance of the Group III Written Notice, on September 18, 2008, the Grievant was given a document titled Pending Discipline which purported to set forth the Agency's thoughts regarding what the Grievant may have done improperly, which might subsequently result in a Written Notice. That document stated in part as follows:

Providing Managers Guidance with regard to addressing performance issues

- Putting agency at risk with Ov/sh policy, ending 7/1/08. Allowing numerous overages and shortages to occur with minimum disciplinary actions.
- From period of July 2008-October 2008, employees are getting a "free/grace" period with overage/shortage discrepancies. Stated in district "operations directive" dated 07/02/08.
- In Last 12 months a total of \$5732.33 over/short discrepancies occurred in CSC alone.
- Lien omissions reported to District Office indicate an employee (A) had 5 lien omissions.³

For purposes of this Decision, the Hearing Officer will assume that the policies that the Grievant did not enforce would be the policies that, if enforced, would have caused the four (4) allegations in the Pending Discipline Notice of September 18, 2008 to have not occurred. The Hearing Officer heard extensive testimony regarding the overages and shortages at the various locations over which the Grievant had management authority. The Hearing Officer heard substantial evidence from both the Grievant and the Agency witnesses that the trend for overages and shortages was that they were becoming smaller and smaller over time. The Grievant testified that he addressed these issues with the staff of each of the locations over which he had authority and that monthly reports were filed with his superiors.

There came a point in time when one of the managers that reported to him became concerned enough about the over/short discrepancies that that manager and Grievant concluded there was enough concern to initiate a special audit. The Grievant testified, and was not contradicted by any Agency witness, that he informed the appropriate parties to initiate a special audit. That special audit led to the finding of the over/short discrepancies in the area Agency and ultimately led to a criminal prosecution. That audit also turned up a lien omission which was mentioned in the Pending Discipline document of September 18, 2008.⁴

The Hearing Officer heard substantial evidence from the Agency regarding a period from July, 2008 through August, 2008 where employees would get a free or grace period with over/shortage discrepancies. They were referencing a directive that the Grievant put out to his District which was dated July 2, 2008.⁵ The Grievant testified that he produced this document in order to attempt to quantify some policy regarding over/short inasmuch as there was no quantitative policy addressing this issue in place at that time. The Agency's concern seemed to be that this policy, which was solely implemented by the Grievant, would allow Agency

³ Agency Exhibit 1, Tab 2, Page 1

⁴ Agency Exhibit 1, Tab 4

⁵ Agency Exhibit 1, Tab 5, Page 11

employees to make numerous errors with no punishment. While the document was inartfully drawn, it does clearly point out as follows:

This 'free' period will not exempt an employee from disciplinary actions due to fraud or overt dereliction of duty...Employees should be made aware that staff in the state have had to be terminated due to an inability to bring accuracy errors under control, and this is a very serious issue.

The Hearing Officer finds that the Grievant was attempting to put in place a quantifiable structure so that employees would know exactly when discipline would apply and that it would be severe.

On August 29, 2008, just prior to the issuance of the Group Notice in this matter, the Commissioner of this Agency sent a memo to all District Managers and discussed several problems. He stated in part in that memo as follows:

I have become more concerned that problems with securing financial resources, particularly cash, extend beyond one office and one individual . . .

We are finding several problems. First, some offices are not following established procedures. There is some evidence that some Managers don't understand procedures or don't know how to detect problems. Also, there are procedures that govern business transactions in the securing of financial assets that need to be changed, some need to be written . . .

I am asking DM to lead a team, or teams, to review and adjust DMV policies and procedures that govern collection and securing financial assets . . .⁶

Clearly, the head of this Agency is indicating that at least several offices were having problems with the same nonquantifiable and unclear policies and procedures for which the Grievant has received a Written Notice. Finally, the Director of Field Operations for this Agency issued a memo to all District Managers on October 9, 2008. In that memo he pointed out that he had spent the last few weeks talking with these Managers to try to determine what was actually happening with them. This memo was a memo that he sent to the Commissioner. In this memo, he stated in part as follows:

...The amount of work that management is expected to do is unrealistic and it is unrealistic for us to think that they are always going to be in compliance. This impacts the daily operation of all CSC's. Some management are able to accomplish this better than others but this does not mean that the ones that are struggling are less proficient, only that they need more help and/or there are other circumstances within their CSC. We keep giving them more to do without taking anything away. We need to lessen what is needed to do in back room and open up time for managers to manage, in addition to expediting processes. There is a need to take some of the responsibility away from management for signing off on accountability transactions, ID documents, etc. They need to be able to spend time observing and walking the counter, spending some time nurturing employees. . .

⁶ Grievant Exhibit 1, Tab 1, Page 1

Because many of the CSC's are short staffed, the attitudes of the management team and the employees are impacted. The ability to comply with policies all the time is physically challenging at some times. Managers covering two offices with the absence of an assistant or work leader in some cases causes a huge gap. A little over two years ago we were given a reduced MEL of 888FTEs and 338 Wage positions for the field that we had been working with. Last weeks numbers showed we have approximately 90 FTE vacancies, and about 130 wage vacancies. We are managing through it, but those kinds of numbers do take a toll on day to day operations and the ability to effectively manage all the things that are required to be done . . .

The day to day changes in policy, procedures, etc. is overwhelming for everyone involved. The idea of DLCI, the new Queuing system, CSI, Real ID, the on-boarding process is overpowering for most of the staff to even think about. No matter how positive we are relaying these upcoming changes, I think everyone is just overwhelmed thinking about it and knowing that a lot is coming in the near future and they are having problems dealing with the day to day stuff that they have to manage through right now . . .⁷

It is clear that this Agency, both prior to the issuance of this Written Notice to the Grievant and subsequent to the issuance of this Written Notice to the Grievant, was suffering and continues to suffer from staff shortages and policies that are either too complex to understand or too vague to understand. Indeed, the policies seem to be so complex and vague that the Written Notice for this Grievant barely charges him with anything. The closest thing that he could be charged with is failure to require policies to be followed that resulted in an environment that promotes fraud and waste. However, the direct examination of both the Grievant and the Agency proved that the Grievant is the one that put in place the process to discover the fraud and waste that ultimately led to a criminal prosecution. The Grievant's issuance of a policy for his District, which was not issued until July 2, 2008, was an attempt to put in place an understandable policy. The Hearing Officer finds that in and of itself did not lead to an environment that promoted fraud and waste.

The Director of Field Operations provided the Grievant with his Interim Evaluation Form and that form is signed by the Grievant on August 11, 2008. While the form indicates that a meeting took place between the Director and the Grievant on June 30, 2008, the Hearing Officer assumes that the document was not actually delivered until the date on which the Grievant signed. Unfortunately, the Director did not date the document where it is called for next to his signature. The date of August 11, 2008 is approximately forty-five (45) days from the date of the Written Notice. In this Interim Evaluation, the Director mentions none of the issues for which the Agency issued a Group III Written Notice against this Grievant. Indeed, the Director stated in part as follows:

⁷ Grievant Exhibit 1, Tab 2 Pages 1-2

As far as your managing of the District and Field Operations, you have done well in the area of performance management and employee relations; two of the major areas at our business in the field.⁸

Under an area where the Director had the ability to identify performance areas where the Grievant needed improvement, he stated in part as follows:

The unique business demands of your district should allow you to take on more activities at the statewide program impact level. Stepping into more of a lead role for DM level initiative is an opportunity for you, and a support need of the program.⁹

It would appear that the Director, on or about August 11, 2008, felt that this Grievant would be an asset if he expanded his horizon and took on activities at a statewide program level.

The evidence presented to the Hearing Officer was clear that a theft of funds took place within the Grievant's area. The evidence was equally clear that the Grievant enforced such policies as were available to attempt to see to it that the state employees, over whom he had supervision, did not commit fraud or waste. The evidence was clear that, when fraud and waste was suspected, the Grievant called in the appropriate persons to initiate an audit to discover such fraud and waste. The evidence is clear that the policies and procedures were vague and convoluted at best, and nonexistent at worst, both before this happened and after this happened. Data regarding the possibility of fraud and waste was transmitted to the Agency on a monthly basis. As recently as August 11, 2008, the Grievant received a positive interim evaluation. The Agency has not borne its burden to prove that this Grievant failed to require or enforce policies to prevent fraud and waste. Accordingly, the Hearing Officer finds that the Grievant did not fail to require policies to be followed that may have resulted in an environment that promoted fraud and waste.

MITIGATION

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..."¹⁰ 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, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been

⁸ Grievant Exhibit 1, Tab 12, Page 2

⁹ Grievant Exhibit 1, Tab 12, Page 2

¹⁰ Va. Code § 2.2-3005

employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

DECISION

For reasons stated herein, the Hearing Officer finds that the Grievant did not fail to require policies to be followed that resulted in an environment that promoted fraud and waste. The Hearing Officer directs that the Grievant be reinstated to his former position or, if occupied, to an objectively similar position; that his pay be returned to the same level that he was receiving prior to his demotion along with any increases that have been granted at that level subsequent to his demotion; that there be a full restitution of benefits and seniority; and that this Group III Written Notice be removed from his record.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar days** from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the Hearing Officer either to reopen the hearing or to reconsider the decision.

2. If you believe the hearing decision is inconsistent with state policy or Agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th Street, 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 Street, Suite 400
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party 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 a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.¹¹ 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.¹²

[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]

William S. Davidson
Hearing Officer

¹¹An 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).

¹²Agencies 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: 9019

Hearing Date:	February 2, 2009
Decision Issued:	February 11, 2009
Reconsideration Request Received:	February 27, 2009
Response to Reconsideration:	March 6, 2009

APPLICABLE LAW

A Hearing Officer's original decision is subject to administrative review. A request for review must be made in writing, and *received* by the administrative reviewer, within 15 calendar days of the date of the original hearing decision. A request to reconsider a decision is made to the Hearing Officer. A copy of all requests must be provided to the other party and to the EDR Director. 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.¹³

OPINION

The Agency seeks reconsideration of the Hearing Officer's Decision based on the following:

1. The Agency believes that the hearing was not conducted in an informal non-judicial environment as prescribed by the Rules.
2. The Agency requests the opportunity to provide the Hearing Officer with facts so that he will not need to make assumptions. The Hearing Officer is a finder of fact: seeking out facts rather than making assumptions must be the course followed.
3. The Agency requests the opportunity to provide testimony regarding the Grievant's policy on overages and shortages so the Hearing Officer can make a more informed decision. The Decision fails to recognize that the Grievant failed to discuss his proposed policy or ask permission to use it prior to his

¹³ §7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

implementing the policy. Clearly, grievant's policy was poorly written, poorly delivered, and subsequently failed.

4. The Decision cites two e-mails that were taken out of context and have no relevance to the grievance.
5. The Hearing Officer concluded that the Grievant initiated a special audit. However, the grievant did not have the authority to order or initiate a special audit. The Agency requests the opportunity to address the Hearing Officer's conclusion, or in the alternative to listen afresh the testimony of the Director of Internal Audit. The audit was done out of concerns that arose elsewhere, not by Grievant.
6. The ruling fails to cite policies which the grievant did not follow and actions the Grievant did not take to prevent fraud and the environment which it flourished.
7. The grievant is the most senior employee outside of the (area) Headquarters building. He had 6 peers but none more senior. His position is expected to carry out and effect the Agency's decisions. He enjoyed a great deal of discretion and the evidence shows that it is more likely than not that he misused that discretion and failed his subordinates, his peers, his supervisors and the Commonwealth.
8. Finally, the Decision extensively cites fault with the written notice. However, in Section II of the form, the Agency is instructed as follows:...
9. The Decision fails to cite item IV of the Written Notice in which the Agency describes circumstances it considered in reaching this important decision.

In paragraph number 1 of the Agency's request for reconsideration the statement is made that the hearing is to be an informal, non-judicial environment. The Agency then quotes two sections from the rules regarding hearings. Beyond that, it cites no specific area where it felt that the hearing was anything other than informal. The Hearing Officer specifically finds that the hearing was conducted in an informal, non-judicial environment and that both the Grievant and the Agency were given the opportunity to introduce such witnesses and documents as they chose.

In paragraph number 2 of the Agency's request for reconsideration, the Agency appears to be upset that the Hearing Officer "assumed" that the first person to touch funds from a customer of the Agency was the first person who had the obligation to see to it that those funds were properly managed and that every manager along the chain of management would have a similar duty. The Agency not only fails to acknowledge a rhetorical statement, but also seems to be questioning whether or not that first person has a duty to be responsible for the funds. Surely the Agency does not contest the fact that each person, who is an employee of the Agency who deals with the public funds, is responsible to see to it that they are properly managed.

Further, in this same paragraph, the Agency states as follows: "While it is true that the grievant engaged in certain conduct that contributed to the nonchalant environment in the (area) District Offices, including (specific area), contributing in a greater fashion is what the grievant did not do." It is statements like that that the Agency now requests an opportunity to clarify. The Agency had ample opportunity to present its evidence before the Hearing Officer in such manner

as it chose to present it. Neither the Agency nor the Grievant is allowed to present its case, find out that it was not done in a successful fashion, and then come back and try again.

In paragraph number 3 of the Agency's request for reconsideration, the Agency requests the opportunity to present more evidence regarding the Grievance Policies on overages and shortages. The Agency argues that the Hearing Officer's Decision failed to recognize that the Grievant did not discuss with management at the Agency his proposed policy on this matter. The Hearing Officer heard no evidence that the Group Notice nor its punishment was based on the Grievant's issuance of a policy on overages and shortages. All of the evidence of substance dealt with the actual loss of funds.

In paragraph number 4 of the Agency's request for reconsideration, the Agency complains that the Hearing Officer used two (2) e-mails that were introduced into evidence as a basis for his Decision. Further, they allege that the Hearing Officer referred to these e-mails as memo's and that memos carry a greater formality and importance than an e-mail. The Hearing Officer explained to both the Agency and the Grievant in the pre-trial conference that he would ask each of them at the commencement of the hearing if they had reviewed all of the documentation contained in the other's Exhibit notebook and, on the record, would inquire as to whether or not they had any objections. Immediately prior to the hearing, he went through those same instructions and asked both the Grievant and the Agency if they had read the other's notebook and if there were any objections. Once the hearing had commenced, the Hearing Officer asked each of them for the third time if they had read the other's notebooks and if there were any objections. There were no objections noted and both the Agency's notebook and the Grievant's notebook were accepted in their entirety as Agency Exhibit 1 and Grievant Exhibit 1. The Agency did not object to these e-mails as Exhibits nor did it object when specific witnesses spoke to these Exhibits. Further, the Hearing Officer does not make nearly as fine a distinction as the Agency is attempting by classifying e-mails as having less formality and importance than inner office memos. The e-mails were sent to multiple parties and the Hearing Officer assumes that they were intended to have some meaning or the e-mails would not have been produced nor would they have been sent.

In paragraph number 5 of the Agency's request for reconsideration, the Agency alleges that the Grievant did not have the authority to initiate a special audit. The evidence before the Hearing Officer, which was un-objected to, was that the Grievant initiated the audit in that he is the first person who asked the question that led to the audit. Again, the Agency is attempting to split too fine a hair in saying that the Grievant did not have the authority to initiate the audit and failing to recognize that he raised the issue that led to the audit.

In paragraph number 6 of the Agency's request for reconsideration, the Agency simply complains that the Hearing Officer did not cite actions and policies that the Grievant could have put in place to prevent audits. Here the Agency is simply objecting to the Hearing Officer's findings and the Hearing Officer is only required to make a finding. The Hearing Officer is not required to make a finding and then explain all possible reasons why the finding could have been otherwise.

In paragraph number 7 of the Agency's request for reconsideration, the Agency alleges that the evidence shows that the Grievant more likely than not misused his discretion and failed his subordinates. Again, that is simply stating that the Hearing Officer ruled against the Agency and they feel that he should not have done so.

Finally, in paragraphs numbered 8 and 9 of the Agency's request for reconsideration, the Agency complains that the Hearing Officer found fault with the Written Notice and that the Hearing Officer did not cite the grounds for mitigation which the Agency set forth at Section IV of the Written Notice. While it is clearly true that the Hearing Officer found that the Written Notice in this matter was, at best, unclear and, at worst, failed to inform the Grievant as to the charge against him, the Hearing Officer clearly set forth the grounds for which it appeared the Agency was charging the Grievant with failing to follow policies and procedures. Further, the Hearing Officer is at a loss as to what the Mitigation circumstances have to do with his finding in this matter, as he found for the Grievant.

The Agency has asked the Hearing Officer to reconsider for many reasons. The Hearing Officer finds that none of those reasons are of such a nature as to cause him to reconsider his finding in this matter. The Hearing Officer acknowledges that one of the ways in which his Decision can be reviewed is for either party to request that he reconsider his Decision. However, the Hearing Officer points out that Section 7.2(a)(1) of the Grievance Procedure Manual states as follows:

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 in the basis for such a request.

The Hearing Officer would point out that none of the nine (9) requests for reconsideration set forth a basis of newly discovered evidence or incorrect legal conclusions.

DECISION

The Hearing Officer finds that none of the reasons given for reconsideration by the Agency rise to a level that would require him to reconsider his Decision. The Hearing Officer has carefully considered the Agency's arguments and has concluded that there is no basis to change the Decision issued on February 11, 2009.

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.¹⁴

William S. Davidson
Hearing Officer

¹⁴ 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).