

Issues: Group II Written Notice (failure to follow instructions & unsatisfactory performance), and Suspension; Hearing Date: 07/06/09; Decision Issued: 07/07/09; Agency: NSU; AHO: Carl Wilson Schmidt, Esq.; Case No. 9115; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 07/18/09; EDR Ruling #2010-2376 issued 10/23/09; Outcome: Remanded to AHO; Reconsideration Decision #1 issued 11/23/09; Outcome: Original Decision Affirmed; Administrative Review: AHO Reconsideration Request on Reconsideration Decision received 12/18/09; Reconsideration Decision #2 issued 12/30/09; Outcome: Original decision affirmed; Administrative Review; EDR Ruling Request received on Reconsideration Decision #2 on 01/11/10; EDR Ruling #2010-2509 issued 03/04/10; Outcome: Remanded to AHO; Reconsideration Decision #3 issued 04/02/10; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request on Reconsideration Decision #3 received 04/27/10; EDR Ruling #2010-2584; 2010-2627 issued 05/13/09; Outcome: Reconsideration Decision #3 was prematurely issued; Reconsideration Decision #4 issued 06/03/10; Outcome: Original decision affirmed; Administrative Review: DHRM Ruling Request received 07/18/09; DHRM Ruling Request on Reconsideration Decision #2 received 01/11/10; DHRM Ruling issued 04/30/10; Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9115

Hearing Date: July 6, 2009
Decision Issued: July 7, 2009

PROCEDURAL HISTORY

On March 12, 2009, Grievant was issued a Group II Written Notice of disciplinary action with a five workday suspension for unsatisfactory work performance and failure to follow a supervisor's instructions.

On March 30, 2009, 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 June 2, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 6, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
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:

Norfolk State University employs Grievant as an Administrative Office Specialist II. The purpose of his position is:

Serves as data entry operator for the Admissions Office. Accurately enters data from numerous types of source documents including but not limited to the non-international and non-degree applicants. Provides professional customer service to all students, prospective students, parents, faculty, staff and the general public via telephone, e-mail, walk-ins, and counter.¹

Some of Grievant's Core Responsibilities include:

Process all L-Z non-international transcripts. ***

Enter daily, all incoming transcripts, test scores, recommendations and comments into [the Student Information Systems]. ***

¹ Agency Exhibit E.

Scan all incomplete, admitted, and partial applicant transcripts, recommendations, fee waivers, test scores, in all of the documents related to admissions split and match documents with proper folder. ***²

On March 28, 2007, Grievant received a written counseling from the Supervisor "in an attempt to resolve your input of applications and transcript entry in a timelier manner."³

On December 20, 2007, Grievant received a written counseling from the Supervisor stating, in part:

After close observation of the applications for data entry process, it is clear that you have not met your expected level of completion for entering the applications into the Datatel SIS System. This counseling is intended to correct a deficiency. It is expected that upon receipt of the applications each day, that you complete the necessary data entry in a timely manner.⁴

On January 18, 2008, the Acting Director sent Grievant a counseling memorandum stating, in part:

During your recent meeting with our Associate Vice President ..., you cited that due to equipment concerns you were unable to produce the expected results. Since this occasion, your scanner has been replaced by a model that would allow you to be more productive in processing and scanning documents.

As a result of this counseling session, you will have until January 31, 2008 to complete the entire backlog of applications and supporting documents. You will be relieved of counter and phone duties during this period.⁵

Norfolk State University has a rolling admissions process. Once a student's application is completed and the appropriate information received by the University, the University may admit or deny the student.

On October 6, 2008, the Agency received an official transcript from a high school for the Student. A temporary employee stamped the date on the document. Grievant wrote an identification number on the document. He did not enter receipt of the transcript into the Datatel Student Information System. Because Grievant did not enter receipt of the transcript into the information system, the student's application for

² Agency Exhibit D.

³ Agency Exhibit A.

⁴ Agency Exhibit A.

⁵ Agency Exhibit A.

admission appeared incomplete and not ready for a determination of the student's admissions to the University.

On November 6, 2008, the Student's transcript was scanned and made a part of the Keyfile. The original transcript, however, remained in Grievant's manual files.

The Student's mother called Grievant regarding the status of her son's application. Grievant told her he had not received the high school transcript. The high school sent a second transcript that was received on December 9, 2008. The Receptionist stamped the date December 9, 2008 on the transcript. Grievant wrote an identification number on that second transcript. He did not enter receipt of that transcript into the Datatel Student Information System. The application was not processed because the Agency's records did not show the application was ready to be processed.

On January 28, 2009, the Student's mother called the President's office to complain about Grievant. She said she wanted all of the money she had paid to the Agency to be returned to her because she did not want her son to attend a university that allowed people like Grievant to work for it. She explained that her son's transcript along with SAT scores and recommendations were sent to the Agency for times, each time she was told by Grievant that the Agency had not received them. The Assistant Director for Admissions contacted Grievant and asked if he had received any transcripts for the Student. Grievant said he had not received them. The Assistant Director examined the documents that had been scanned into the Keyfile. The Student's transcript appeared in the Keyfile along with all supporting documents. The Assistant Director looked to Grievant's manual files and found the transcript received on October 6, 2008. She also found the transcript received on December 9, 2008.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."⁶ Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

Unsatisfactory work performance as a Group I offense. Failure to follow a supervisor's instructions is a Group II offense.⁷ On December 20, 2007, Grievant was instructed by a supervisor that "upon receipt of the applications each day, that you

⁶ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

⁷ See Attachment A, DHRM Policy 1.60.

complete the necessary data entry in a timely manner”. Transcripts are a part of a student’s application for admission. Grievant received the transcript stamped October 6, 2008 and the transcript stamped December 9, 2008 but he failed to make the necessary data entry to record those transcripts in the Datatel SIS. His failure to do so was contrary to a supervisor’s instructions thereby justifying the issuance of a Group II Written Notice for failure to follow a supervisor’s instructions. Upon the issuance of a Group II Written Notice, the Agency may suspend an employee for up to 10 workdays. In this case, Grievant was suspended for five work days and, thus, his suspension must be upheld.

Grievant argued that each time the Student’s mother called him, he searched his files and could not find the transcript. He indicated that he had given the transcript of Mr. G so that the GPA could be calculated. He argued that some of the items on his desk had been removed and were put back at a later time. This argument fails. If the Hearing Officer assumes for the sake of argument that Grievant’s assertions are true, they show how important it was for Grievant to immediately enter his receipt of the transcript into the computer system. Had he done so, whether someone removed the transcript from his desk would become irrelevant.

Grievant argued that his health concerns may have affected his ability to timely process the Student’s transcript. The evidence showed, however, Grievant’s illness was many months prior to October 2008 and it did not affect his work performance in October 2008 or December 2008.

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....”⁸ 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 argued that the Agency inconsistently disciplined its employees. He contends that other employees made mistakes but were not disciplined. The evidence is insufficient for the Hearing Officer to conclude that the Agency had inconsistently disciplined its employees. The details of the alleged errors made by other employees were not explained. Several of Grievant’s coworkers were not classified employees and thus not subject to receiving Written Notices. In light of the standard set forth in the

⁸ *Va. Code § 2.2-3005.*

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;⁹ (2) suffered a materially adverse action¹⁰; 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.¹¹

The nature of Grievant's protective activity is unclear. Grievant suffered a materially adverse action because he received a Written Notice. No credible evidence was presented to suggest that the Written Notice was issued as a form of retaliation. The Agency did not discipline Grievant as a pretext for retaliation.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with suspension 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 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.

¹⁰ 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.

¹¹ 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
600 East Main St. STE 301
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.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].

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

¹² 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: 9115-R

Reconsideration Decision Issued: November 23, 2009

RECONSIDERATION DECISION

On June 30, 2009, Grievant asked the Agency to produce certain documents regarding Mr. S and Mrs. J. On July 1, 2009, the Agency's Counsel objected to producing the documents because they were confidential and personal information involving Grievant's supervisors. The Agency asserted that the information requested was meant to intimidate and harass Grievant's supervisors for the actions being taken against him. The Agency added, "It is not appropriate to allow employees to file grievances to attempt to 'attack' and gain personal information regarding their immediate supervisors by making such speculative and non-relevant requests." The Hearing Officer agreed with the Agency and denied Grievant's request for the documents.

The EDR Director issued Ruling No. 2010-2376 stating:

In addition, the hearing officer erred by concluding that only actual discipline issued to other employees is relevant. To the contrary, complaints of misconduct and, more to the point, all documents (or the lack of documents) relating to how an agency responded to complaints can be relevant. For example, if one employee receives a Written Notice for a founded complaint of misconduct and a second employee receives only a counseling memorandum, or nothing at all, for the same confirmed misconduct, a hearing officer may consider the disparity in the discipline as a potential mitigating circumstance. Even documents pertaining to unfounded complaints could be relevant. Accordingly, the hearing officer is ordered to instruct the agency to produce documents pertaining to the two individuals in question that relate to any alleged acts of failure to follow their supervisor's instructions. To the extent that such documents

exist, the hearing officer shall consider the weight to be assigned to them in his reconsidered decision, and whether inconsistent discipline, if any, should be viewed as a mitigating circumstance in this case.¹³

Accordingly, the Agency is **ordered** to produce the documents in accordance with the EDR Director's Ruling. The Agency is **ordered** to redact personal identifying information from those documents. The Agency should produce those documents to the Hearing Officer (with copies to the Grievant) within 30 calendar days of the date of this decision and order.

The EDR Director also stated:

Because the hearing officer is already addressing mitigation, he is instructed to address the potential factor of "experience" as well.

Upon consideration of Grievant's experience, the Hearing Officer finds that there is nothing unusual or exceptional about Grievant's experience that would make the disciplinary action against him subject to mitigation.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

¹³ Original footnotes are omitted.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 9115-R2

Reconsideration Decision Issued: December 30, 2009

SECOND RECONSIDERATION DECISION

The Hearing Officer ordered the Agency to produce documents in accordance with the EDR Director's Ruling No. 2010-2376. The Agency, by counsel, informed the Hearing Officer that a review of the personnel files of Mr. S and Ms. J showed that neither of them had been counseled or disciplined for failure to follow a supervisor's instructions. Grievant was disciplined for failure to follow a supervisor's instructions. There is no evidence upon which to conclude that Mr. S and Mr. J¹⁴ failed to follow a supervisor's instructions and then were not disciplined for failing to do so. There is no basis for the Hearing Officer to conclude that Grievant was similarly situated to either Mr. S or Ms. J and then treated differently from them by the Agency. There is no basis to mitigate the disciplinary action against Grievant.

Carl Wilson Schmidt, Esq.
Hearing Officer

¹⁴ Mr. J was issued a counseling memorandum for failing to follow a supervisor's instructions. This counseling was issued after the Hearing Officer's reconsideration order. If the Hearing Officer assumes for the sake of argument that such counseling is relevant, it is consistent with the disciplinary pattern the Agency demonstrated with Grievant. Grievant was counseled several times before disciplinary action was taken. Mr. J had no prior counseling before he was counseled on November 25, 2009.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 9115-R3

Reconsideration Decision Issued: April 2, 2010

THIRD RECONSIDERATION DECISION

The EDR Director issued Ruling 2010-2509 stating, in part:

In his original request for documents, the grievant asked for “any and all files, records, e-mails *and/or complaints* and any disciplinary action that have been filed in the Customer Care department or Enrollment Management’ on Mr. S and Ms. J.”¹⁵ The agency does not appear to have stated whether or not any such complaints exist outside of the personnel files for Mr. S. and Ms. J. To the extent that any such complaints exist, they must be provided to the grievant and hearing officer within 5 workdays of receipt of this ruling. If such complaints do not exist, the agency shall inform the grievant and hearing officer. To the extent that such complaints exist and are relevant,¹⁶ the hearing officer shall consider them as evidence that may support mitigation. The hearing officer may allow the parties to submit briefs in conjunction with the submission and receipt of any such documents and may reopen the hearing if necessary.

The Agency presented a letter dated March 24, 2010 with attachments to the Hearing Officer in accordance with the EDR Ruling. The Hearing Officer has reviewed the Agency’s documents and finds that it is not necessary to reopen the hearing or to receive briefs regarding the documents. The Hearing Officer finds that the information provided by the Agency does not change any conclusions in the original hearing decision and reconsideration decisions. The Hearing Office finds that the Agency did not single out Grievant for disciplinary action. The Agency did not engage in the

¹⁵ See July 1, 2009, correspondence from agency counsel to the hearing officer (emphasis added).

¹⁶ As we noted in EDR Ruling 2010-2376, any such complaints would have to be of the same character as the charge against the grievant. EDR Ruling 2010-2376 at 8, note 19.

inconsistent application of disciplinary action. There are no mitigating circumstances whatsoever that would justify the reduction of the disciplinary action against Grievant. Grievant's request for relief is denied.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 9115-R4

Reconsideration Decision Issued: June 3, 2010

FOURTH RECONSIDERATION DECISION

The EDR Director issued Ruling No. 2010-2584, 2010-2627 stating, in part:

As to the grievant's concern that he was provided a summary of complaints instead of the actual complaints (Objection A), we note that the grievance procedure allows parties to mutually agree to allow for disclosure of relevant non-privileged information in an alternative form that still protects the privacy interests of third parties, such as a chart or table, in lieu of production of original redacted documents.¹⁷ When there is no mutual agreement to substitute a chart or table in lieu of the requested documents, however, the documents (appropriately redacted where necessary) must be provided. **To the extent that the parties did not agree on a substitution, as the grievant appears to assert, the agency is ordered to produce the documents within five workdays of the date of this ruling.**¹⁸ (Emphasis added).

The Agency presented a letter dated May 24, 2010 with attachments to the Hearing Officer in accordance with the EDR Ruling. Grievant has not provided any objection to the Hearing Officer regarding the Agency's submission. The Hearing

¹⁷ *E.g.*, EDR Ruling Nos. 2009-2087; 2006-1312.

¹⁸ To the extent that it is not possible to provide the requested documents (complaints) within the five workday period, the agency must, within five workdays of receiving this ruling, explain to the grievant in writing why such a response is not possible, and produce the documents no later than ten work days from the receipt of this ruling. Any future issues regarding this directive to produce the documents must first be raised with the hearing officer. If a party is not satisfied with the hearing officer's decision relating to any document production issue, the party may seek a ruling from this Department and must do so within 15 calendar days of the issuance of the hearing officer's decision regarding the documents and their production.

Officer has reviewed the Agency's documents and finds that it is not necessary to reopen the hearing or to receive briefs regarding the documents. The Hearing Officer finds that the information provided by the Agency does not change any conclusions in the original hearing decision and reconsideration decisions. The Hearing Office finds that the Agency did not single out Grievant for disciplinary action. The Agency did not engage in the inconsistent application of disciplinary action. There are no mitigating circumstances whatsoever that would justify the reduction of the disciplinary action against Grievant. Grievant's request for relief is **denied**.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Norfolk State University

April 30, 2010

The grievant has requested an administrative review of the hearing officer's decision in Case No. 9115. The grievant was issued a Group II Written Notice with a five workday suspension. He filed a grievance to have the disciplinary action reversed. When he did not get the relief he was seeking, he requested a hearing before an administrative hearing officer. In his decision, the hearing officer upheld the agency's disciplinary action. For reasons stated below, this Agency will not disturb the hearing officer's decision. The agency head of the Department of Human Resource Management, Ms. Sara Redding Wilson, has asked that I respond to this request for an administrative review.

FACTS

The hearing officer submitted, in part, the following in his **Findings of Fact**:

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

Norfolk State University (NSU) employs the grievant as an Administrative Office Specialist II. According to the hearing officer's Findings of Facts, the purpose of his position is:

Serves as data entry operator for the Admissions Office. Accurately enters data from numerous types of source documents including but not limited to the non-international and non-degree applicants. Provides professional customer service to all students, prospective students, parents, faculty, staff and the general public via telephone, e-mail, walk-ins, and counter.

The hearing officer continues:

On March 28, 2007, Grievant received a written counseling from the Supervisor stating, in part:

After close observation of the applications for data entry process, it is clear that you have not met your expected level of completion for entering the applications into the Datatel SIS System. This counseling is intended to correct a deficiency. It is expected that upon receipt of the application each day, that you complete the necessary data entry in a timely manner.

Some of Grievant's Core Responsibilities include:

Process all L-Z non-international transcripts. Enter daily, all incoming transcripts, test scores, recommendations and comments into [the Student Information Systems]

Scan all incomplete, admitted, and partial applicant transcripts, recommendations, fee waivers, test scores, in all of the documents related to admissions split and match documents with proper folder.

On January 18, 2008, the Acting Director sent Grievant a counseling memorandum stating in part:

During your recent meeting with our Associate Vice President..., you cited that due to equipment concerns you were unable to produce the expected results. Since this occasion, your scanner has been replaced by a model that would allow you to be more productive in processing and scanning documents.

As a result of this counseling session, you will have until January 31, 2008 to complete the entire backlog of applications and supporting documents. You will be relieved of counter and phone duties during this period.

Norfolk State University has a rolling admissions process. Once a student's application is completed and the appropriate information received by the University, the University may admit or deny the student.

On October 6, 2008, the Agency received an official transcript from a high school for the Student. A temporary employee stamped the date on the document. Grievant wrote an identification number on the document. He did not enter receipt of the transcript into the Datatel Student Information System. Because Grievant did not enter receipt of the transcript into the information system, the student's application for admission appeared incomplete and not ready for a determination of the student's admission to the University.

On November 6, 2008, the Student's transcript was scanned and made a part of the Keyfile. The original transcript, however, remained in Grievant's manual files.

The student's mother called Grievant regarding the status of her son's application. Grievant told her he had not received the high school transcript. The high school sent a second transcript that was received on December 9, 2008. The Receptionist stamped the date December 9, 2008 on the transcript. Grievant wrote an identification number on that second transcript. He did not enter receipt of that transcript into the Datatel Student Information System. The application was not processed because the Agency's records did not show the application was ready to be processed.

After the student's mother called again and an investigation was conducted, it was determined the University had received the transcripts but because they were not logged in properly, the student's application was not processed. Based on the grievant's performance in this matter, management officials at the University issued a disciplinary action.

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 the limits of 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.

The relevant policy, the Department of Human Resource Management's Policy No. 1.60, Standards of Conduct, states, "It is the policy of the Commonwealth to promote the well-being of its employees in the workplace by maintaining high standards of work performance and professional conduct." The policy states as its purpose, "The purpose of the policy is to set forth the Commonwealth's Standards of Conduct and the disciplinary process that agencies must utilize to address unacceptable behavior, conduct, and related employment problems in the workplace, or outside the workplace when conduct impacts an employee's ability to do his/her job and/or influences the agency's overall effectiveness." Attachment A, 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.

The grievant stated that the hearing officer's decision is not correct and listed 10 reasons why it is not. Of the 10 reasons, this Agency will address the following three because of their policy implications: (1) DHRM Policy states that if someone is given below contributor marks a substandard performance plan should be in place to show which deficiencies need to be corrected but none was done by the Acting Director; (2) official records should be signed documents (paraphrased); and, (3) the time frame for adding an addendum to a prior document (paraphrased). This Agency will address each issue individually.

(1) DHRM Policy states that if someone is given below contributor marks, a substandard performance plan should be in place to show which deficiencies need to be corrected but none was done by the Acting Director.

According to DHRM Policy No. 1.40, "An employee who receives a rating of "Below Contributor" must be re-evaluated and have a performance re-evaluation plan developed, as outlined below." "Within 10 workdays of the evaluation meeting during which the employee received the annual rating, the employee's supervisor must develop a performance re-evaluation plan that sets forth performance measures for the following three (3) months, and have it approved by the reviewer."

Our review of the Grievance Form A and the hearing decision does not reveal that this issue, raised by the grievant in his appeal, was put before either the agency officials during the management steps or the hearing officer. The grievant has not shown a nexus between the application of that policy, the disciplinary action of the agency and the resulting hearing decision. Therefore, this issue warrants no further discussion.

(2) **Official records should be signed documents.**

DHRM Policy No. 6.10 provides the recordkeeping requirements for classified and non-classified employees in State government. However, the grievant has failed to show a nexus between this policy, the disciplinary action the University took and the outcome of the hearing. Therefore, this issue warrants no further discussion.

(3) **The timeframe for adding an addendum to an existing document.**

There is no policy that describes the timeframe for adding an addendum to an existing document. However, it is a best employee relations practice to add any such addendum to the document as soon as possible after management officials determine that there is some relationship between the issues described in the original document and the addendum.

The issues not discussed in this ruling are either evidentiary or matters of compliance and cannot be ruled on by this Agency. The Director of the Department of Employment Dispute Resolution remanded the original and second reconsideration hearing decisions to the hearing officer for further consideration. The hearing officer addressed all outstanding issues in his third reconsideration decision. Because all issues raised by the grievant now have been addressed, this Agency opines that the grievant is challenging the hearing officer's findings of fact, the weight accorded to the evidence, the resulting inferences that he drew and his resulting decision.

It is the opinion of this Agency that the grievant did not demonstrate that the hearing officer violated any DHRM or NSU human resource policy in making his decision. Thus, this Agency will not interfere with the application of the decision.

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.¹⁹ Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.²⁰ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²¹

Ernest G. Spratley

¹⁹ *Grievance Procedure Manual* § 7.2(d).

²⁰ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

²¹ *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).