Issues: Misapplication of layoff policy; Hearing Date: 01/21/10; Decision Issued: 01/25/10; Agency: DSS; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 9232; Outcome: No Relief – Agency Upheld; **Administrative Review: Reconsideration Request received 02/09/10; Reconsideration Decision issued 02/10/10; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 02/09/10; EDR Ruling #2010-2537 issued 03/29/10; Outcome: Remanded to AHO; Remand Decision issued 04/05/10; Outcome: Original decision affirmed; Administrative Review: DHRM Ruling Request received 02/09/10; DHRM Ruling issued 06/03/10; Outcome: AHO's decision affirmed.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 9232

Hearing Date: January 21, 2010
Decision Issued: January 25, 2010

PROCEDURAL HISTORY

On August 15, 2008, Grievant, a Program Support Technician (PST) for the Department of Social Services ("Agency") grieved the classification of her position, asserting that the agency failed to follow properly the Commonwealth's classification policy.

The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On December 7, 2009, the Hearing Officer received the appointment from the Department of Employment Dispute Resolution ("EDR"). A pre-hearing conference was held by telephone on December 15, 2009. The hearing was scheduled at the first date available between the parties and the hearing officer, January 6, 2010. Because of the grievant's request based on family illness, considered good cause, the hearing was continued to January 21, 2010, when the grievance hearing was held at the agency's headquarters building. For such good cause shown, the time for concluding the grievance was extended, accordingly.

Both the grievant and the agency submitted documents for exhibits that were, without objection from either side, admitted into the grievance record, and will be considered and referred to, accordingly. All evidence presented has been carefully considered by the hearing officer.

APPEARANCES

Grievant
Representative for Agency
Advocate for Agency
Witnesses

ISSUES

1. Whether the agency misapplied policy when classifying the grievant's position?

2. Whether the agency's classification of the grievant's position was arbitrary or capricious?

The Grievant requests reclassification of her position from a pay band 3 to a pay band 4.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the grievant.* 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.

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).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .
> To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

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

In her grievance, the grievant challenges the classification of her position, asserting that the agency failed to follow properly the Commonwealth's classification policy. The grievant's current role is Administrative and Office Specialist III and her work title is Program Support Technician ("PST"). In 1999, the grievant was hired as a PST Senior. As a PST Senior, the grievant's documented duties included serving as the "lead worker" over other agency employees. According to the agency, over time, the lead responsibilities were decreased and

ultimately removed from the grievant's employee work profile ("EWP") in 2000. The agency asserts that the removal of these lead worker responsibilities rendered the grievant a PST rather than a PST Senior. However, the grievant's EWP continued to document her work title as a PST Senior until 2006. Moreover, at least some of her EWPs after 2000 contain language that could potentially be construed as describing the grievant's job elements or core responsibilities as including back-up assistance to staff in the absence of the supervisor, as well as the training of staff, as assigned.

In 2007, the agency conducted an agency-wide study that led to certain changes in classification and compensation. Those employees performing the duties of a PST Senior were moved from pay band 3 to pay band 4 with a new role title of General Administration Supervisor I/Coordinator I. According to the agency, because the grievant was not performing the duties of a PST Senior, she was not moved to the new pay band 4 role. Moreover, the grievant's role title, role code and pay band remained unchanged and the she actually received a salary increase as a result of the 2007 Classification and Compensation Study. After the study was conducted and the grievant became aware that employees with a working title of PST Senior were moved to a different role in a higher pay band, the grievant questioned agency management on why her classification had not been changed. As a result of the grievant's inquiries, the agency apparently conducted an individual assessment of the grievant's job duties in August 2007. This internal assessment revealed that the grievant was actually performing the duties of a PST despite the fact that her EWP documented her working title as a PST Senior. As such, the agency asserts that the grievant is properly classified as an Administrative and Office Specialist III with a working title of PST in pay band 3.

In January 2008, at the agency's invitation, the grievant completed a Position Description Questionnaire ("PDQ") whereby she assessed her current duties and responsibilities and submitted it to the agency for review. Grievant Exh. 2. The grievant's direct supervisor signed off on the PDQ as prepared by the grievant. The agency did not change the grievant's work title or classification as a result of the PDQ. The grievant initiated her grievance on August 15, 2008 to challenge her classification and what she characterizes as a "demotion" from a PST Senior to a PST while other PST Seniors were "promoted to a higher pay band."

Throughout her challenge to her classification, the grievant requested documentation supporting the agency's rationale, including the PDQs that had been completed for other PST Senior positions. Despite the grievant's requests for such documentation, she never received the PDQs for other PST Seniors. The agency's third step response stated that "[a]ll information regarding these reviews was shared with you." Agency Exh. 1. However, because the grievant did not seek a pre-hearing order from the hearing officer under the grievance hearing procedure, the hearing officer has no authority to grant compliance relief for the agency's failure to honor the grievant's document request during earlier stages of her grievance.

The agency's human resource manager testified that the grievant's position was thoroughly reviewed for classification and it was deemed that the position was properly classified as pay band 3 instead of pay band 4. The agency asserts that over time, the grievant's lead worker duties diminished and were ultimately removed from her EWP in 2000 and as such, she could no longer be classified as a PST Senior. However, as noted above, in 2008, the grievant was asked to complete a PDQ in order to assess her current duties and responsibilities.

In this PDQ, one of the things the grievant was asked to identify was her level of supervision and scope of responsibilities over her own work as well as the work of other agency employees. In response, the grievant indicated that she was "formally assigned to serve as the lead worker over professional or administrative employees" and listed five employees, all PSTs, that she allegedly led. The last page of the PDQ, entitled the "Immediate Supervisor's Statement," was completed by the employee's immediate supervisor, who assessed the employee's responses to the PDQ for accuracy and completeness. One question posed to the immediate supervisor was whether "the description of the job as given by the employee accurately reflect[s] the tasks, duties and responsibilities that are actually required of [the] position?" The grievant's supervisor completed this page of the PDQ and answered affirmatively to the question regarding whether the grievant had accurately defined her job responsibilities. The grievant's immediate supervisor appears to have agreed with the grievant's statement that she currently leads other workers, a duty which the agency asserts the grievant no longer performed and as such, rendered her a PST rather than a PST Senior. After 2000, the year management allegedly removed the lead responsibilities from her EWP, the grievant's EWP continued to reflect that she was a PST Senior. Based on the foregoing, the grievant has a very rational basis to pursue this grievance.

The agency's human resource manager testified that a HR consultant reviewed the PDQ and found discrepancies, notably that the grievant did not actually have or exercise lead worker responsibilities. The grievant's direct supervisor, after the grievance was filed, reviewed the PDQ and revised her approval of the PDQ, deeming, instead, that the grievant's position had, in fact, no lead responsibilities. Agency Exh. 4. The supervisor testified that she did not give the PDQ document the attention she should have and erred when initially approving it as written by the grievant.

The agency never presented to the grievant, until the grievance hearing, information and documentation of the direct supervisor's retreat on her approval of the PDQ. The grievant's direct supervisor testified at the grievance hearing that she did, in fact, concede she had overlooked the details of the PDQ and made an error in approving the PDQ that was prepared by the grievant, and the supervisor testified that the revisions to the PDQ were justified by the grievant's actual job duties. The supervisor testified that the grievant had no lead worker responsibilities.

The grievant relied on her job title and her historically recognized position as a lead employee. The grievant, however, in support of her grievance, did not testify to any specific lead duties that she recently or currently was expected to perform or did perform. While the grievant was the most senior among her co-workers, that fact, alone, does not establish that her position should properly be in a different, higher pay band. The grievant did not rebut the agency's evidence that the PDQ as completed by the grievant overstated her job responsibilities.

Va. Code § 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 § 2.2-3005.1 provides that the hearing officer may order appropriate remedies. For issues of policy misapplication, the relief may include an order for the agency to reapply the policy. Implicit in the hearing officer's statutory authority is the ability independently to determine whether the agency misapplied policy. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va.

App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), 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."

While the *Tatum* case involved a disciplinary matter, the same principle of the *de novo* review applies to cases involving the alleged misapplication of policy.

Based on the manner, tone, and demeanor of the witnesses, I find that the agency has presented sufficient facts to rebut the grievant's presentation regarding classification of her position. However, I find the grievant's genuineness and good faith belief of her misclassification was unnecessarily fueled by the agency's inexplicable failure to provide the grievant the complete information she continuously sought. The grievant was justified in questioning her classification, and it was rather regrettable that the agency did not present the complete information to the grievant, including her immediate supervisor's rescission of her prior approval of the PDQ that indicated a higher level of administrative duties and supervision. However, the grievant presented no facts or actual lead duties that she was required or expected to perform. The agency could have better responded earlier to the grievance, and perhaps even avoided a hearing, especially regarding the direct supervisor's PDQ reversal. This grievance, however, must be decided on the facts of the grievant's actual job duties as presented and not the agency's poor handling of the grievant's challenge. Based on the facts, the grievant has not borne her burden of proof that the agency misclassified her position.

DECISION

For the reasons stated herein, the grievant has not shown that agency's classification of her position is contrary to policy, arbitrary or capricious.

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, Main Street Centre, 600 East Main Street, Suite 301, Richmond, VA 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 the 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.

I hereby certify that a copy of this decision was sent to the parties and their advocates by certified mail, return receipt requested.

Cecil H. Creasey, Jr.
Hearing Officer

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 9232

Hearing Date:	January 21, 2010
Decision Issued:	January 25, 2010
Reconsideration Issued:	February 10, 2010

RECONSIDERATION DECISION

The Department of Employment Dispute Resolution (EDR) Grievance Procedure Manual, § 7.2(a), (effective August 30, 2004) provides, "A hearing officer's original decision is subject to three types of administrative review. A party may make more than one type of request for review. However, all requests 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. Requests may be initiated by electronic means such as a facsimile or e-mail. However, as with all aspects of the grievance procedure, a party may be required to show proof of timeliness. Therefore, parties are strongly encouraged to retain evidence of timeliness. A copy of all requests must be provided to the other party and to the EDR Director."

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 conclusion is the basis for such a request. § 7.2(a)(1), Grievance Procedure Manual.

On February 9, 2010, the grievant's request for reconsideration was received timely by electronic mail to the hearing officer. The grievant has raised several points of error, which I construe as arguing errors of fact and others arguing errors of law and policy. The grievant points out that the hearing officer required both sides to provide a list of witnesses and exhibits to be used at the hearing, and that the agency listed two witnesses who did not appear. The agency, instead, had the human resources director and the grievant's direct supervisor testify, neither of whom were identified previously. The grievant voiced objection at the hearing that was overruled. However, the hearing officer did not refuse any relief requested by the grievant.

The grievant asserts that the agency had not acted in good faith by notifying her that her immediate supervisor would be called as a witness. The grievant takes issue with the supervisor's evidence of her rescission of her approval of the Position Description Questionnaire (PDQ) that she had initially approved.

The grievant also argues that the Agency never advised her, prior to the hearing, of any indication that her supervisor had retreated on her approval of her PDQ. This information was never presented to her in writing. The grievant asserts that the hearing was when she first learned of her supervisor's change in position. Throughout this grievance, the grievant asserts she requested documentation which formed the bases for the Agency position that she was not a Program Support Tech Sr. The grievant contends this failure by the agency was contrary to a ruling from the Director of Employee Dispute Resolution dated 11/3/2008. The Agency was ordered to provide her with documents related to evaluations and classification of the Program Support Tech Sr. position in relation to the 2007 study on which the classification of her position was based. This was never done. All exhibits submitted by the Agency were after the fact of her grievance being filed. There was never any evidence presented to document my position was not properly classified as a Program Support Tech Sr. until after my grievance had been filed.

The grievant argues, on reconsideration, that her supervisor bowed to management's pressure to change her approval of the PDQ. The grievant, however, freely testified at the grievance hearing and does not assert any additional evidence she either could not then or wishes now to present.

Although the grievant does not so explicitly state, the hearing officer accepts the grievant's arguments as a motion to reopen the hearing to allow for presentation of new evidence. However, there is no showing that the grievant has met the requirement of presenting additional evidence. To establish that evidence is "newly discovered," the moving party must show

> (1) the evidence was first discovered after the hearing; (2) due diligence on the moving party's part to discover the new evidence had been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were reheard, or is such that would require the hearing decision to be amended.

See Boryan v. United States, 884 F.2d 767, 771 (4th Cir. 1989) (*citing Taylor v. Texgas Corp.*, 831 F. 2d 255, 259 (11th Cir. 1987)). *See also* EDR Ruling No. 2007-1490 which adopted the *Texgas* standard.

By statute, hearing officers have the duty to receive probative evidence and to exclude only evidence which is irrelevant, immaterial, insubstantial, privileged, or repetitive. Va. Code § 2.2-3005(C)(5). Thus, where a grievant or agency seeks to introduce probative evidence at hearing, but has previously failed to identify the evidence in accordance with the hearing officer's prehearing orders, the hearing officer must nevertheless admit the evidence, but in the interests of due process, must ensure that the opposing party is not prejudiced by the dilatory proffer of evidence, for instance by adjourning the hearing to allow the opposing party time to respond. *See* EDR Ruling #2006-1387 and EDR Ruling #2006-1290.

While the hearing officer does not condone the agency's handling of the grievance during the stages before the grievance hearing, the hearing officer does not have compliance jurisdiction or power to penalize the agency. As stated in the original decision, because the grievant did not seek a pre-hearing order from the hearing officer under the grievance hearing procedure, the hearing

officer has no authority to grant compliance relief for the agency's failure to honor the grievant's document request during earlier stages of her grievance.

The hearing officer did not deny the grievant any relief requested at the hearing, other than admitting the agency's evidence, as required by applicable rulings. The request for reconsideration does not advance any allowable request for additional evidence and the request does not proffer any factual evidence in addition to what was introduced at the hearing.

The grievant has not presented probative evidence of any incorrect legal conclusions by the hearing officer as the basis for her request for reconsideration. The issues raised by the grievant were considered and decided in the original decision, and the hearing officer, after conducting a *de novo* hearing, found the grievant did not meet her burden of proving by a preponderance of the evidence that the agency misapplied policy or acted arbitrarily or capriciously in classifying her position. For this reason and the rationale expressed in the underlying decision, the hearing officer hereby denies the grievant's request for reconsideration and hereby affirms his decision that the grievant failed to meet her burden of proving by a preponderance of the evidence that the agency misapplied policy or acted arbitrarily or capriciously.

APPEAL RIGHTS

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

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

2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

I hereby certify that a copy of this decision was sent to the parties and their advocates by certified mail, return receipt requested.

Cecil H. Creasey, Jr.
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Department of Social Services

June 3, 2010

The grievant has requested that the Department of Human Resource Management conduct an administrative review of the hearing officer's decision in Case No. 9232. For the reason stated below, this Department will not disturb the decision. The agency head, Ms. Sara Redding Wilson, has asked that I respond to this appeal.

FACTS

The facts as set forth by the hearing officer in his **Finding of Facts**, in part, are as follows:

> After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions:
>
> In her grievance, the grievant challenges the classification of her position, asserting that the agency failed to follow properly the Commonwealth's classification policy. The grievant's current role is Administrative and Office Specialist III and her work title is Program Support Technician ("PST"). In 1999, the grievant was hired as a PST Senior. As a PST Senior, the grievant's documented duties included serving as the "lead worker" over other agency employees. According to the agency, over time, the lead responsibilities were decreased and ultimately removed from the grievant's employee work profile ("EWP") in 2000. The agency asserts that the removal of these lead worker responsibilities rendered the grievant a PST rather than a PST Senior. However, the grievant's EWP continued to document her work title as a PST Senior until 2006. Moreover, at least some of her EWPs after 2000 contain language that could potentially be construed as describing the grievant's job elements or core responsibilities as including back-up assistance to staff in the absence of the supervisor, as well as the training of staff, as assigned.
>
> In 2007, the agency conducted an agency-wide study that led to certain changes in classification and compensation. Those employees performing the duties of a PST Senior were moved from pay band 3 to pay band 4 with a new role title of General Administration Supervisor I/Coordinator I. According to the agency, because the grievant was not performing the duties of a PST Senior, she was not moved to the new pay band 4 role. Moreover, the grievant's role title, role code and pay band

remained unchanged and she actually received a salary increase as a result of the 2007 Classification and Compensation Study. After the study was conducted and the grievant became aware that employees with a working title of PST Senior were moved to a different role in a higher pay band, the grievant questioned agency management on why her classification had not been changed. As a result of the grievant's inquiries, the agency apparently conducted an individual assessment of the grievant's job duties in August 2007. This internal assessment revealed that the grievant was actually performing the duties of a PST despite the fact that her EWP documented her working title as a PST Senior. As such, the agency asserts that the grievant is properly classified as an Administrative and Office Specialist III with a working title of PST in pay band 3.

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Throughout her challenge to her classification, the grievant requested documentation supporting the agency's rationale, including the PDQs that had been completed for other PST Senior positions. Despite the grievant's requests for such documentation, she never received the PDQs for other PST Seniors. The agency's third step response stated that "[a]ll information regarding these reviews was shared with you." Agency Exh. 1. However, because the grievant did not seek a pre-hearing order from the hearing officer under the grievance hearing procedure, the hearing officer has no authority to grant compliance relief for the agency's failure to honor the grievant's document request during earlier stages of her grievance.

The agency's human resource manager testified that the grievant's position was thoroughly reviewed for classification and it was deemed that the position was properly classified as pay band 3 instead of pay band 4. The agency asserts that over time, the grievant's lead worker duties diminished and were ultimately removed from her EWP in 2000 and as such, she could no longer be classified as a PST Senior. However, as noted above, in 2008, the grievant was asked to complete a PDQ in order to assess her current duties and responsibilities. In this PDQ, one of the things the grievant was asked to identify was her level of supervision and scope of responsibilities over her own work as well as the work of other agency employees. In response, the grievant indicated that she was "formally assigned to serve as the lead worker over professional or administrative employees" and listed five employees, all PSTs, that she allegedly led. The last page of the PDQ, entitled the "Immediate Supervisor's Statement," was completed by the employee's immediate supervisor, who assessed the employee's responses to the PDQ for accuracy and completeness. One question posed to the immediate supervisor was whether "the description of the job as given by the employee accurately reflect[s] the tasks, duties and

responsibilities that are actually required of [the] position?" The grievant's supervisor completed this page of the PDQ and answered affirmatively to the question regarding whether the grievant had accurately defined her job responsibilities. The grievant's immediate supervisor appears to have agreed with the grievant's statement that she currently leads other workers, a duty which the agency asserts the grievant no longer performed and as such, rendered her a PST rather than a PST Senior. After 2000, the year management allegedly removed the lead responsibilities from her EWP, the grievant's EWP continued to reflect that she was a PST Senior. Based on the foregoing, the grievant has a very rational basis to pursue this grievance.

The agency's human resource manager testified that a HR consultant reviewed the PDQ and found discrepancies, notably that the grievant did not actually have or exercise lead worker responsibilities. The grievant's direct supervisor, after the grievance was filed, reviewed the PDQ and revised her approval of the PDQ, deeming, instead, that the grievant's position had, in fact, no lead responsibilities. Agency Exh. 4. The supervisor testified that she did not give the PDQ document the attention she should have and erred when initially approving it as written by the grievant.

The agency never presented to the grievant, until the grievance hearing, information and documentation of the direct supervisor's retreat on her approval of the PDQ. The grievant's direct supervisor testified at the grievance hearing that she did, in fact, concede she had overlooked the details of the PDQ and made an error in approving the PDQ that was prepared by the grievant, and the supervisor testified that the revisions to the PDQ were justified by the grievant's actual job duties. The supervisor testified that the grievant had no lead worker responsibilities.

The grievant relied on her job title and her historically recognized position as a lead employee. The grievant, however, in support of her grievance, did not testify to any specific lead duties that she recently or currently was expected to perform or did perform. While the grievant was the most senior among her co-workers, that fact, alone, does not establish that her position should properly be in a different, higher pay band. The grievant did not rebut the agency's evidence that the PDQ as completed by the grievant overstated her job responsibilities.

In his **Conclusion,** the hearing officer continued as follows:

> Based on the manner, tone, and demeanor of the witnesses, I find that the agency has presented sufficient facts to rebut the grievant's presentation regarding classification of her position. However, I find the grievant's genuineness and good faith belief of her misclassification was unnecessarily fueled by the agency's inexplicable failure to provide the grievant the complete information she continuously sought. The grievant was justified in questioning her classification, and it was rather regrettable that the agency did not present the complete information to the grievant, including her immediate supervisor's rescission of her prior approval of the PDQ that indicated a higher level of administrative duties and supervision.

> However, the grievant presented no facts or actual lead duties that she was required or expected to perform. The agency could have better responded earlier to the grievance, and perhaps even avoided a hearing, especially regarding the direct supervisor's PDQ reversal. This grievance, however, must be decided on the facts of the grievant's actual job duties as presented and not the agency's poor handling of the grievant's challenge. Based on the facts, the grievant has not borne her burden of proof that the agency misclassified her position.

DECISION

> For the reasons stated herein, the grievant has not shown that agency's classification of her position is contrary to policy, arbitrary or capricious.

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 exceeds the limits of reasonableness, he may reduce the discipline. By statute, this Department 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/or procedure.

The relevant policy, the Department of Human Resource Management's Policy No. 1.40, "Provides for the establishment and communication of employees' performance plans and procedures for evaluating employees' performance." Updating the Employee Work Profile annually provides a means to describe the duties and responsibilities of an employee's position and measures by which to evaluate work performance. The issue for this Agency to review is whether the agency's classification action was contrary to policy, arbitrary or capricious. In addition to contesting the accuracy of the classification, the grievant also raised the issue that the agency did not produce all requested documents as directed by the EDR in an earlier compliance ruling.

We note that in a March 29, 2010 ruling, the Director of the Department of Employment Dispute Resolution addressed the agency's non-production of documents requested by grievant, the authority of the hearing officer to draw an adverse inference, and remanded the decision to the hearing officer. That ruling stated, in part, the following:

> To the extent that he did not recognize the authority to draw an adverse inference against the agency, he is instructed on remand to consider whether an adverse inference should be drawn against the agency in this case and what impact, if any, such an inference would have on the hearing decision.

We note that in an April 5, 2010, decision the hearing officer returned the case to the agency and stated, in part, the following:

> Based on the Agency's non-compliance with the November 3, 2008, compliance ruling, and the EDR Director's remand to the hearing officer with specific direction, I find that an adverse inference should apply against the Agency for its failure to comply with the document production ordered by the EDR Director on November 3, 2008. The Agency's failure to provide the documents impeded the grievant's inquiry and ability to present other similar decisions within the agency. Thus, based on adverse inference, I find that the Agency's application of policy in classifying the Grievant's position was tainted and the classification review and decision must be repeated.

In response to the remanded decision from the hearing officer, in a memorandum dated April 19, 2010, the agency indicated that it had provided the documents the grievant had requested and conducted another classification analysis of the grievant's position. The memorandum further indicated that two other human resources professionals had reviewed the analysis for verification, and the classification did not change. There is no evidence that the hearing officer commented on this final submission.

In the instant case, the hearing officer's remanded decision determined that because the classification process was tainted, the corrective action was to repeat the process. The process was repeated, but the classification did not change. Given the foregoing chronology of events, it is the opinion of this Department that the issues cited in your request for administrative review of the original decision are no longer applicable. Therefore, this Department has closed its review of the original decision.

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Ernest G. Spratley