

Issues: Group II Written Notice (failure to follow policy, abuse of State equipment, disclosure of confidential information) and Termination; Hearing Date: 01/11/10; Decision Issued: 01/19/10; Agency: DSS; AHO: Lorin A. Costanzo, Esq.; Case No. 9248; Outcome: No Relief – Agency Upheld in Full; **Administrative Review:** **Reconsideration Request received 01/23/10; Reconsideration Decision issued: 02/10/10; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 02/03/10; EDR Ruling #2010-2525 issued 03/30/10; Outcome: AHO’s decision affirmed; Administrative Review: DHRM Ruling Request received 02/02/10; DHRM Ruling issued 04/14/10; Outcome: No policy violation identified – AHO’s decision affirmed.**

**Commonwealth of Virginia
DEPARTMENT OF SOCIAL SERVICES**

**DECISION OF HEARING OFFICER
In the matter of: Case No: 9248**

Hearing Date: January 11, 2010
Decision Issued: January 19, 2010

PROCEDURAL HISTORY

On September 25, 2009 Grievant was issued a Group III Written Notice with termination. The Written Notice provided, "Termination due to your misuse and unauthorized use of state records and disclosure of confidential information; disclosure of confidential information and failure to comply with written policy." The Written Notice indicated Offense Codes/Categories of:

- 13...Failure to follow instructions and/or policy,
- 51...Unauthorized use of State property or records, and
- 52...Computer/Internet misuse.¹

Following the failure to resolve the matter at the second resolution step, Grievant requested qualification of her grievance on November 18, 2009 and on November 30, 2009 the matter was qualified for a hearing by Agency Head.² The undersigned was appointed Hearing Officer effective December 16, 2009 and hearing was held on January 11, 2010 with Grievant in attendance.

APPEARANCES

Grievant (who was a witness)
Family member

Agency's representative
Agency party designee, who was a witness
Fiscal Technician
Fiscal Technician #2
District Manager
Senior Accountant

ISSUES

Were the Grievant's actions such as to warrant disciplinary actions under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

¹ Agency Exhibits, Tab 1, Written Notice issued 9/25/09.

² Agency Exhibits, Tab 2, Grievance Form A-Expedited Process.

FINDINGS OF FACT

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

Grievant was employed by Agency as a Fiscal Technician, (roll title: Administrative and Office Specialist, III). Her duties with Agency include processing payments received from certain individuals on their child support obligations. Her duties also involve use an Agency computer and access to Agency information systems and resources.³

Agency has in place written policies prohibiting the disclosure of confidential information and accessing confidential information not related directly to the responsibilities of the administration child support enforcement laws.⁴

Grievant was aware that agency policy prohibited her from making any unauthorized access to confidential information and that she was prohibited from disclosing confidential information. On 11/2/07 Grievant signed the "Virginia Department of Social Services, Information Security Policy, Standards and Acceptable Use Awareness Acknowledgement Form". On 11/24/08 Grievant signed a document indicating she had received a copy of, read, and understood the "Conflict of Interest Guidelines for [Division] Employees" and the requirement of maintaining confidentiality of records.⁵

The Automated System for Enforcement of Child Support ("APECS") provides a notice and warning page to employees each day that it is accessed by an employee. This notice and warning page includes the following:

"THE APECS SYSTEM CONTAINS PRIVILEGED CUSTOMER INFORMATION AS WELL AS GOVERNMENT INFORMATION THAT IS RESTRICTED TO AUTHORIZED USERS ONLY."

"... UNAUTHORIZED PRINTING OR RELEASE OF DATA IS A VIOLATION OF [DIVISION] POLICY AND PROCEDURES...."

"... MAINTAINING CONFIDENTIALITY OF RECORDS AND OBEYING THE CONFLICT OF INTEREST (COI) AVOIDANCE REQUIREMENTS IS AN IMPORTANT PART OF EACH [DIVISION] EMPLOYEE'S RESPONSIBILITY. ANY VIOLATION OF THE COI GUIDELINES IS GROUNDS FOR DISCIPLINARY ACTION. SHOULD FACTS AND CIRCUMSTANCES WARRANT IT, DISCIPLINARY ACTION FOR A FIRST TIME VIOLATION MAY RESULT IN TERMINATION OF EMPLOYMENT AND POSSIBLE CRIMINAL PROSECUTION."⁶

Grievant has access to SPIDeR, (System Partnering in a Demographic Repository) a web-based system which facilitates communication between several applications including the Division of Motor Vehicles and Virginia Employment Commission. Agency utilized "SPIDeR" for locate purposes for people who do not have addresses in the Automated System for Enforcement of Child Support ("APECS").⁷

On or about July 14, 2009, Grievant retrieved payments placed in the Agency's drop box. She was tasked with recording incoming payments and preparing them for deposit. Grievant

³ Agency Exhibits, Tab 5 and Testimony.

⁴ Agency Exhibits, Tab 6 and Tab 7.

⁵ Agency Exhibits, Tab 6, and Tab. 7.

⁶ Agency Exhibits, Tab 7 and Testimony.

⁷ Agency Exhibits, Tab 3 and Testimony.

observed the name of a particular payor on a money order and expressed to a co-worker that she had a past boyfriend by the same name.⁸

The relevant information needed to properly identify the payment retrieved was provided by the individual's money order which indicated on its face the payor's name and social security number. This information matched information in the Automated System for Enforcement of Child Support ("APECS"). However, Grievant initiated a search through SPIDeR to access DMV records of the individual whose name was the same as a past boyfriend. She showed his DMV photograph to another employee and commented that it was not the same person as her past boyfriend.⁹

On July 24, 2009 another individual made a check payment on his child support case at Agency's office. Grievant was not assigned by Agency to work on the case of this individual. The individual who made the check payment on 7/24/09 had never met or talked to Grievant at the Agency office or away from the Agency office.¹⁰

Shortly after the individual's visit to the Agency office Grievant accessed the individual's DMV records through SPIDeR. She showed the individual's DMV photograph to a fellow employee. Grievant initiated a search on Myspace and Facebook as to the individual whose DMV records she had accessed. On subsequent dates she transmitted, using Myspace, communications to him. On Myspace Grievant disclosed the individual's affiliation with "[the Division]" indicating she saw him in the lobby at her work place and specifically indicating "[the Division]" in the e-mail.¹¹

The Individual expressed concern over the contacts by Grievant and he made a police report concerning harassment to law enforcement officials. Individual's wife was upset that somebody from Agency contacted her husband knowing him to be married and having a family.¹²

Grievant has one active Group I offense issued 4/23/09 (Offense Dates 3/2/09 - 4/3/09) issued for, "continued unsatisfactory job performance including failure to follow daily deposit procedures, undistributed report, customer service inquiries and follow up on fiscal adjustments timely."¹³

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that the disciplinary action taken was warranted and appropriate under the circumstances. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence that is more convincing than the opposing evidence.¹⁴

APPLICABLE LAW AND OPINION

⁸ Agency Exhibits, Tab 3 and Testimony.

⁹ Agency Exhibits, Tab 3 and Testimony.

¹⁰ Agency Exhibits, Tab 3 and Tab 4.

¹¹ Agency Exhibits, Tab 3 and Tab 4.

¹² Agency Exhibits, Tab 4.

¹³ Agency Exhibits, Tab 8, Written Notice.

¹⁴ Department of Employment Dispute Resolution, Grievance Procedure Manual, ("GPM") Section 5.8 and 9.

The General Assembly enacted the Virginia Personnel Act, Va. Code Section 2.2-2900 *et seq.*, establishing the procedures and policies applicable to employment within the Commonwealth of Virginia. 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 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).

Virginia Code Section 2.2-3000(A) sets forth the Virginia grievance procedure and provides, in 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 employee disputes which may arise between state agencies and those employees who have access to the procedure under Section 2.2-3001."

To establish procedures on standards of conduct and performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Human Resources Management promulgated the *Standards of Conduct*, Policy No. 1.60. The *Standards of Conduct* provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The *Standards of Conduct* serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct, and to provide appropriate corrective action.

Section B.2 of the Commonwealth of Virginia's Department of Human Resource Management Policies and Procedures Manual, *Standards of Conduct*, Policy No. 1.60 provides that:

"Examples of offenses, by group, are presented in Attachment A. These examples are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. Accordingly, any offense not specifically enumerated, that in the judgment of agency heads or their designees undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of this section."

Section B.2.c. of the *Standards of Conduct* provides that Group III offenses include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.¹⁵ "Any misuse or unauthorized use of state records" is listed in "Attachment A" as an example of a Group III Offense.¹⁶

Conflict of Interest Guidelines for [Division] Employees provides, in pertinent part:

¹⁵ Agency Exhibits, Tab 9, - DHRM Policies and Procedures Manual, Policy No. 1.60, effective April 16, 2008, "Standards of Conduct".

¹⁶ Agency Exhibits, Tab 9, - Attachment A: Examples of Offenses Grouped by Level, DHRM Policies and Procedures Manual, Policy No. 1.60, effective April 16, 2008, "Standards of Conduct".

"Conflict of Interest is defined as a contradiction between the private interests and the public obligation of a person in an official position. Every [Division] employee is in an official position."

"[Division] deals with extremely confidential and sensitive facts that have profound and lasting impact on our customers and other citizens. The results of these private dealings can often have public consequences, especially if some citizen should believe a [Division] employee has breached public trust."

Examples of areas of potential conflict of interest are:

"b. Disclosure of confidential information on [Division] cases to unauthorized individuals."

"c. Researching cases which the employee is not assigned to work, to gain information about persons he or she knows personally or knows of, whether or not that information is divulged to anyone else."

"e. Accessing confidential information not related directly to the responsibilities of administering child support enforcement laws."

"Maintaining confidentiality of records and obeying the conflict of interest avoidance requirements are an important part of each [Division] employee's responsibility. Any action that breaches this responsibility, including noncompliance with [Division] procedures, is grounds for disciplinary action under the Commonwealth of Virginia's Standard of Conduct and Performance. Should the facts and circumstances warrant it, discipline for a first time violation may result in termination of employment and potential criminal prosecution."¹⁷

On 11/24/08 Grievant signed the *Conflict of Interest Guidelines for [Division] Employees* indicating that maintaining confidentiality of records and obeying the conflict of interest avoidance requirements are an important part of each [Division] employee's responsibility. Grievant signed indicating she had read and understood the importance of compliance with these guidelines and had been provided with a copy of the document.¹⁸

Virginia Department of Social Services, Information Security Policy, Revised: May 2008 states at subsection 1.2 that:

"a. Information is:

1. A critical asset that shall be protected.
2. Restricted to authorized personnel for official use."¹⁹

An "*Information Security Policy Acknowledgement*" was signed by Grievant. This document indicated that the Agency provides computers and computer accounts to its staff to assist them in the performance of their jobs. She acknowledged that the computer system belongs to the Agency and the user may use the system for authorized purposes only. She further acknowledged that any and all databases and files she has access to are confidential and that she is prohibited from making any unauthorized access or disclosure of confidential information.²⁰

¹⁷ Agency Exhibits, Tab 6, "Conflict of Interest Guidelines for [Division] Employees".

¹⁸ Agency Exhibits, Tab 6, "Conflict of Interest Guidelines for [Division] Employees".

¹⁹ Agency Exhibits, Tab 7.

²⁰ Agency Exhibits, Tab 7, Information Security Policy Acknowledgement.

DHRM Policies and Procedures Manual, Policy Number: 1.75. *Use of the Internet and Electronic Communications Systems*, Efft. Date: 8/1/01 is applicable to Grievant and states:

"Business Use: Agency-provided computer systems that allow access to the Internet and electronic communications systems are the property of the Commonwealth and are provided to facilitate the effective and efficient conduct of State Business. Users are permitted access to the Internet and electronic communication systems to assist in the performance of their jobs."

"Personal Use: Personal use means use that is not job related. In general, incidental and occasional personal use of the Commonwealth's Internet access or electronic communication systems is permitted; however, personal use is prohibited that ... violates any provision of this policy, any supplemental policy adopted by the agency supplying the Internet or electronic communication systems, or any other policy, regulation, law or guideline as set forth in local, state or federal law...."

Policy Number 1.75 indicates prohibited activities include "any other activities designated as prohibited by the agency."²¹

On 11/2/07 Grievant signed the *"Virginia Department of Social Services, Information Security Policy, Standards and Acceptable Use Awareness Acknowledgement Form"* indicating, in pertinent part:

"I understand that any and all databases and files I have access to are confidential."

"I understand that I am prohibited from making any unauthorized access or disclosure of confidential information."²²

Grievant attended "Best Practices Security Training", 1/30/06, 2/12/07, and 3/4/08.²³

The Automated System for Enforcement of Child Support ("APECS") displays an electronic page of information to employees each day that it is accessed. This page contains, in pertinent part, the following:

"THE APECS SYSTEM CONTAINS PRIVILEGED CUSTOMER INFORMATION AS WELL AS GOVERNMENT INFORMATION THAT IS RESTRICTED TO AUTHORIZED USERS ONLY."

"... UNAUTHORIZED PRINTING OR RELEASE OF DATA IS A VIOLATION OF [DIVISION] POLICY AND PROCEDURES...."

"... MAINTAINING CONFIDENTIALITY OF RECORDS AND OBEYING THE CONFLICT OF INTEREST (COI) AVOIDANCE REQUIREMENTS IS AN IMPORTANT PART OF EACH [DIVISION] EMPLOYEE'S RESPONSIBILITY. ANY VIOLATION OF THE COI GUIDELINES IS GROUNDS FOR DISCIPLINARY ACTION. SHOULD FACTS AND CIRCUMSTANCES WARRANT IT, DISCIPLINARY ACTION FOR A FIRST TIME VIOLATION MAY RESULT IN TERMINATION OF EMPLOYMENT AND POSSIBLE CRIMINAL PROSECUTION."

Written Notice:

Grievant was issued a Group III Written Notice on 9/25/09 concerning incidents related to

²¹ Agency Exhibits, Tab 7.

²² Agency Exhibits, Tab 7.

²³ Agency Exhibits, Tab 7.

two individuals. Both of these matters involved allegations of Grievant, for a non-business purpose, accessing confidential information at work and using an Agency computer. Certain confidential information was divulged as to one individual.

Incident number 1.

On or about July 14, 2009, Grievant retrieved payments received in the Agency's office's drop box. Grievant was tasked with recording and preparing such payments for deposit.

In this incident, Grievant observed the name of a payor on a money order she retrieved from the Agency's drop box to be the same name as a past boyfriend. Grievant told a co-worker that she had a past boyfriend by the same name and thought maybe he had a case here. Testimony described Grievant as being upset at the thought the past boyfriend may have a child and was paying child support. To see if the name on the money order was her past boyfriend Grievant pulled confidential information up on SPIDeR accessing the DMV records of the payor.

When a payment is recorded for deposit, the payment information provided by the payor is verified to the Automated System for Enforcement of Child Support ("APECS"). Agency witnesses testified that there was no business need for Grievant to access payor's information on DMV records. The information needed to post the payment was on the money order itself. The money order listed payor's name and social security number and this matched information in APECS.²⁴

Agency utilized "SPIDeR" for locate purposes for people who do not have addresses in APECS. Grievant was looking to determine if the money order payor was her past boyfriend and not to determine a payor's address. This was not part of the Agency's locate process and there was no business need to utilize "SPIDeR".

For personal reasons, Grievant initiated a search through "SPIDeR" to access DMV records of the payor and called a fellow employee to view the payor's DMV photograph she accessed on her computer. Grievant made the comment that the payor was not the same person as her past boyfriend. Additionally, Grievant sent an Agency employee an e-mail stating her being happy that it was not him.²⁵

Incident number 2.

On July 24, 2009 a non-custodial parent made a check payment in Agency office on his child support case. After the payment Grievant was observed accessing DMV information on this individual through "SPIDeR". Grievant showed this individual's picture to an Agency employee and commented as to him having dreamy eyes and that she was in love with him.²⁶

After accessing the confidential information through "SPIDeR" and using the confidential case information accessed, Grievant started a search on "Myspace" and "Facebook" for this individual. Grievant located the individual and initiated social networking contacts with him. Contact was made by Grievant with this individual in July and August of 2009. In one of the contacts Grievant indicated that she had seen the individual in the lobby at her work at "[the Division]".

²⁴ Agency Exhibits, Tab 3 page 2.

²⁵ Agency Exhibits, Tab 3.

²⁶ Agency Exhibits, Tab 3and Testimony.

Agency expressed concern that information as to an individual having a case with Agency is confidential and should not have been divulged or posted on a social networking website.²⁷ The individual expressed concern over the contacts by Grievant. He indicated to Agency that he reported matters to law enforcement. Agency was contacted by law enforcement to discuss the police report filed.²⁸ Additionally, the individual's spouse was described by him as being upset that somebody from agency contacted him knowing him to be married and having a family.²⁹

Agency's fiscal unit consists of two team members and each is assigned a caseload. The caseload split is determined by the first letter of the non-custodial parent's last name. The individual's name did not fall into Grievant's case load. She does not contest that she called up confidential information and showed the individual's picture to a co-worker. She does not contest contacting the individual via Myspace and Facebook. Grievant contends that the individual had questions and that is what brought her into his case even though it was not assigned to her.

Grievant called over co-worker to her worksite and showed the co-worker a picture of the individual on the SPIDeR website through the DMV. Grievant told the co-worker his eyes were dreamy, told the co-worker the individual's name, and that she was going to find him in Facebook or Myspace to see if she could get more information on him. After accessing confidential information Grievant initiated a name search on Myspace and Facebook.

Grievant transmitted social networking e-mails to the individual. In these e-mails on Myspace, Grievant disclosed she saw the individual in the Agency lobby at her work place and specifically indicated "[the Division]".³⁰

Offense:

Agency expressed concern over the seriousness of matters in this case. Agency investigated matters and determined, as a result of their investigation, that there was a breach of confidentiality and that Grievant's actions constituted a misuse/unauthorized use of state records which is listed in the Standards of Conduct, Attachment A: Policy 1.60 as an example of a Group III offense. Agency was concerned that Grievant utilized an Agency computer for non-business reasons, she accessed confidential information accessed using Agency's information system for non-business reasons, and that Grievant disclosed confidential information.

Computer access to confidential information was utilized by Grievant on the job for personal reasons. In one incident, Grievant checked out the name of a payor to see if it was a past boyfriend. In a second incident she called up confidential information to establish a personal contact with the individual. This individual brought his concerns to Agency that confidential information was disclosed by Grievant. He was concerned over disclosure of his relationship with [the Division] and over contacts initiated by Grievant. Grievant did not know him before he came into the [the Division] office, Grievant saw him in the [the Division] lobby, and used confidential information to identify and contact him.

Mitigation:

²⁷ Agency Exhibits, Tab 3 and Testimony of District Manager.

²⁸ Agency Exhibits, Tab 3; Testimony.

²⁹ Agency Exhibits, Tab 4.

³⁰ Agency Exhibits, Tab 3 and Tab 4.

Grievant has one active Group I offense issued 4/23/09 (Offense Dates 3/2/09 - 4/3/09) issued for, "continued unsatisfactory job performance including failure to follow daily deposit procedures, undistributed report, customer service inquiries and follow up on fiscal adjustments timely.

The Standards of Conduct provides that Group III Offenses include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination. Under the *Rules for Conducting Grievance Hearings*, Section VI. B.1., 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. The Agency's discipline is not found to exceed the limits of reasonableness.

Conclusion:

Agency had in place at all times relevant to this proceeding, written policy concerning confidentiality, the use of information/records, and the use of computers at the worksite. Grievant was aware of such policy. Grievant accessed, utilized, and disclosed confidential information for non-business reasons. Agency has proven, by a preponderance of the evidence, that Grievant:

- a.) failed to follow instructions and/or written policy,
- b.) used without authorization State property or records,
- c.) misused computer/Internet, and
- d.) disclosed confidential information.

Reviewing the facts de novo (afresh and independently, as if no determination had yet been made) it is determined, for the reasons stated above, that Agency has proven by a preponderance of the evidence that (i) Grievant engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, (iii) the Agency's discipline was consistent with law and policy, and (iv.) there are not mitigating circumstances justifying a reduction or removal of the disciplinary action.

The disciplinary action of issuing a Group III Written Notice with termination was warranted and appropriate under the circumstances.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant on 9/25/09, of a Group III Written Notice with termination is hereby **UPHELD**.

APPEAL RIGHTS

You may file an Administrative review request within **15 calendar days** from the date the decision was issued.

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 are 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: Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219.

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: Director, Department of Employment Dispute Resolution, Main Street Centre, 600 East Main Street, Suite 301, Richmond, VA 23219.

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 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. You must give a copy of your notice of appeal the Director of the Department of Employment Dispute Resolution.

Lorin A. Costanzo, Hearing Officer

Commonwealth of Virginia
DEPARTMENT OF SOCIAL SERVICES

RECONSIDERATION DECISION OF HEARING OFFICER
In the matter of: Case No: 9248-R

Reconsideration Decision Issued: February 3, 2010

RECONSIDERATION DECISION

§ 7.2(a) of the Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual* states,

"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 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 conclusions is the basis for such a request.³¹ Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended.

On January 19, 2010, a decision was issued by the hearing officer in this cause. By e-mail dated January 23, 2010, Grievant timely requested a reconsideration of the decision in this cause. Grievant's request for reconsideration contended there were misunderstandings, no proof, and/or lack of proper proof as to matters.

³¹ § 7.2(a) of the Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*

Consideration was given by the hearing officer to the evidence admitted at the hearing in arriving at the decision in this cause. The hearing officer has authority to weigh the evidence and determine witness credibility. Where the evidence conflicts or is subject to varying interpretations the Hearing Officer has the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact.

In disciplinary actions the hearing officer reviews the facts *de novo* to determine whether the actions constituted misconduct and whether the agency has established by a preponderance of the evidence that the action taken by agency was both warranted and appropriate under all the facts and circumstances. Grievance Procedure Manual §5.8.

In her request to reconsider the decision, Grievant has not offered any probative newly discovered evidence nor has Grievant presented probative evidence of any incorrect legal conclusion by the hearing officer.

For the reasons stated above, Grievant's request for reconsideration of the decision is **denied**.

APPEAL RIGHTS

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

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision:

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

Lorin A. Costanzo, Esq.
Hearing Officer

April 14, 2010

RE: **Grievance of [Grievant] v. Department of Social Services**
Case No. 9248

Dear [Grievant]:

The agency head of the Department of Human Resource Management, Ms. Sara Redding Wilson, has asked that I respond to your request for an administrative review of the hearing officer's decision in the above referenced case. Please note that, pursuant to the Grievance Procedure Manual, §7.2(a), either party to the grievance may request an administrative review 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 (DHRM) to review the decision. You must refer to the specific policy and explain why you believe the decision is inconsistent with that policy.
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.

In each instance where a request is made to this Agency for an administrative review, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent. In our opinion, your request does not identify any such policy. Rather, it appears that you are disagreeing with how the hearing officer assessed the evidence and with the resulting decision. We must therefore we must respectfully decline to honor your request to conduct the review.

Sincerely,

Ernest G. Spratley
Assistant Director, Office of
Equal Employment Services

c: Sara R. Wilson, Director, DHRM
Claudia T. Farr, Director, EDR
Lorin A. Costanzo, Hearing Officer