Issue: Two Group II Written Notices with Termination (failure to follow policy); Hearing Date: 06/15/10; Decision Issued: 06/21/10; Agency: DCE; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 9329; Outcome: Partial Relief; **Administrative Review: AHO Reconsideration Request received 07/01/10; Reconsideration Decision issued 07/12/10; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 07/01/10; EDR Ruling #2011-2694 issued 07/16/10; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 07/01/10; DHRM Ruling issued 07/08/10; Outcome: Declined to review.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 9329

Hearing Date: June 15, 2010
Decision Issued: June 21, 2010

PROCEDURAL HISTORY

Grievant was a cosmetology instructor for the Department of Correctional Education. On November 24, 2009, the grievant's managers told her of the agency's intent to issue two Group II Written Notices and terminate her employment. The managers gave the grievant the option of resignation. After considering her options during the meeting, the grievant submitted her resignation. The grievant ultimately sought to withdraw her resignation, but the agency refused. The agency also disallowed access to the grievance procedure because of the resignation. By Ruling No. 2010-2510 (February 23, 2010), the EDR Director found the resignation to be involuntary and allowed the grievant the option of revoking her resignation. The grievant revoked her resignation and the agency, pursuant to the EDR ruling, issued two Group II Written Notices on March 17, 2010, with termination retroactive to November 24, 2009, which is deemed the date of termination.

Grievant timely filed a grievance to challenge the Agency's action. The outcome of the resolution steps was not satisfactory to the Grievant and she requested a hearing. On May 11, 2010, the Department of Employment Dispute Resolution ("EDR") appointed the Hearing Officer. A pre-hearing conference was held by telephone on May 18, 2010. Because of exigent circumstances, the time for scheduling the hearing and decision was extended for good cause. The hearing was scheduled at the first date available between the parties and the hearing officer, Tuesday, June 15, 2010, on which date the grievance hearing was held, at the Agency's headquarters facility.

The Agency and grievant submitted documents for exhibits that were, without objection, admitted into the grievance record and will be referred to as Agency's or Grievant's Exhibits, respectively. All evidence presented has been carefully considered by the hearing officer.

The Written Notices issued on March 17, 2010, and subject of this grievance are as follows:

1. From January 2009 to October 2009, "[y]ou are being issued a Group II for not following DCE Policy 3-5 regarding use of inmate aides. You failed to supervise your inmate

aides, and failed to perform the duties of a teacher by allowing your inmate aides to perform teacher duties."

2. From January 2009 to October 2009, "[y]ou violated policy 3-5 as well as policy 3-32 by not securing a key that was found in an inmate aide[']s desk, and by allowing confidential documents to end up in a desk drawer and file cabinets that you had assigned for your inmate aides to use." This was marked a Group II offense.

With the concurrent issuance of two Group II Written Notices, the Grievant was terminated.

APPEARANCES

Grievant
Counsel for Grievant
Representative/Advocate for Agency
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?

The Grievant requests rescission or reduction of the two Group II Written Notices and reinstatement to her position, with back pay.

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 Agency.* 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.

DHRM Policy No. 160, Standards of Conduct, defines Group I Offenses to include acts of minor misconduct that require formal disciplinary action. This level is appropriate for repeated acts of minor misconduct or for first offenses that have a relatively minor impact on business operations but still require formal intervention. Group II offenses include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action. "This level is appropriate for offenses that significantly impact business operations and/or constitute neglect of duty, insubordination, the abuse of state resources, violations of policies, procedures, or laws." Examples of Group II offenses stated in the policy are "failure to follow supervisor's instructions or comply with written policy." Agency Exh. V. "A second active Group II Notice normally should result in termination; however, when mitigating circumstances exist, an employee may be suspended for up to 30 workdays and/or demoted or transferred with reduced responsibilities and a disciplinary salary action; or transferred to an equivalent position in a different work area with no change in salary." *Id.*

DHRM Policy No. 140, Performance Planning and Evaluation, states "Supervisors should immediately identify poor, substandard, or unacceptable performance. Supervisors normally should address first-time minor or marginal performance issues through performance counseling and coaching." The policy also states

> Feedback provided during the cycle may be informal or formal. Informal feedback is encouraged, but there may be times when formal feedback is more appropriate. Formal feedback should be documented through memos or interim evaluations. Employees should receive copies of formal feedback documentation and the documentation (including interim evaluations) should be retained in the supervisor's confidential files for use in completing the annual evaluation.

(This policy was not provided by either side as an exhibit.)

The Agency's Policy No. 3-5, Use of Inmate Aides, states, among other things:

> IV. E. Non-Aproved Duties: Besides those times mentioned above and throughout this policy and other DCE policies, aides shall not be asked, or allowed the use of a telephone, fax machine, scanner, DVD burner, Internet, printer, copy machine, checkout tools, waiting list information, maintain tool control records, teacher's computer, or work in an administrator or teacher's office. Aides shall not have access to any standardized testing materials.
>
> VI. F. Inmate aides shall not have access to any sensitive and personal information, such as the school's student files. Aides will have access to classroom student files pertaining to a student's abilities and progress within an Academic or CTE program. Files that aides have access to shall not contain sensitive or personal information.

Agency Exh. W.

The Agency's Policy No. 3-32, Confidentiality of Student Records, states, among other things:

> VI. C. Individual instructors who maintain confidential student information in their classrooms should ensure that the information is kept in a lockable filing cabinet.

Agency Exh. X.

The Offenses

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

The Agency employed Grievant as a cosmetology instructor for two years and nine months before her termination, with no other active disciplinary actions indicated.

The Agency conducted an investigation of Grievant's performance over multiple months prior to the investigation report's issuance on October 30, 2009. The investigation and report covered multiple issues and examined the Grievant's conduct going back as far as 2008, with notations that the Grievant's supervisor observed or was aware of the Grievant's conduct throughout the period. The investigation was conducted and the report prepared by the Agency's advocate for the grievance hearing. The Agency's advocate was not a witness.

The Agency's human resources director testified and identified exhibits for the Agency, including the grievance documents and the Agency's policies. The HR director testified that no

specific documentation of Policies 3-5 and 3-32 were included in the orientation, but the Grievant signed a statement indicating she would seek out all the Agency's policies and comply with them. No policy manual was specifically provided to the Grievant.

The security sergeant at the facility testified of his involvement with the Agency advocate's search of the Grievant's classroom area, including file cabinets accessible to inmate aides and the confidential records found therein. The sergeant requested the investigation of the Grievant based on suspicions of accountability of funding. The sergeant conceded that no similar investigation or search was conducted during or following the Grievant's predecessor, who had left the Agency months before the Grievant was hired. Some documents found in the file cabinets accessible by the inmate aides were dated and signed by the Grievant, and the documents had Social Security numbers and other sensitive data considered confidential and potentially subject to misuse by inmates. Regarding accountability of funding, the investigation concluded that inmate aides had scheduled cosmetology services for other inmates and proper payment was not recorded or received.

The regional principal, Grievant's direct supervisor, testified of his issuance of the two Group II Written Notices and his observations of the Grievant allowing inmate aides access to chemicals and recording inventory, activities he considered beyond the appropriate scope for inmate aides. The principal also testified that he directed the Grievant to make sure the records accessible in the classroom did not have sensitive data or that such data be redacted. On cross-examination, the principal conceded that he had not observed the Grievant's inmate aides doing any of the specifically non-approved duties referenced in Policy 3-5, quoted above. The principal testified that from a razor blade found in a prohibited area, he asked the Agency advocate to investigate the cosmetology area in January 2009. The Grievant herself found this razor blade and wrote an incident report for it.

The principal testified that his style is to talk to his employees when he notices something that needs improvement or addressing. He did not have any documentation of counseling of the Grievant regarding the issues for which he issued the two Group II Written Notices.

The Agency's investigation report was admitted into the grievance record, however, the author of the report, the Agency's advocate, did not testify. Agency Exh. E; Grievant's Exh. 22. The investigation report states in its synopsis the following thrust:

> DOC initially found where more funds were being spent in the cosmetology class than was [sic] being taken in for services. Other functions came to light as to how inmates were being served in the classroom and finally a report that [the Grievant] was still allowing free services to inmates.

Agency Exh. E; Grievant Exh. 22, p 1. The synopsis issues and some others covered by the report were not included among the two Group II Written Notices. The report details many instances of conduct and/or observations of the Grievant that occurred in 2008 and actually observed by the Grievant's immediate supervisor, the school principal. The two Group II Written Notices are supported by details in the report going back to 2008. The written notices themselves indicate the time period is January 2009 to October 2009.

The Grievant testified that she had the largest vocational class within the Agency, and that she was the first to graduate all of her students with a 100% pass rate of the state exam. She testified that she had never met her predecessor who retired several months before the Grievant was hired. The Grievant testified that her assigned teacher mentor was not helpful to her regarding learning the specifics of her position. Another teacher with a nearby classroom became her *de facto* mentor, and he testified that the Grievant was very diligent and competent, to the point he recommended the instutional warden give the Grievant commendation for contribution to the accreditation achievment. The Grievant never received a notice of less than satisfactory performance, and the assistant principal, after actual observation, found no irregularities. Grievant Exh. 8, p. 14.

The Grievant testified that she accepted responsibility for the razor blade found outside her classroom, despite the lack of proof that the origin of the razor blade was her classroom. The Grievant was given a letter of counseling.

The Grievant conceded on cross-examination that the documents found outside her office in unlocked file cabinets should have been secured in her office. The Grievant testified, however, that her predecessor, based on how she found the classroom when she was hired, kept these records the same way. The Grievant testified that she did not allow inmate aides to perform teacher functions or to do any other prohibited activities. She testified that she closely supervised her classroom and the activities in it.

The Grievant testified that she believed the discipline levied against her was retaliation for her memos concerning the security sergeant's and others' conduct at the institution and her stance of asserting her rights. Grievant's Exh. 19, 20, 21.

Another teacher testified to her similar use of inmate aides in her department for clerical duties and of the Grievant's good intentions. An institutional security officer testified that razor blades were not considered tools under the tool control policy. Razor blades were considered a disposable item, but the institutional view of razor blades ultimately changed.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings,* § VI; *DeJarnette* v. *Corning,* 133 F.3d 293,299 (4th Cir. 1988).

Pursuant to applicable policy, management has the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to

substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id*.

Group II Written Notice regarding use of inmate aides.

The Agency presents a position in advance of its role as guardian of public and institutional safety and arguing that the Grievant's failings contravene that paramount mission. The hearing officer accepts, recognizes, and upholds the Agency's important role in public safety and the valid public policies promoted by the Agency and its policies. However, the hearing officer conducts a *de novo* hearing, and the hearing officer must weigh the evidence presented and make an independent finding and decision, based on the Written Notice.

As stated above, the grievance hearing is a *de novo* review of the evidence presented at the hearing. I find the Grievant's testimony and that of her supporting witnesses to be at least as credible as the contrary information and conclusions charged by the internal investigation. Based on the manner, tone, and demeanor of the witnesses, I find that the Grievant to be credible. The hearing officer cannot allow the Agency's investigation report to rise any higher than the testifying witnesses. The Agency's primary witness on this issue was the principal, who was Grievant's immediate supervisor. He testified that the Grievant did not violate the specifics of the applicable policy concerning use of inmate aides. To the extent that he voiced instances of concern with the Grievant's use of inmate aides, the dates and events were vague and without any corroborating documentation. Consequently, the Agency has not borne its burden of proof on this offense.

While the Agency may point to certain corroborating information to support its conclusions, the weight of such evidence does not overcome the Grievant's testimony. The Agency has the burden to show convincing information beyond equipoise. When there are conflicting, credible accounts regarding a situation or issue, the charging party needs to show a reliable basis on which to conclude one way or the other. The evidence presented at the grievance hearing did not show by a preponderance of the evidence that the Grievant violated applicable policy on use of inmate aides. For this reason, the Agency has not borne its burden of proving that the Grievant misused inmate aides or allowed the aides to perform prohibited functions, and the Group II Written Notice on this basis is reversed and rescinded.

Had the Agency met its burden of proof on the merits of the charge, the delay presented by the issuance of the Group II Written Notice would have mitigated against it. One of the basic tenets of the Standards of Conduct is the requirement to issue promptly disciplinary action when an offense is committed. Supervisors should be aware of inadequate or unsatisfactory work performance or behavior on the part of employees and attempt to correct the performance or behavior timely.

> The Commonwealth's disciplinary system typically involves the use of increasingly significant measures to provide feedback to employees so that they may correct conduct or performance problems. It is designed to encourage employees to become fully contributing members of the organization and to

> enable agencies to fairly, and with reliable documentation, terminate employees who are unable or unwilling to improve their conduct and/or job performance.

Standards of Conduct, Agency Exhibit V. Section B. 2. "Management should issue Written Notices as soon as reasonably possible after becoming aware of misconduct or unacceptable performance." *Id*. One purpose in acting promptly is to bring the offense to the employee's attention while it is still fresh in memory. A second purpose in disciplining promptly is to prevent a recurrence of the offense. The hearing officer takes administrative notice that unless an extensive, detailed investigation is required, most state agencies issue disciplinary actions within days or, at most, a few weeks after commission of an offense.

When an agency delays imposition of discipline for an extended time, it gives the appearance that the offense is not serious. In an appropriate case, a hearing officer may give consideration to reducing the level of discipline where the agency's delay in the issuance of discipline is sufficiently egregious as to negate the alleged seriousness of the offense. *See, e.g.,* Decision of Hearing Officer, EDR Case Number 801, issued August 26, 2004. A hearing officer may not direct an agency on how to conduct its business, however, when an agency delays the imposition of discipline for an extraordinarily long time, such delay will be considered an extenuating circumstance that can mitigate the level of discipline imposed. Although there is no bright line test, the issuance of the Group II Written notice concerning the use of inmate aides comes months (and perhaps years) after the Grievant's supervisor knew or should have known about the conduct. This offense is not in the nature of something concealed by the Grievant. The facts in this case dictate that supervision's initial failure in responding on this issue and the extended delay in issuance of discipline constitute a prejudicial and mitigating failure to comply with policy.

Group II Written Notice regarding student records.

Based on the discovery of the student documents with sensitive data in unlocked file cabinets, and the Grievant's corroboration of the instances, the Agency has borne its burden of proof that the Grievant did not comply with the applicable policies concerning student records. This discovery by the Agency occurred through its search of the Grievant's classroom in August 2009. The Agency's apparent condonation of the Grievant's predecessor's management of the classroom and student records, while potentially relevant, does not overcome the evidence of the principal's prior, direct request to the Grievant to redact sensitive information from the records not otherwise secure. The Grievant actually redacted some of the records and sensitive data, but not all. On this record, the Group II Written Notice is upheld, as a failure to comply with supervisor's instructions and failure to comply with applicable written policy. *See* Policies 3-5 and 3-32, above.

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 including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. 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."

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution." None of the Agency's witnesses testified that any mitigation was specifically considered. In a case where there is no evidence that the agency considered any mitigating circumstances, a hearing officer can still fulfill the requirement to determine if mitigation is appropriate. While the hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances, the hearing officer is permitted to mitigate a disciplinary action if it exceeds the limits of reasonableness. If the agency presents no evidence of its consideration of mitigatingcircumstances, then the simple result is there is no agency position on mitigation to which the hearing officer must give deference. The hearing officer should then proceed to assess whether the disciplinary action exceeds the limits of reasonableness to determine if mitigation is appropriate. EDR Ruling #2008-1749, 2008-1759 (September 5, 2007).

As for mitigation of the remaining Group II Written Notice, I find no further mitigation is warranted. This decision will rescind one Group II Written Notice, reverse the termination and reinstate the Grievant to employment. This offense falls squarely within the confines of a Group II offense.

Retaliation

To establish a *prima facie* case of retaliation, the grievant must show that: (1) she engaged in protected activity; (2) she suffered a materially adverse employment action; and (3) a causal connection exists between the protected activity and the materially adverse employment action. *Von Gunten v. Maryland*, 243 F.3d 858, 863 (4th Cir. 2001). Only certain activities are protected activities under the state grievance procedure. They include "use of or participation in the grievance procedure or because the employee has complied with any law of the United States or of the Commonwealth, has reported any violation of such law to a governmental authority, has sought any change in law before the Congress of the United States or the General Assembly, or has reported an incidence of fraud, abuse, or gross mismanagement, or exercising any right otherwise protected by law." *See* Va. Code § 2.2-3004(A). The grievance statute also provides that it is "the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management." Va. Code § 2.2-3000.

The Grievant arguably engaged in protected activity, *i.e*., her memoranda to management. Grievant's Exh. 19, 20, 21. If the grievant makes a *prima facie* case of retaliation, the agency merely has to proffer a legitimate, non-discriminatory reason for the discipline, which it did. In cases where a plaintiff establishes a *prima facie* case of retaliation, the burden shifts to the agency to articulate some legitimate, nondiscriminatory reason for the agency's action. *See McDonnell Douglas Corp v. Green*, 411 U.S. 792, 802, 803 (1973). The agency needs only to proffer a legitimate, non-discriminatory reason; it is not required to prove it. Put another way, the burden is one of production, not persuasion; it "can involve no credibility assessment." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509 (1993). The burden of proof is at all times with the grievant. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). (The ultimate burden of persuading the trier of fact remains at all times with the plaintiff).

As stated above, for the Grievant to show retaliation, she must show that (1) she engaged in a protected activity; (2) she suffered a materially adverse action; and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took a materially adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, the employee must then present sufficient 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. On this issue, I find the Grievant has not borne her burden of proving the Agency's issuance of the Group II Written Notice regarding student records was merely pretextual.

DECISION

For the reasons stated herein, 1) the Agency's issuance of a Group II Written Notice for misuse of inmate aides is **reversed and rescinded**; 2) the Agency's issuance of a Group II Written Notice for failing to keep student records secure is **upheld**; 3) the Agency's termination is **reversed** because the single Group II Written Notice may not support termination; 4) the Agency is ordered to **reinstate** Grievant to Grievant's former position, or if occupied, to an objectively similar position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue. Grievant is further entitled to seek a **reasonable attorney's fee**, which cost shall be borne by the agency. Finally, under the unique circumstance of this case, the Group II Written Notice should have an active date concurrent with the termination date, November 24, 2009, instead of the issuance date of March 17, 2010.

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

RECONSIDERATION
DECISION OF HEARING OFFICER

In the matter of: Case No. 9329

Hearing Date: June 15, 2010
Decision Issued: June 21, 2010
Reconsideration Decision Issued: July 12, 2010

RECONSIDERATION DECISION

§ 7.2(a) of the Department of Employment Dispute Resolution (EDR) Grievance Procedure Manual, (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 July 1, 2010, the Agency's request for reconsideration was received timely. Grievant, by counsel, provided a reply to the Agency's request for reconsideration. The Agency has asserted an incorrect legal conclusion that the Grievant is entitled to attorney's fees and did not substantially prevail given the multiple issues and the Agency prevailing on one of two Group Notices.

Va. Code § 2.2-3005.1 provides the scope of a hearing officer's authority to include the following:

> In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust. All awards of relief, including attorneys' fees, by a

> hearing officer must be in accordance with rules established by the Department of Employment Dispute Resolution.

EDR's Grievance Procedure Manual, at § 7.2(e), states

> For such an employee to 'substantially prevail' in a discharge grievance, the hearing officer's decision must contain an order that the agency reinstate the employee to his former (or objectively similar) position.

EDR's Rules for Conducting Grievance Hearings, at § VII (D), states

> [A]n employee who is represented by an attorney and substantially prevails on the merits of a grievance challenging his or her discharge is entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust. For such an employee to 'substantially prevail' in a discharge grievance, the hearing officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.

The hearing officer's decision ordered reinstatement following disciplinary discharge. Based on the above, the Agency has not presented probative evidence of any incorrect legal conclusions by the hearing officer. For this reason, the Agency's request for reconsideration is denied. Although the Grievant has already submitted a petition for attorneys' fees, following the administrative reviews the hearing officer will accept a revised petition for attorneys' fees. The hearing officer is mindful of the EDR Director's Ruling No. 2007-1671 that addresses the scope of awardable attorneys' fees. Fees incurred for the representation of the Grievant in conjunction with the management steps are not compensable. The statute is meant to reimburse a grievant only for attorneys' fees related to the hearing. *Id.* at p. 3.

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

July 8, 2010

Department of Correctional Education
101 N. 14th Street., 7th Floor
Richmond, VA 23219

RE: **Grievance of Grievant v. Department of Correctional Education**
Case No. 9329

Dear Agency:

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.

Your request to DHRM is based on the hearing officer's decision, "Grievant is further entitled to seek a **reasonable attorney's fee,** which cost is to be borne by the agency." You contend that the grievant did not substantially prevail in this grievance, therefore, the awarding of attorney's fees is improper.

In each instance where a request is made to the Department of Human Resource Management (DHRM) 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. The DHRM has determined that the concerns you raised are not related to the administration any

human resource policy. Rather, your concerns are related to the administration of the grievance procedure. Therefore, the DHRM has no authority to honor your request. It is our understanding that you have submitted a similar request to the Director of the Department of Employment Dispute Resolution and that agency will address your concerns.

Sincerely,

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