Issues: Group II Written Notice (unsatisfactory performance, abuse of State time, failure to follow instructions) and Termination (due to accumulation); Hearing Date: 01/12/11; Decision Issued: 01/18/11; Outcome: No Relief - Agency Upheld.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 9480

Hearing Date: January 12, 2011
Decision Issued: January 18, 2011

PROCEDURAL HISTORY

The Department of Agriculture and Consumer Services ("Agency") issued to the Grievant a Group II Written Notice on September 23, 2010, for unsatisfactory performance, failure to follow instructions, abuse of state time, unauthorized use of state property, and computer misuse. Agency Exh. 1. The Grievant had two prior active Group II Written Notices. Agency Exhs. 2 and 4. The discipline for the current Group II Written Notice was termination, based on the accumulated discipline.

Grievant timely filed a grievance to challenge the Agency's disciplinary action. The outcome of the resolution steps was not satisfactory to the Grievant and she requested a hearing. On December 10, 2010, the Department of Employment Dispute Resolution ("EDR") appointed the Hearing Officer. A pre-hearing conference was held by telephone on December 16, 2010. The hearing ultimately was scheduled at the first date available between the parties and the hearing officer, January 12, 2011, on which date the grievance hearing was held, at the Agency's office.

The Agency and Grievant submitted documents for exhibits that were, without objection, admitted into the grievance record, and they will be referred to as Agency's Exhibits or Grievant's Exhibits. There were pre-hearing questions regarding availability of witnesses for the Grievant; however, witness issues were resolved to the parties' satisfaction and the Grievant used 13 witnesses. The hearing officer has carefully considered all evidence presented.

APPEARANCES

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 Group II Written Notice, reinstatement to a job under different supervision, and 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.

The Agency's Standards of Conduct, Policy 1.60, defines Group II offenses to include acts of misconduct of a more serious nature that significantly impact agency operations, such as abuse of state resources. Agency Exh. 5.

The Agency's Policy and Procedure No. 10.1, Ethical Use of Agency Information Resources, prohibits the intentional abuse of computing resources and abuse of state work time through unauthorized use of the Internet or other Agency computing resources. The policy requires use of computing resources to bear a reasonable relationship to any employee's agency-related duties and responsibilities, and that a supervisor must approve any exceptions. The Grievant signed her receipt and agreement to comply with this policy. Agency Exh. 6.

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 financial processor. Her work profile required her to perform the duties of her position, which include: a working understanding of revenue and expenditure processing; detail oriented; ability to use an electronic spreadsheet and enter data into a financial software system; ability to work and maintain files; and the ability to handle multiple tasks and meet deadlines while providing quality customer service. A core measure of responsibility is to reconcile the small purchase credit card bill by month end.

The Grievant's performance was at a contributor level until the fall of 2009, at which time she began making careless errors—a significant issue when processing financial transactions. The Agency issued a Group II Written Notice on December 9, 2009, for failure to follow instructions/policy. Her performance did not improve and on April 9, 2010, the Agency issued a second Group II Written Notice for attendance/excessive tardiness and failure to follow instructions/policy. As discipline for the second Group II Written Notice, the Agency considered termination but instead issued a 5-day suspension. The Grievant grieved the April 9, 2010, disciplinary action, which was upheld after a grievance hearing.

Following the grievance of the April 9, 2010, Group II Written Notice, the Agency had a meeting with the Grievant on June 22, 2010, to "start fresh." At the meeting, the Grievant acknowledged that she understood the improvements needed. The Agency issued a memorandum to the Grievant on June 23, 2010, summarizing the discussion. Agency Exh. 9. The memorandum specifically directed the Grievant not to attend to personal business during work.

The Grievant's performance did not improve and on September 17, 2010, the department director and supervisor met with the Grievant over the continued concerns, including the untimely small purchase charge card processing, miscommunications, and time spent on personal emails and faxes. The Agency discovered the Grievant's continued personal email usage and they met again with the Grievant on September 22, 2010. Agency Exh. 11 sets forth a record of the Grievant's personal emails from June 21, 2010, through September 16, 2010. These printed emails comprise nearly 300 pages.

All Agency witnesses, including the department director and supervisor testified that the Grievant lacked attention to detail, repeatedly failed to process transactions timely and

accurately, and failed to meet deadlines. The Agency witnesses testified that they were aware of the Grievant's pregnancy, but that she did not indicate her pregnancy had an impact on her work performance. Nor did she request any accommodations or time off that was denied. The Agency witnesses also testified that they were aware that the Grievant's computer access to the financial software system occassionally "froze" and had to be restarted. The Agency witnesses also testified that they were aware the Grievant had child custody issues. The Grievant's direct supervisor testified that she gave permission for the Grievant to use the Agency fax machine for specific, limited use concerning her personal issues, but the supervisor denied giving the Grievant permission to use state resources for unlimited personal use.

The Grievant's supervisor testified to repeated errors in financial transactions that followed the April 9, 2010, Group II Written Notice up to the issuance of the current discipline. The supervisor testified that the Grievant would have always had work to do when access to the financial software was interrupted, and that the voluminous record of personal emails explained and demonstrated the Grievant's abuse of state time and resources and lack of attention to her work responsibilities.

The supervisor denied being aware of the letter from the Grievant's physician's assistant, dated April 15, 2010, indicating a decrease in medication for bipolar disorder might be contributing to the Grievant's difficulties with focus and concentration. Grievant's Exh. 4. The Grievant also presented other medical letters concerning her pregnancy, indicating a due date of October 18, 2010. A medical note dated August 20, 2010, prescribed frequent breaks and restricted walking long distances or uphill. Grievant's Exh. 4. The medical records also indicate the Grievant was evaluated on September 7, 2010, for posttraumatic stress disorder and to rule out bipolar disorder. A psychiatric note of September 13, 2010, requested that the Grievant be allowed to participate in a September 15, 2010, court appearance by telephone to avoid direct contact with her son's father. That note indicated that the Grievant is currently receiving outpatient psychiatric services, is functioning well, has been able to maintain employment, and is fully capable of caring for herself and her children at this time. Grievant's Exh. 4. All of the Agency witnesses testified that they were unaware of any of the Grievant's medical notes and that no requests for accommodations were received or denied.

The Grievant elected not to testify on her own behalf, but through her questioning and cross-examination of witnesses she asserted the points of her grievance. The Grievant asserted by argument that her excessive use of her state computer for email either was approved by her supervisor or the only way to spend her work time when her access to the Agency financial software was interrupted. Similarly, the Grievant asserted through questioning that the computer software interruptions caused her inability to meet project deadlines. The Grievant was repeatedly advised during the grievance hearing that her questioning was not considered testimony and cannot be considered as such. Thus, the testimony of the witnesses, rather than assertions during questioning, is the evidence for the grievance hearing. The witnesses' testimony did not establish or support the Grievant's positions.

Based on the evidence presented, I find that the Agency has met its burden of proof that the Grievant failed to attend to her assigned duties as required and abused state resources and time, justifying the Group II Written Notice issued September 23, 2010.

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."

The offenses detailed in the Written Notice are appropriately qualified as Group II. Abuse of state resources and even repeat violations of Group I offenses constitute may be disciplined as a Group II. The Agency, thus, has met its burden of proving the Group II Written notice because the abuse of state resources and repeated performance offenses. The Agency could have justified more than one Written Notice for the separate offenses combined in the one Group II Written Notice.

Despite the above rationale, the Agency had the discretion to elect less severe discipline. Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution…." Va. Code § 2.2-3005. 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."

Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

The Grievant admits to the conduct disciplined, but she advances either supervisory approval, computer disruptions, retaliation, or the unmet need for accommodation to excuse or mitigate the discipline. The evidence preponderates in the Agency's favor to show that the bases

for the Group II Written Notice are well-founded. While I find the Agency has met its burden of proof, the hearing officer must consider the arguments for mitigation.

Although the Agency could have done so, it did not terminate employment after the Grievant's second Group II Written Notice in April 2010. Thus, under applicable policy, termination is appropriate unless the Grievant shows that she is shielded from discipline under the Family Medical Leave Act ("FMLA"), which she mentioned during the grievance hearing, or other applicable protection.

Family Medical Leave Act. While magic words are not necessary, an employee must do something to invoke protection under FMLA. While neither party specifically referred to the applicable policy, I have reviewed DHRM policy 4.20, the state's policy on FMLA.[1] The policy provides:

> An employee should submit a written request for family and medical leave at least 30 calendar days prior to the anticipated leave begin date or as soon as practicable in unforeseen circumstances. If an employee is not able to provide notice because of an illness or injury, notice may be given by a family member or a spokesperson as soon as practicable.

As held by the Fourth Circuit in *Dotson v. Pfizer*, 558 F.3d 284 (4th Cir. 2009), case law and federal regulations make it clear that employees do not need to invoke the FMLA in order to benefit from its protections. The regulations do not require the employee expressly to assert rights under the FMLA or even mention the FMLA; instead, the employee may only state that leave is needed for a potentially qualifying reason. After the employee makes such a statement, the responsibility falls on the employer to inquire further about whether the employee is seeking FMLA leave. *Id.* at 295. "In providing notice, the employee need not use any magic words." *Id., quoting Sarnowski v. Air Brooke Limousine, Inc.*, 510 F.3d 398, 402 (3d Cir. 2007). Here, however, the Grievant used no words at all to put the Agency on notice of even a hint that FMLA or other leave was being sought or requested.

In *Lochridge v. City of Winston-Salem*, 388 F. Supp. 2d 618 (M.D.N.C. 2005), an employee submitted an untimely request for FMLA leave four days after she was suspended pending termination. She was seeking intermittent FMLA leave to begin, retroactively prior to her suspension. The employee had been terminated for violation of the City's attendance policy. The City denied the employee's FMLA request because the request was untimely and because the employee had already been suspended pending termination when she submitted the request. The court held the FMLA does not insulate employees from legitimate disciplinary action by the employer.

The *Lochridge* court discussed that the employee did not request FMLA leave and submit accompanying medical certification until four days after the City suspended her pending termination due to her chronic absenteeism and her resulting poor work performance. The employee's request for FMLA leave was, therefore, not considered in the decision to terminate her since she did not make the request until after the termination process had already begun.

[1] DHRM Policy 4.20 is found at http://www.dhrm.virginia.gov/hrpolicy/policy/pol4_20FMLA.pdf.

The *Lochridge* decision is consistent with the majority view of case law governing enforcement of employer "no call, no show" policies. The case of *Heltzel v. Dutchman Mfg. Inc.*, 2007 U.S. Dist. LEXIS 93682 (N.D. In. 2007) provides another example of a court's view of disciplinary action and the FMLA. The court held:

> The notice requirements of the FMLA are not onerous; indeed, an employee need not expressly mention **[*23]** the FMLA in his leave request or otherwise invoke any of its provisions. *See Phillips v. Quebecor World RAI, Inc.*, 450 F.3d 308, 311 (7th Cir. 2006) (citing 29 C.F.R. § 825.303(b)). However, FMLA regulations also provide that "[a]n employer may … require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave." 29 C.F.R. § 825.302(d). Thus, **the FMLA does not prohibit employers from terminating employees who do not comply with an internal company policy that requires employees to call-in when they will be absent. "The fact that the absence might be related to a FMLA qualifying event does not abrogate the right of employers to know whether their employees will be coming to work on a particular day."** *Knox v. Cessna Aircraft Co.*, 2007 U.S. Dist. LEXIS 71528, 2007 WL 2874228, *5 (M.D.Ga., 2007). And, as is the case here, "an employer's policy that requires employees to call in to work when they will be absent is clearly consistent with FMLA and its regulations because the regulations themselves require that employees give notice of the need for unforeseeable leave as soon as practicable." *Id. See Spraggins v. Knauf Fiber Glass GmbH, Inc.*, 401 F.Supp.2d 1235, 1239-40 (M.D.Ala.2005) **[*24]** (holding that FMLA allows an employer to require notice one hour before the employee's shift begins, as long as it is reasonable to expect the employee, under the individual circumstances, to give such notice). (Emphasis added).

In the Grievant's prior grievance decision, the hearing officer held, on remand from EDR:

> On March 24, 2010, there was a meeting between the Grievant and her immediate supervisor and the Director of Finance. At this time, the Grievant was told that this meeting of March 24, 2010 was a disciplinary meeting and that a Written Notice was going to be issued. As it turned out, for reasons set forth in the Hearing Officer's original Decision, the Agency did not issue Written Notice until April 9, 2010, some sixteen (16) days after the disciplinary meeting. During the March 24, 2010 meeting, it was suggested to the Grievant that she go to Human Resources and inquire as to any and all benefits that may be available to her. Indeed, in her own testimony, the Grievant stated that she was fully aware that she could go to the Human Resources Department whenever she wanted and that she did not need an invitation from a supervisor to seek out any benefits that may be available to her. Further, the Grievant testified that if she were to stay home, she would have nothing to do and she preferred being at work and that she had to stay busy.

Case No. 9351, Decision on Remand, November 2, 2010.

The Grievant refers to FMLA in her grievance and hearing presentation, but she has not shown that she can invoke any protections of FMLA retroactively. The FMLA does not provide a basis to reverse the disciplinary action against Grievant in this case. The Agency is entitled to have its employees follow instructions, meet work deadlines, and not abuse state resources. The prior active Group II Written Notices and for similar misconduct and direct counseling provide the best notice to the Grievant and shows her knowledge of the Agency's expectations on these basic employment obligations.

Americans with Disabilities Act. In certain circumstances, a qualified individual with a disability may be able to receive relief under the Americans with Disabilities Act. An individual is considered to have a disability if that individual either (1) has a physical or mental impairment which substantially limits one or more of his or her major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment. A qualified individual with a disability is one who "satisfies the requisite skill, experience, education and other job-related requirement of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position." 29 CFR § 1630.2(m). Grievant has not shown through the evidence provided that she is a qualified individual with a disability.

Based on the evidence presented, there is no demonstration that a disability has caused the discipline or that a reasonable accommodation would enable the Grievant to perform the essential functions of the position with the Agency or explain the repeated abuse of state resources. The Americans with Disabilities Act does not provide a basis to grant relief to Grievant in this case.

Retaliation. The Grievant asserts that the Agency's action is motivated by retaliation. It appears that the Grievant's theory of retaliation is her prior exercise of her grievance rights and a loan of money from her supervisor. Although the Grievant did not testify, her claims of retaliatory treatment will be analyzed under a retaliation theory. For a claim of retaliation to succeed, the Grievant must show (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. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006); s*ee, e.g.*, EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633. If the Agency presents a nonretaliatory business reason for the adverse action, then the Grievant must present sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation. *See EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 405 (4th Cir. 2005). Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

The Grievant engaged in protected activity by initiating a prior grievance, although unsuccessful. The Grievant asserts that the retaliation she has experienced stems from this prior grievance. Further, she could be viewed as having potentially suffered a materially adverse action due to the agency's discipline and termination. However, as explained below, the

Grievant does not satisfy the burden of proof of showing that the materially adverse actions were taken because of her protected activity.

The Agency's evidence is that the Grievant continued with unsatisfactory work performance and abuse of state resources, despite counseling to help her improve her position. While the Grievant may dispute these actions, she has presented no evidence that would counter the Agency's stated non-retaliatory explanations. There is nothing to suggest that the Agency's handling of this discipline was in any way retaliatory beyond the Grievant's mere allegation.

Grievant has not presented sufficient evidence of a causal link between her protected activities and the materially adverse action she suffered. Grievant has not presented sufficient evidence that the Agency's discipline was motivated by improper factors. Rather, it appears that the determinations were based on the Grievant's actual conduct of poor performance and abuse of state resources, all of which is solely within the control of the Grievant. Accordingly, Grievant's request for relief must be denied.

Mitigation. The Grievant argues, reasonably, that the Agency could have exercised discipline along the continuum short of termination. The Agency had the discretion to elect less severe discipline. Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution…." Va. Code § 2.2-3005. Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant contends the disciplinary action should be mitigated. Grievant contends her prior years of service, personal stressors, and medical situation should provide enough consideration to mandate a lesser sanction than termination. However, length of service, alone, is insufficient for a hearing officer to overrule an agency's mitigation determination. EDR Ruling No. 2007-1518 (October 27, 2009) held:

> Both length of service and otherwise satisfactory work performance are grounds for mitigation by agency management under the Standards of Conduct. However, a hearing officer's authority to mitigate under the *Rules for Conducting Grievance Hearings* is not identical to the agency's authority to mitigate under the Standards of Conduct. Under the *Rules for Conducting Grievance Hearings*, the hearing officer can only mitigate if the agency's discipline exceeded the limits of reasonableness. Therefore, while it cannot be said that either length of service or otherwise satisfactory work performance are *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which these factors

> could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become.

Similarly, personal stressors, alone, cannot provide protection for poor job performance or abuse of state resources. The Grievant's history of psychiatric treatment and her pregnancy in 2010 should be, according to the Grievant, mitigating circumstances. However, the Grievant did not testify and only offered indirect evidence of the impact on her job performance and abuse of state resources. The record does not show sufficient connection to explain her chronic ineffective work performance, misuse of state resources, or, alternatively, should mitigate in favor of a lesser sanction.

In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action. The hearing officer is not a "super-personnel officer." Therefore, the hearing officer should give the appropriate level of deference to actions by Agency management that are found to be consistent with law and policy, even if he disagrees with the action. Accordingly, the Hearing Officer finds no mitigating circumstances exist that compel a reduction of the disciplinary action. Here, the Agency has a record of issuing progressive discipline for this Grievant, and refraining from the exercise of termination following the second Group II Written Notice. When viewing the prior Group II Written Notices, the issuance of a third Group II Written Notice with termination falls within the bounds of reasonableness and no further mitigation is permitted.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of the Group II Written Notice with termination of employment is **upheld**.

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 email or certified mail, return receipt requested.

Cecil H. Creasey, Jr.
Hearing Officer