Issue: Group I Written Notice (personal grooming in the workplace); Hearing Date: 02/10/11; Decision Issued: 02/11/11; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 9499; Outcome: No Relief – Agency Upheld; **Administrative Review: AHO Reconsideration Request received 02/24/11; Reconsideration Decision issued 02/28/11; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 02/24/11; EDR Ruling No. 2011-2912 issued 03/31/11; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 02/24/11; DHRM Ruling issued 04/15/11; Outcome: AHO's decision affirmed.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9499

Hearing Date: February 10, 2011
Decision Issued: February 11, 2011

PROCEDURAL HISTORY

On August 5, 2010, Grievant was issued a Group I Written Notice of disciplinary action for personal grooming in the workplace that occurred on May 4, 2010.

On August 18, 2010, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On January 24, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 10, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Representative
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?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

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

The Virginia Department of Transportation employs Grievant as a Roadway Designer at one of its Facilities. She has been employed by the Agency for approximately 8 years. Grievant had prior active disciplinary action. She received a Group II Written Notice on January 27, 2010 for failure to comply with written policy.

Grievant works in an office cubical without a door. The opening to her cubicle is approximately 6 feet wide. Ms. P works in a cubicle next to Grievant. The opening to Ms. P's cubicle faces the opening of Grievant's cubicle. When facing in the appropriate direction, Grievant and Ms. P can see into each others cubicle.

On February 17, 2010, Grievant underwent surgery on to remove ingrown toenails from both of her big toes. On April 29, 2010, she began taking a prescription drug to treat a fungus on her feet and toenails. As the medicine began to work, the skin on her feet started cracking and hardening, making it painful to wear shoes for an extended period of time. On May 4, 2010, Grievant's feet were bothering her because of the medical treatment. Her discomfort was to so great that at the 3 p.m. break, she sat in her office cubical with her feet under her desk and over a trashcan and peeled away dead skin from her feet and let it drop into the trashcan. She took a dull pocket knife blade to exfoliate a few remaining uneven spots on her feet. Some of the dead skin fell outside of the trashcan and onto the floor. Ms. P noticed Grievant's actions and concluded that Grievant was "shaving" her feet of dead skin. Ms. P complained to her supervisor, Ms. G. Ms. G called Grievant's supervisor, Mr. S, at home that evening When Mr. S. reported to work the following morning he went to Grievant's cubicle and

observed skin scrapings covering an area of approximately 2' x 3'. The scrapings were plainly visible to Mr. S. Mr. S spoke with Grievant approximately one hour later when she reported to work and told her to clean up the skin. Grievant said that she had already done so. Mr. S instructed Grievant not to repeat that behavior.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."[1] Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

DHRM Policy 1.60 lists numerous examples of offenses. 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.

The Agency contends that Grievant's behavior was sufficient to justify the issuance of a Group I Written Notice. The Agency has presented sufficient evidence to support this assertion. Scraping skin from one's feet is unusual behavior in an office setting. Leaving skin on the floor in a cubicle where other employees may enter creates the risk of offending other employees who do not wish to touch or come into contact with Grievant's dead skin. Ms. P was offended by Grievant's behavior and reported it to her supervisor who also felt that Grievant's behavior was inappropriate. Grievant's supervisor considered Grievant's behavior to be inappropriate for the workplace and cautioned her not to repeat it. The Agency's judgment is consistent with the Group I offense of disruptive behavior which is enumerated in the Standards of Conduct.

Grievant argued that although she left some skin on the floor when she left work on May 4, 2010, when she returned to work on May 5, 2010, she found that someone had taken the skin she had placed in her trashcan and spread it on the floor. She argued that it was likely Ms. P took the skin scraping she left in the trashcan and spread them on the floor. Grievant's argument fails. Grievant testified that she left some skin on the floor when she left work on May 4, 2010. She indicated she did not have time to vacuum the area when she left on May 4, 2010 but planned to vacuum the area when she returned on May 5, 2010. This admission is consistent with the Agency's assertion that Grievant left skin on the floor in her cubicle area on May 4, 2010. Grievant's claim that Ms. P removed skin from the trashcan and spread it on the floor is speculative.

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

Although Grievant and Ms. P were not getting along well on May 4, 2010, no evidence was presented that Ms. P had been confronted with the allegation that she removed skin from the trashcan and spread it on the floor. Because Ms. P did not testify during the hearing and no evidence was presented that she had ever been confronted with the allegation against her, the Hearing Officer cannot conclude that Ms. P removed skin from the trashcan and spread it on the floor. It is not necessary for the Agency to prove that Ms. P did not remove the skin from the trashcan in order to meet its burden of proof.

Grievant argued that the Agency had not specified rules regarding her behavior with respect to breaks. She argued that employees regularly attended to personal business during their breaks such as smoking, applying perfume or cologne. Simply because the Agency has not established specific rules limiting an employee's behavior during his or her breaks it does not mean that an employee is free to engage in any behavior. Employees are obligated to comply with the Standards of Conduct and the Agency's expectations regarding employee behavior in the workplace even while those employees are on break at the Agency's facility. Grievant's behavior rises to the level justified the Agency's decision to issue disciplinary action to her.

Grievant argued that other employees engaged in personal grooming on a regular basis without being discipline. In order to show the inconsistent application of disciplinary action, a grievant must show that agency managers were aware of the behavior by other employees without taking action against them and also that the behavior was similar in nature to the grievant's behavior. In this case, Grievant has not presented evidence of other employees who removed skin from their feet without being disciplined. Grievant has also not shown that Agency managers were aware of any inappropriate personal grooming and failed to take action against it. Grievant presented evidence of an employee who used an electric razor and shaved at his desk. She reported that employee's behavior to the Agency because she felt she was not being treated equally. Agency managers initially issued that employee a Group I Written Notice but mitigated the disciplinary action to a formal counseling because the employee had no prior active disciplinary action. The Agency did not mitigate Grievant's Group I Written Notice because she had prior active disciplinary action. The existence of prior active disciplinary action is a legitimate basis for an agency to distinguish between two employees when determining whether to mitigate disciplinary action.

Grievant argued that she needed to exfoliate her feet in accordance with her doctor's instructions and her need to relieve pain. She argues that under the Americans with Disabilities Act, the Agency is obligated to provide her a reasonable accommodation. Grievant's argument is untenable. There is no dispute that Grievant had a legitimate medical need to remove skin from her feet. No credible evidence was presented to show that she had to do so at 3 p.m. on May 4, 2010 in her office cubicle. There is no reason to believe that Grievant was experiencing a medical emergency that prevented her from waiting until the end of her shift at 5 p.m. to remove the skin. If the Hearing Officer assumes for the sake of argument that Grievant's medical condition would require a reasonable accommodation, a reasonable accommodation would not

include permitting an employee to scrape skin from her feet in her office cubicle when other locations such as restrooms might be available. The Agency had no opportunity to address any request for a reasonable accommodation prior to May 4, 2010.

Grievant argued that the Agency should have responded to her action with a formal counseling rather than a Group I Written Notice in order to comply with the principles of progressive disciplinary action as expressed under the Standards of Conduct. When an employee engages in behavior giving rise to disciplinary action, an agency has the discretion to decide whether to counsel the employee or take disciplinary action against the employee.

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…."[2] 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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

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

[2] Va. Code § 2.2-3005.

to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Director
Department of Employment Dispute Resolution
600 East Main St. STE 301
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of all of your appeals to the other party and to the EDR Director. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[3]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

[3] Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 9499-R

Reconsideration Decision Issued: February 28, 2011

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. "[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis …" to grant the request.

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. However, the fact that a party discovered the evidence after the hearing does not necessarily make it "newly discovered." Rather, the party must show that:

> (1) the evidence is newly discovered since the date of the Hearing Decision; (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

Grievant argues that her behavior was not disruptive under the Standards of Conduct. Disruptive behavior includes behavior that interferes with the Agency's normal work practices. When one employee has a legitimate complaint regarding the behavior of another employee and finds it necessary to complain to Agency managers about that behavior, there exists disruptive behavior. In this case, Grievant's behavior was disruptive to the Agency because it was sufficiently unusual and offensive to a coworker as to generate a complaint for Agency managers to resolve.

Grievant argues that her behavior was not expressly prohibited by the Standards of Conduct and that there were no rules governing her behavior during breaks. The Standards of Conduct are not intended to address every conceivable inappropriate behavior by an employee. It is not necessary for the Agency to show that cutting skin from one's feet was written specifically as an offense under the Standards of Conduct.

Grievant argues that her behavior was protected by the Americans with Disabilities Act. She argues that she had a legitimate medical need to remove skin from her feet. Grievant's argument fails. Nothing in the Americans with Disabilities Act prohibits an agency from taking disciplinary action against an employee who acts contrary to the Agency's disciplinary rules. Although Grievant had a legitimate medical need to remove skin from her feet, there is no reason for the Hearing Officer to believe that she could not have waited until the end of her shift to remove the skin. The evidence is not sufficient for the Hearing Officer to believe the Grievant's discomfort was so great that she could not have waited an additional approximately two hours to address her discomfort or addressed her discomfort in some other location by seeking sick leave and leaving the Facility.

Grievant argues that the Agency should have counseled her instead of taking disciplinary action against her for her behavior. The Hearing Officer is not a "Super Personnel Officer" who can substitute his decision for that of the Agency once the Agency has presented sufficient evidence to carry its burden of proof to show that an employee engaged in behavior contrary to the Standards of Conduct. There is no reason for the Hearing Officer to believe that the Agency abused its discretion regarding whether to take disciplinary action or to counsel Grievant.

Grievant argues that the Hearing Officer excludes the possibility that someone may have taken the dead skin from the trashcan and placed it on the floor. Although it is possible that someone took the dead skin from the trashcan and placed it on the floor, the Hearing Officer does not believe that anyone did so. The Hearing Officer believes that Grievant left dead skin on the floor when she left for the day. The evidence showed that the cleaning crew did not come in every night to clean Grievant's office area. There is no reason to believe that the cleaning crew worked in Grievant's area that evening. If a cleaning crew had come to the Facility that evening, surely the crew would have both vacuumed and removed the contents of trash cans instead of merely vacuuming the floor and leaving the contents of a Grievant's trashcan untouched. It is not likely that another person would have been able to remove the contents of Grievant's trash can if the cleaning crew had worked that evening.

Grievant argues that the disciplinary action should be mitigated. The standard for mitigation is set forth in the Rules for Conducting Grievance Hearings. Under that standard there is no basis to mitigate the disciplinary action against Grievant.

Grievant argues that the Agency did not meet its burden of proof. This argument fails. The Agency presented sufficient evidence to support the issuance of the Group I Written Notice of disciplinary action.

The request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, the request for reconsideration 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.

S/Carl Wilson Schmidt

_____

Carl Wilson Schmidt, Esq.
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Department of Transportation

April 15, 2011

The grievant, through her representative, has requested an administrative review of the hearing officer's decision in Case No. 9499. The grievant is challenging the decision because she believes the hearing decision is inconsistent with several policies. For the reasons stated below, we will not interfere with the application of this decision with respect to this decision. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has directed that I conduct this administrative review.

FACTS

In his Findings of Facts, the hearing officer, in relevant part, stated the following:

> After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:
>
> The Virginia Department of Transportation employs Grievant as a Roadway Designer at one of its Facilities. She has been employed by the Agency for approximately 8 years. Grievant had prior active disciplinary action. She received a Group II Written Notice on January 27, 2010 for failure to comply with written policy.
>
> Grievant works in an office cubical without a door. The opening to her cubicle is approximately 6 feet wide. Ms. P works in a cubicle next to Grievant. The opening to Ms. P's cubicle faces the opening of Grievant's cubicle. When facing in the appropriate direction, Grievant and Ms. P can see into each others cubicle.
>
> On February 17, 2010, Grievant underwent surgery to remove ingrown toenails from both of her big toes. On April 29, 2010, she began taking a prescription drug to treat a fungus on her feet and toenails. As the medicine began to work, the skin on her feet started cracking and hardening, making it painful to wear shoes for an extended period of time. On May 4, 2010, Grievant's feet were bothering her because of the medical treatment. Her discomfort was so great that at the 3 p.m. break, she sat in her office cubical with her feet under her desk and over a trashcan and peeled away dead skin from her feet and let it drop into the trashcan. She took a dull pocket knife blade to exfoliate a few remaining uneven spots on her feet. Some of the dead skin fell outside of the trashcan and onto the floor. Ms. P noticed Grievant's actions and concluded that Grievant was "shaving"

her feet of dead skin. Ms. P complained to her supervisor, Ms. G. Ms. G called Grievant's supervisor, Mr. S, at home that evening. When Mr. S. reported to work the following morning he went to Grievant's cubicle and observed skin scrapings covering an area of approximately 2' x 3'. The scrapings were plainly visible to Mr. S. Mr. S spoke with Grievant approximately one hour later when she reported to work and told her to clean up the skin. Grievant said that she had already done so. Mr. S instructed Grievant not to repeat that behavior.

CONCLUSIONS OF POLICY

****

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

DHRM Policy 1.60 lists numerous examples of offenses. 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.

The Agency contends that Grievant's behavior was sufficient to justify the issuance of a Group I Written Notice. The Agency has presented sufficient evidence to support this assertion. Scraping skin from one's feet is unusual behavior in an office setting. Leaving skin on the floor in a cubicle where other employees may enter creates the risk of offending other employees who do not wish to touch or come into contact with Grievant's dead skin. Ms. P was offended by Grievant's behavior and reported it to her supervisor who also felt that Grievant's behavior was inappropriate. Grievant's supervisor considered Grievant's behavior to be inappropriate for the workplace and cautioned her not to repeat it. The Agency's judgment is consistent with the Group I offense of disruptive behavior which is enumerated in the Standards of Conduct.

Grievant argued that although she left some skin on the floor when she left work on May 4, 2010, when she returned to work on May 5, 2010, she found that someone had taken the skin she had placed in her trashcan and spread it on the floor. She argued that it was likely Ms. P took the skin scraping she left in the trashcan and spread them on the floor. Grievant's argument fails. Grievant testified that she left some skin on the floor when she left work on May 4, 2010. She indicated she did not have time to vacuum the area when she left on May 4, 2010 but planned to vacuum the area when she returned on May 5, 2010. This admission is consistent with the Agency's assertion that Grievant left skin on the

floor in her cubicle area on May 4, 2010. Grievant's claim that Ms. P removed skin from the trashcan and spread it on the floor is speculative.

Although Grievant and Ms. P were not getting along well on May 4, 2010, no evidence was presented that Ms. P had been confronted with the allegation that she removed skin from the trashcan and spread it on the floor. Because Ms. P did not testify during the hearing and no evidence was presented that she had ever been confronted with the allegation against her, the Hearing Officer cannot conclude that Ms. P removed skin from the trashcan and spread it on the floor. It is not necessary for the Agency to prove that Ms. P did not remove the skin from the trashcan in order to meet its burden of proof.

Grievant argued that the Agency had not specified rules regarding her behavior with respect to breaks. She argued that employees regularly attended to personal business during their breaks such as smoking, applying perfume or cologne. Simply because the Agency has not established specific rules limiting an employee's behavior during his or her breaks it does not mean that an employee is free to engage in any behavior. Employees are obligated to comply with the Standards of Conduct and the Agency's expectations regarding employee behavior in the workplace even while those employees are on break at the Agency's facility. Grievant's behavior rises to the level justified the Agency's decision to issue disciplinary action to her.

Grievant argued that other employees engaged in personal grooming on a regular basis without being discipline. In order to show the inconsistent application of disciplinary action, a grievant must show that agency managers were aware of the behavior by other employees without taking action against them and also that the behavior was similar in nature to the grievant’s behavior. In this case, Grievant has not presented evidence of other employees who removed skin from their feet without being disciplined. Grievant has also not shown that Agency managers were aware of any inappropriate personal grooming and failed to take action against it. Grievant presented evidence of an employee who used an electric razor and shaved at his desk. She reported that employee's behavior to the Agency because she felt she was not being treated equally. Agency managers initially issued that employee a Group I Written Notice but mitigated the disciplinary action to a formal counseling because the employee had no prior active disciplinary action. The Agency did not mitigate Grievant's Group I Written Notice because she had prior active disciplinary action. The existence of prior active disciplinary action is a legitimate basis for an agency to distinguish between two employees when determining whether to mitigate disciplinary action.

Grievant argued that she needed to exfoliate her feet in accordance with her doctor's instructions and her need to relieve pain. She argues that under the Americans with Disabilities Act, the Agency is obligated to provide her a reasonable accommodation. Grievant's argument is untenable. There is no dispute that Grievant had a legitimate medical need to remove skin from her feet. No

credible evidence was presented to show that she had to do so at 3 p.m. on May 4, 2010 in her office cubicle. There is no reason to believe that Grievant was experiencing a medical emergency that prevented her from waiting until the end of her shift at 5 p.m. to remove the skin. If the Hearing Officer assumes for the sake of argument that Grievant's medical condition would require a reasonable accommodation, a reasonable accommodation would not include permitting an employee to scrape skin from her feet in her office cubicle when other locations such as restrooms might be available. The Agency had no opportunity to address any request for a reasonable accommodation prior to May 4, 2010.

Grievant argued that the Agency should have responded to her action with a formal counseling rather than a Group I Written Notice in order to comply with the principles of progressive disciplinary action as expressed under the Standards of Conduct. When an employee engages in behavior giving rise to disciplinary action, an agency has the discretion to decide whether to counsel the employee or take disciplinary action against the employee. *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…." 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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or

mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In her request to this Department for an administrative review, the grievant asserts the following:

1. The decision concludes that under the Americans with Disabilities Act, an employee would not have the ability to remove skin from her foot in an office cubicle during break time.
2. The decision concludes that the standards of conduct were delineated clearly enough so as to make exfoliating dead skin form one's foot a violation of the standards of conduct.
3. The decision concludes that the agency appropriately decided to give the grievant a Group One Written Notice.
4. The decision did not allow a mitigation or reduction in the agency disciplinary action.
5. The examiner failed to apply the proper standard in analyzing the findings of fact.

Concerning item number one, the grievant suggests that hearing officer's ruling is not in compliance with the Americans with Disabilities Act (ADA). She asserts that she has a medical condition that should be handled under the reasonable accommodation provisions of the ADA. We are compelled to note that all medical conditions do not rise to the level of disabilities. We also note that under the ADA, it is the responsibility of the employee to inform the employer of his/her disability and to request any reasonable accommodations. In the instant case, the evidence does not support that the grievant at any time, prior to the incident, declared herself as an employee with a disability or requested reasonable accommodations. Therefore, it is the opinion of this Department that the hearing officer's ruling is consistent with the provisions of the ADA.

Concerning item number two, while the Standards of Conduct policy does not specifically delineate that defoliating one's foot in the workplace is a violation, the examples listed are not all-inclusive. Management officials have the discretion to determine what workplace behavior is counterproductive or disruptive.

Concerning item number three, while it is generally appropriate for management officials to conduct counseling upon a first offense, counseling is not required. Rather, they may issue a Standards of Conduct notice depending on the egregiousness of the misconduct.

Concerning item number four, this Agency is not authorized to address issues of mitigation. Issues of mitigation are the responsibilities of the agency and the hearing officer.

Concerning item number five, the issues you raised are evidentiary in nature. Hearing officers are charged with making decisions based on their consideration and assessment of the evidence. This Agency has no authority to review the hearing officer's assessment of that

evidence unless that assessment results in a decision that is in violation of human resource management policy or law.

Based on the above reasons, this Agency will not interfere with the application of this hearing decision.

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