Issue: Group II Written Notice with Suspension (failure to perform assigned work and interference with operations); Hearing Date: 05/05/11; Decision Issued: 05/09/11; Agency: DMV; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 9514; Outcome: No Relief – Agency Upheld; **Administrative Review: AHO Reconsideration Request received 05/23/11; AHO Reconsideration Decision issued 06/01/11; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 05/23/11; EDR Ruling No. 2011-2992 issued 06/29/11; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 05/23/11; DHRM form letter issued 06/02/11 declining to review; Administrative Review: DHRM Ruling Request on EDR Ruling No. 2011-2992 received 07/14/11; DHRM Ruling issued 07/22/11; Outcome: EDR Ruling and Hearing Decision affirmed; Judicial Review: Appealed to Richmond Circuit Court [CL11-3958]; Outcome pending.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 9514

Hearing Date: May 5, 2011
Decision Issued: May 9, 2011

PROCEDURAL HISTORY

The Department of Motor Vehicles ("Agency") issued to the Grievant a Group II Written Notice on August 30, 2010, for refusal to perform assigned work and interference with state operations on August 10, 2010. Agency Exh. A. The Grievant had no prior active Written Notices, with 27 years of service. The discipline for the current Group II Written Notice was three days suspension.

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 he requested a hearing. On February 14, 2011, the Department of Employment Dispute Resolution ("EDR") appointed the Hearing Officer. A pre-hearing conference was held by telephone on February 16, 2010. The Agency advocate requested that the usual timeline for completing the grievance hearing and decision be extended to accommodate her medical situation. The Grievant agreed to extend the timeline for this purpose, and for good cause shown the timeline was extended and the grievance hearing was scheduled for May 5, 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. 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 and suspension.

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 and/or

constitute neglect of duty, insubordination, the abuse of state resources, violations of policies, procedures, or laws. Agency Exh. J.

The Agency's Employee Code of Conduct states the requirement that Agency employees "Be dedicated to the PEAK (People, Ethics, Accuracy and Knowledge). Agency Exh. H. Among the attributes expected are service that is friendly, helpful, proactive, customized, etc. The Grievant's Employee Work Profile (EWP) specifically requires him to demonstrate PEAK performance. Agency Exh. G. Specifically, the EWP states that Agency management expects the employee to "Provide friendly service to co-workers and customers; ensure professionalism in service and security of items belonging to DMV; accomplish assignments correctly and accurately to kindle communication between co-workers and customers as related to job duties." The EWP also requires the employee to promote, educate and comply with DMV's mission, vision and values. The Agency's vision is "PEAK performance – everyone, every time." Agency Exh. H.

The Offense

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 warehouse specialist, and he has enjoyed 27 years of service with the Agency. His work profile, as referenced above, requires him to cooperate within the work environment with a high degree of care and responsiveness.

On August 10, 2010, the manager of a related department, Printing Services, requested the Grievant to obtain and provide a supply of needed boxes. The boxes were stored at a remote warehouse, and the Grievant responded to the printing manager that he lacked the proper access code for the remote warehouse. The regular warehouse manager was off and another manager was covering, as usual, for the Grievant's warehouse department. Other than informing the Printing manager that he did not have an access code, the Grievant did nothing to further the Printing manager's request.

The same afternoon, the Printing manager learned from other sources that all employees in the warehouse should have an access code for the remote warehouse. The Printing manager returned late in the afternoon to ask, again, the Grievant about his ability to fulfill the request, and the Grievant reiterated that he did not have an access code. The Printing manager reports that the Grievant responded to his requests and intentions to get the boxes with a disrespectful attitude, stating something like "knock yourself out."

The Printing manager brought the conduct to the attention of the manager covering the warehouse. The covering manager investigated the incident and interviewed the Grievant and co-worker witnesses who mostly corroborated the Printing manager's account. The covering manager reported that two warehouse coworkers corroborated overhearing the Grievant use inappropriate language and tone with the Printing manager. The covering manager testified that

the Grievant admitted to her making the "knock yourself out" comment. However, during the grievance hearing, the Grievant denied making that comment.

Upon his return to work, the Warehouse manager investigated the incident and issued the Group II Written Notice with three days' suspension. He testified that the seriousness of the conduct could have justified a Group III Written Notice, but he mitigated it down to a Group II with less than the ten days suspension permitted. The mitigation was in deference to the Grievant's long tenure with the Agency.

The Agency's controller testified that his department manages all the areas involved in these circumstances, including the warehouse, printing division and the mailing department. He testified to the requirements and expectations of employees to interract and cooperate with each other.

A program support technician from another department who found herself in the warehouse area overheard the exchange between the Grievant and the Printing manager. She described the Grievant as speaking heatedly at the Printing manager to the point that she felt uncomfortable and left the area. She reported this to the covering manager.

Contrary to the covering manager's report and testimony, two warehouse co-workers testifying on the Grievant's behalf denied overhearing or corroborating any heated or inappropriate communication between the Grievant and the Printing manager.

In his testimony, the Grievant denied that he raised his voice to the Printing manager or used any inappropriate language. The Grievant insisted that he did not have an access code to the remote warehouse, and that he tried only to communicate that to the Printing manager.

From the evidence presented, it appears that the Grievant should have had an access code to the remote warehouse, but neither side presented sufficient evidence either to show that a code had been issued to the Grievant or to explain why the Grievant did not have an access code. This code issue appears to be the genesis of the negative interraction at issue. Nevertheless, the Grievant made no effort to honor the manager's request to obtain the needed supplies.

Based on the evidence presented, I find that the Agency has met its burden of proof that the Grievant failed to accept the manager's direction or cooperate in seeing that the request was satisfied. Regardless of whether the Grievant had an access code to the remote warehouse, he admitted during questioning at the grievance hearing that he did not take any action to help or respond to the Printing manager's request for boxes. While there is conflict in the evidence on the severity of the Grievant's response to the Printing manager, the Grievant's response is misconduct. The question, then, turns to whether the level of discipline was justified.

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."

Because the offending conduct satisfies the characterization of failure to perform assigned work, violation of PEAK performance policy, and insubordination, it falls within the categories of offenses assigned to Group II. The Agency, thus, has met its burden of proving the 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 challenges the degree of the conduct charged, but he advances the argument that the Agency blew his offense out of proportion or over-reacted. While there is some conflict in the evidence on the severity of the confrontation on August 10, 2010, it does preponderate in showing that the Grievant did not make any effort to satisfy the manager's request or fulfill the Agency's mission and vision of service. Although the Agency could have justified a lesser sanction, the Agency's choice of a Group II offense is well-founded. While I find the Agency has met its burden of proof, the hearing officer must consider the arguments for mitigation.

Mitigation. Although the Agency could have done so, it did not assess the maximum ten days suspension that a Group II offense allows. The Grievant argues, reasonably, that the Agency could have exercised discipline along the continuum short of what was levied. 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 his prior years of service and good work record should provide enough consideration to mandate a lesser sanction than the Group II with three days suspension. Other than arguing the degree of his conduct and his long career at the Agency, the Grievant does not present any evidence or argument that he did not have notice of the Agency's conduct expectations or an improper motive by the Agency. 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.

In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action. In fact and law, the hearing officer lacks the authority to override the Agency's discipline and mitigation determination unless the circumstances show that the discipline exceeds the limits of reasonableness. As stated above, the hearing officer is not allowed to act as a "super-personnel officer." Therefore, the hearing officer must give deference to actions by Agency management that are found to be consistent

with law and policy, even if he disagrees with the severity of the disciplinary action. Accordingly, the Hearing Officer finds no mitigating circumstances exist that compel a reduction of the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of the Group II Written Notice with three days suspension 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 shown on the attached list.

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. 9514

Hearing Date:	May 5, 2011
Decision Issued:	May 9, 2011
Reconsideration Issued:	June 1, 2011

APPLICABLE LAW

A hearing officer's original decision is subject to administrative review. A request 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. A request to reconsider a decision is made to the hearing officer. A copy of all requests must be provided to the other party and to the EDR Director. 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.[1]

OPINION

On May 24, 2011, the grievant timely requested reconsideration of the May 9, 2011, decision. The grievant asserts factual errors, newly discovered evidence, or incorrect conclusions by the hearing officer.

The grievant argues against the weight of the evidence as determined by the hearing officer, and appears to indicate a racial discrimination element to his argument. The grievant did not advance a racial discrimination position at the grievance hearing, and to raise it on a request for reconsideration does not meet the newly discovered evidence standard for reopening the grievance hearing. A reopening of the hearing and/or a reconsideration of the hearing decision as well as the ability to present additional information requires that the evidence to be presented be "newly discovered." Newly discovered evidence is evidence that was in existence at the time of the trial, but was not known (or discovered) by the aggrieved party until after the trial ended. *See* EDR Ruling No. 2011-2819. This issue presented does not satisfy the requirement for newly discovered evidence and cannot be considered now.

[1] § 7.2 Department of Employment Dispute Resolution (EDR) Grievance Procedure Manual, effective August 30, 2004.

As pointed out by the grievant, there was discrepancy in the testimony, as noted in the original decision. However, discrepancy in the testimony is not a basis to reconsider or overturn a decision as long as there is evidence to support the finding. For example, the hearing officer found believable the covering manager's testimony, especially her account that the grievant admitted stating to the Printing manager "knock yourself out." The testimony of the program support technician corroborated the inappropriate expressions from the grievant. Even the grievant's request for reconsideration does not point out how he satisfied the agency's expectation for PEAK performance.

In sum, as found orignially, the Agency met its burden of showing the offending conduct satisfied the characterization of failure to perform assigned work, violation of PEAK performance policy, and insubordination. The Agency had discretion to treat the misconduct as Group II or less, and the hearing officer lacked authority to substitute his judgment on extent of discipline because the discipline did not exceed the bounds of reasonableness.

DECISION

Based on the above, the hearing officer denies the grievant's request for reconsideration of the original decision issued on May 9, 2011.

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:

4. **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.

5. **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.

6. **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:

3. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
4. 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 shown on the attached recipient list.

Cecil H. Creasey, Jr.
Hearing Officer

June 2, 2011

[Grievant]

RE: **Grievance of [Grievant] v. Department of Motor Vehicles**
Case No. 9514

Dear [Grievant]:

The agency head of the Department of Human Resource Management, Ms. Sara Redding Wilson, has asked that I respond to your request for an administrative review of the hearing officer's decision in the above referenced case. Please note that, pursuant to the Grievance Procedure Manual, §7.2(a), either party to the grievance may request an administrative review within 15 calendar days from the date the decision was issued if any of the following apply:

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

2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management (DHRM) to review the decision. You must refer to the specific policy and explain why you believe the decision is inconsistent with that policy.

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

In each instance where a request is made to this Agency for an administrative review, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent. In our opinion, while your request indicates that the agency did not apply the Standards of Conduct properly, it does not identify how the hearing decision violates that policy. Rather, it appears that you are contesting what evidence the hearing officer considered, how he assessed that evidence and the conclusions he drew. As such, the Department of Human Resource Management has no authority to review the issues you raise and therefore must respectfully decline to honor your request.

Sincerely,

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

July 22, 2011

[Grievant]

RE: **Grievance of [Grievant] v. Department of Motor Vehicles**
Case No. 9514 - R

Dear [Grievant]:

This letter is in response to your request for a review of the administrative review ruling issued by the Director of the Department of Employment Dispute Resolution (EDR) dated June 29, 2011. More specifically, in an email dated July 14, 2011, you stated…"I just want a respond for page 7 on that book they sent me."

In a letter to you dated June 2, 2011, we stated the following:

> 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.

Please note that this Department will not review any administrative review ruling issued by the EDR unless there are outstanding policies issues as a result of that ruling. In the instant case, on page 7 the EDR ruling stated the following:

> The grievant challenges the decision on several policy bases. Among other things, the grievant asserts that the Standards of Conduct "require that supervisors from other departments inquire with the employees' direct/acting supervisor when manpower and/or supplies are needed from another department." This Department is unaware of any such policy provision but the Department of Human Resource Management (DHRM) has the sole authority to make a final determination on whether the hearing decision comports with policy. Accordingly, if he has not already done so, the grievant may, within 15 calendar days of the date of this ruling, raise this issue (as well as his assertion that progressive discipline required the agency to issue a counseling memorandum rather than written notice) in a request for administrative review to the Director of the Department of Human Resource Management, 101 North 14th Street, 12th Floor, Richmond, VA 23219.

Concerning the policy-related issues raised by EDR in the above ruling, the Standards of Conduct policy does not provide guidance as to how an agency manages its affairs when it comes to making assignments to employees. Concerning progressive discipline, while counseling typically is the first level of corrective action, it is not a required precursor to the issuance of Written Notices. The decision to conduct counseling before the issuance of a Written Notice must be individualized and based on the circumstances. Thus, this Agency will disturb neither the hearing officer's decision nor the ruling by the Director of the EDR.

Concerning the other issues you raised in the attachment to your email, we have determined that you are contesting how the hearing officer evaluated the evidence and the conclusions he drew. Thus, we will not interfere with the application of this hearing decision.

_____

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