Issues: Group II Written Notice (Other – unfounded allegations against another employee) and Notice of Improvement Needed; Hearing Date: 07/20/11; Decision Issued: 08/09/11; Agency: VCCS; AHO: Thomas P. Walk, Esq.; Case No. 9620; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 08/24/11; EDR Ruling No. 2012-3076 issued 12/07/11; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 08/24/11; DHRM Ruling issued 01/09/12; Outcome: AHO's decision affirmed.**

COMMONWEALTH OF VIRGINIA, DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

IN RE: CASE NO. 9620

DECISION OF HEARING OFFICER

HEARING DATE: JULY 20, 2011

DECISION ISSUED: AUGUST 9, 2011

PROCEDURAL BACKGROUND

On February 28, 2011, the agency issued to the grievant a Written Notice and a Notice of Improvement Needed. The grievant filed her grievance to both these matters on March 22, 2011. I was appointed as hearing officer on June 14, 2011. I conducted a pre-hearing telephone conference call on July 5, 2011. With the consent of both sides, the matter was confirmed for hearing on July 20. The agency dropped two of the alleged violations prior to the hearing. I conducted the hearing on that date. The parties have submitted, at my request, written argument and authorities.

APPEARANCES

Agency counsel

Agency representative

Three witnesses for the agency, including the representative

Counsel for grievant

Grievant

Three additional witnesses for the grievant

ISSUES

1. Whether the agency acted properly in issuing to the grievant the Group II Written Notice fro her writing a letter to the school's President complaining of certain actions by other employees?

2. Whether the agency acted properly in issuing to the grievant the Notice of Improvement Needed for the letter to the school's President?

FINDINGS OF FACT

The grievant is employed as an administrative support person at a public college in the Commonwealth of Virginia (hereafter referred to as the agency, the school, or the college). The school has employed her for several years prior to the incidents giving rise to this grievance. During several of those years, the school gave the grievant an above contributor rating on her employee work profile.

In or about September, 2009 the grievant accused another employee of the school of creating a hostile work environment. The supervisor resolved that issue without formal discipline being issued to either the grievant or her co-worker.

The grievant is a pleasant individual with a rather unique personality. She has suffered from various health issues during recent years. In the fall of 2010, she began eating raw garlic as a homeopathic way of dealing with certain of her health problems. This practice created an offensive odor at her worksite. After

several complaints were made, two air fresheners were placed in the office where the grievant was assigned. The air fresheners were the suggestion of her supervisor. A co-worker (Employee X) acted upon the suggestion. Within

approximately two weeks after the air fresheners were placed in the office, the grievant began suffering from vision and other health issues. She attributed those problems to the presence of the air fresheners. Her feelings were confirmed by a brief conversation with her nurse practitioner.

The grievant took a sick day on December 22, 2010. The following day, while the office was closed for the Christmas holidays, she returned and removed the air fresheners. She took them to her home and placed them on her porch.

On December 27, she wrote a letter to the school president. In this letter, she made numerous accusations against Employee X. The letter began:

> " I am writing to ask you to please help me! Please do not let (Employee X) continue to persecute me, and now she is trying to kill me."

The grievant proceeded to detail her relationship with Employee X. She made several allegations against Employee X including:

- That Employee X had stated that she "would do whatever she had to, to get what she wanted" and that she wanted the position of the grievant. The grievant said that her supervisor had failed to respond to concerns regarding the statements;

- That she feared that Employee X was attempting to poison her, citing that her food kept in her refrigerator at the office had been subject to tampering;

- That Employee X had removed an envelope from a purse or bag of the grievant, which envelope contained a check payable to a charity supported by the grievant. Again, the grievant said that the supervisor failed to respond to her concerns;
- That the phone settings on her cell phone had been changed;
- That the air fresheners had been pointed at her by Employee X.

The grievant admits that she knows of no evidence supporting the allegations, both direct and implied, made in the letter that Employee X had attempted to tamper with her food, had stolen the envelope from her bag, or had changed the settings on her cell phone.

The grievant mailed the letter by overnight delivery on or about December 27. Because school was still closed for the holidays, she had it directed to the school president at his home. He received the letter on December 29 and immediately directed that an investigation be commenced. When the school reopened on January 3, 2011, the supervisor of the grievant transferred Employee X to another worksite pending the results of the investigation. A lengthy and complete investigation was performed. It revealed no basis for the allegations in

the letter, specifically including that Employee X was persecuting and attempting to kill the grievant.

The Human Resource Director notified the grievant on February 1 that she was to participate in counseling sessions through the Employee Assistance Program. The Human Resource Director gave as her reason the unfounded

allegations in the letter of December 27, 2010. Those allegations yielded concern over the emotional and mental health of the grievant. The grievant has complied with that directive. At the hearing in this matter, she testified that she was not in her right mind at the time she wrote the letter.

The grievant received a Notice of Improvement Needed on February 28. She was found to have violated the provision of her employee work profile that requires her to "work to enhance the image of the department" and school. The document also recited her failing to maintain an effective working relationship with other employees. The counseling sessions mentioned above were prescribed as part of her improvement plan. The grievant acknowledged that she was actively working on these concerns.

In addition, on February 28 the agency issued to the grievant Group II Written Notice based on three violations. Prior to the hearing, the agency voluntarily dropped two of the violations and proceeded only on the basis of the December 27, 2010 letter.

DISCUSSION AND CONCLUSIONS OF LAW

The Commonwealth of Virginia provides certain protections to employees in Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary actions. The Department of Employment Dispute Resolution has developed a Grievance Procedural Manual (GPM). This manual sets forth the applicable standards for this type of proceeding. Section 5.8 of the GPM provides that in disciplinary grievances the agency has the burden of

going forward with the evidence. It has the burden of proving by a preponderance of the evidence that its actions were warranted and appropriate.

The GPM is supplemented by a separate set of standards promulgated by the Department of Employment Dispute Resolutions, Rules for Conducting Grievances. These Rules state that in a disciplinary grievance (such as this matter) a hearing officer shall review facts de novo and determine:

I. Whether the employee engaged in the behavior described in the Written Notice;

II. Whether the behavior constituted misconduct;

III. Whether the discipline was consistent with law and policy; and

IV. Whether there were mitigating circumstances justifying the reduction or removal of the disciplinary action, and, if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

I will discuss these considerations in the order presented.

The grievant admits that she wrote the letter of December 27, 2010. She recognizes that writing and sending the letter were wrong. She came to the realization on or before January 6 that she needed help for her emotional issues. The grievant has not argued, nor has she presented any expert testimony, that her emotional problems prevented her from knowing right

from wrong or conforming her actions to appropriate legal standards on December 27.

The Department of Resource Management for the Commonwealth of Virginia has issued Policy 1.60, labeled "Standards of Conduct." The grievant is challenging her Group II Discipline issued under that policy. Group II offenses are those "that significantly impact business operations." The letter of the grievant set in motion a chain of events. The most serious of these events was the investigation commenced by the Human Resource Director. The school President contacted her at her home upon his receipt of the letter on December 29. Her investigation began in earnest when the school re-opened on January 3. The investigation consumed an estimated minimum of 40 hours of administrative and supervisory time during a crucial period of the school year. This investigation of unfounded allegations certainly qualifies as a substantial or significant disruption of the operations of the college. Therefore, the letter clearly qualifies as

misconduct subject to a Group II Written Notice. It also supports the issuance of the Notice of Improvement Needed.

Pursuant to §4.1 (B) of the GPM, a claim of retaliation is grievable if the grievant is punished for exercising any right otherwise protected by law. Section 2.2-3000.A of the Code of Virginia states "employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management." The grievant has also has referred me to §40.1-51.2:1 of the Code. To establish a claim for retaliation, an employee must also show that she

suffered a materially adverse action and that a causal link exists between the materially adverse action and the protected activity. DEDR Ruling No. 2010-2714. Both the issuance of a Formal Written Notice and a Notice of Improvement Needed can qualify as a materially adverse employment action. DEDR Ruling 2007-1669.

Here, the grievant could be terminated from employment by the agency if she is issued another Group II Written Notice while the subject Notice remains active (i.e. until February 28, 2014). If the grievant is subsequently found to have fallen out of compliance with the Notice of Improvement Needed, that non-compliance could possibly serve as the basis for that second Group II Written Notice. Therefore, the actions taken by the agency on February 28 clearly fall within the definition of a materially adverse action against the grievant.

Similarly, there is no question that the agency would not have taken the disciplinary actions but for the letter of December 27, 2010.

The crux of the retaliation claim by the grievant is that she was engaging in protected activity when she sent the letter. For purposes of this decision, I assume that the complaint of the grievant about the air fresheners themselves was protected speech under statutory and constitutional provisions. I further assume for purposes of this decision that the accusation by the grievant that Employee X was trying to kill her through the mechanism of the air fresheners, when viewed in isolation from the rest of the letter, was obvious hyperbole. Finally, I assume that the grievant made the complaints regarding the air fresheners with good faith concerns for her health and safety.

I cannot, however, view the statements regarding the air fresheners in isolation. The other allegations contained in the letter against Employee X and the supervisor must be read as a whole. The grievant made wholly unfounded accusations against Employee X, accusing her of attempting to poison her, larceny, and other mischief. She now acknowledges that those allegations were wrong. These allegations and the use of the word "persecute" in two different locations in the letter add color to the primary allegation regarding the air fresheners. That allegation was unfounded.

Freedom of speech is a fundamental right. The exercise of that right is not absolute. It must be done consistently with the rights of other individuals.

Thomas v. City of Danville, 207 Va. 656, 152 S.E. 2d 265 (1967). By including the untrue statements about Employee X in the letter, the grievant abused whatever privilege she may have enjoyed. I cannot find that the disciplinary actions of the agency were in retaliation for the letter. Clearly, they were the result of the letter, but that is a vastly different question than the issue argued by the grievant.

The mitigation of punishment by a hearing officer is addressed by the Rules for Conduction Grievance Hearings. Section VI (B) of those Rules requires me to give deference to the right of management to exercise its good faith business judgment in employee matters and the agency's right to manage its operations. I may mitigate the discipline only if it is unreasonable.

Certain actions of the agency in the course of this grievance and otherwise lead me to question whether deference should be given in this matter. Initially the grievant was accused of misuse of states resources and misuse of state time. Those violations were dropped from this proceeding prior to the hearing. At the hearing, the agency introduced evidence regarding alleged violations by the grievant of policies and procedures arising subsequent to her filing this grievance. Although I allowed that evidence to be heard, at the conclusion of the agency's case-in-chief I struck that evidence as being irrelevant.

The work history of the grievant has been relatively lengthy and contains a record of good service to the faculty at the school. I find credible the testimony of

the grievant that she was not thinking clearly when she wrote the letter. These are all mitigating factors considered by me.

On the other hand are the aggravating factors of the extreme seriousness of the allegations made by the grievant and the need for an extensive investigation. The agency issued this discipline to the grievant approximately eight weeks after the investigation began. It did not act rashly or precipitously. Despite my concerns over whether the school attempted to bolster its case by pointing out whatever shortcomings it could find in the performance of the grievant, I do not find it acted unreasonably in issuing the two disciplinary matters before me. Its case on those matters was sufficiently strong to support the charges. Although others may have reached a different conclusion and imposed other sanctions, the school acted within its discretion.

DECISION

For the reasons stated herein, I uphold the issuance of the Group II Written Notice and the Notice of Improvement Needed.

APPEAL RIGHTS

As the Grievant 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** to the Director of the Department of Human Resource Management. This request must cite to a particular mandate in the state or agency policy. The Director=s authority is limited to ordering the hearing officer to review the decision to conform it to written policy. Requests should be sent to the Director of Human Resources Management, 101 N. 14th St., 12th Floor, Richmond, VA 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 DEDR. 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 DEDR Director, 600 E. Main St., 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**. 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 court shall award reasonable attorneys fees and costs to the employee if the employee substantially prevails on

the merits of the appeal. Either party may appeal the final decision of the Circuit Court to the Court of Appeals pursuant to Virginia Code Section 17.1-405.

DECIDED this August 9, 2011.

/s/ Thomas P. Walk
Thomas P. Walk, Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of
Virginia Community College System

January 9, 2012

The grievant has requested an administrative review of the hearing officer's decision in Case No. 9620. For the reasons stated below, we will not interfere with the application of this hearing decision. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has directed that I conduct this administrative review.

In his PROCEDURAL HISTORY, the hearing officer wrote, in relevant part, the following:

> On February 28, 2011, the agency issued to the grievant a Written Notice and a Notice of Improvement Needed. The grievant filed her grievance to both these matters on March 22, 2011.

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FACTS

In his FINDINGS OF FACT, the hearing officer wrote the following:

> The grievant is employed as an administrative support person at a public college in the Commonwealth of Virginia (hereafter referred to as the agency, the school, or the college). The school has employed her for several years prior to the incidents giving rise to this grievance. During several of those years, the school gave the grievant an above contributor rating on her employee work profile.
>
> In or about September 2009 the grievant accused another employee of the school of creating a hostile work environment. The supervisor resolved that issue without formal discipline being issued to either the grievant or her co-worker.
>
> The grievant is a pleasant individual with a rather unique personality. She has suffered from various health issues during recent years. In the fall of 2010 she began eating raw garlic as a homeopathic way of dealing with certain of her health problems. This practice created an offensive odor at her worksite. After

several complaints were made, two air fresheners were placed in the office where the grievant was assigned. The air fresheners were the suggestion of her supervisor. A co-worker (Employee X) acted upon the suggestion. Within approximately two weeks after the air fresheners were placed in the office, the grievant began suffering from vision and other health issues. She attributed those problems to the presence of the air fresheners. Her feelings were confirmed by a brief conversation with her nurse practitioner.

The grievant took a sick day on December 22, 2010. The following day, while the office was closed for the Christmas holidays, she returned and removed the air fresheners. She took them to her home and placed them on her porch.

On December 27, she wrote a letter to the school president. In this letter, she made numerous accusations against Employee X. The letter began:

> "I am writing to ask you to please help me! Please do not let (Employee X) continue to persecute me, and now she is trying to kill me."

The grievant proceeded to detail her relationship with Employee X. She made several allegations against Employee X including:

- That Employee X had stated that she "would do whatever she had to, to get what she wanted" and that she wanted the position of the grievant. The grievant said that her supervisor had failed to respond to concerns regarding the statements;

- That she feared that Employee X was attempting to poison her, citing that her food kept in her refrigerator at the office had been subject to tampering;

- That Employee X had removed an envelope from a purse or bag of the grievant, which envelope contained a check payable to a charity supported by the grievant. Again, the grievant said that the supervisor failed to respond to her concerns;

- That the phone settings on her cell phone had been changed;

- That the air fresheners had been pointed at her by Employee X.

The grievant admits that she knows of no evidence supporting the allegations, both direct and implied, made in the letter that Employee X had attempted to tamper with her food, had stolen the envelope from her bag, or had changed the settings on her cell phone.

The grievant mailed the letter by overnight delivery on or about December 27. Because school was still closed for the holidays, she had it directed to the school president at his home. He received the letter on December 29 and immediately directed that an investigation be commenced. When the school reopened on January 3, 2011, the supervisor of the grievant transferred Employee X to another worksite pending the results of the investigation. A lengthy and complete investigation was performed. It revealed no basis for the allegations in the letter, specifically including that Employee X was persecuting and attempting to kill the grievant.

The Human Resource Director notified the grievant on February 1 that she was to participate in counseling sessions through the Employee Assistance Program. The Human Resource Director gave as her reason the unfounded allegations in the letter of December 27, 2010. Those allegations yielded concern over the emotional and mental health of the grievant. The grievant has complied with that directive. At the hearing in this matter, she testified that she was not in her right mind at the time she wrote the letter.

The grievant received a Notice of Improvement Needed on February 28. She was found to have violated the provision of her employee work profile that requires her to "work to enhance the image of the department" and school. The document also recited her failing to maintain an effective working relationship with other employees. The counseling sessions mentioned above were prescribed as part of her improvement plan. The grievant acknowledged that she was actively working on these concerns.

In addition, on February 28 the agency issued to the grievant Group II Written Notice based on three violations. Prior to the hearing, the agency voluntarily dropped two of the violations and proceeded only on the basis of the December 27, 2010 letter.

In his DISCUSSION AND CONCLUSIONS OF LAW, the hearing officer stated the following:

The Commonwealth of Virginia provides certain protections to employees in Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary actions. The Department of Employment Dispute Resolution has developed a Grievance Procedural Manual (GPM). This manual sets forth the applicable standards for this type of proceeding. Section 5.8 of the GPM provides that in disciplinary grievances the agency has the burden of going forward with the evidence. It has the burden of proving by a preponderance of the evidence that its actions were warranted and appropriate.

The GPM is supplemented by a separate set of standards promulgated by the Department of Employment Dispute Resolutions, Rules for Conducting Grievances. These Rules state that in a disciplinary grievance (such as this matter) a hearing officer shall review facts de novo and determine:

I. Whether the employee engaged in the behavior described in the Written Notice;
II. Whether the behavior constituted misconduct;
III. Whether the discipline was consistent with law and policy; and
IV. Whether there were mitigating circumstances justifying the reduction or removal of the disciplinary action, and, if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

I will discuss these considerations in the order presented.

The grievant admits that she wrote the letter of December 27, 2010. She recognizes that writing and sending the letter were wrong. She came to the realization on or before January 6 that she needed help for her emotional issues. The grievant has not argued, nor has she presented any expert testimony, that her emotional problems prevented her from knowing right from wrong or conforming her actions to appropriate legal standards on December 27.

The Department of Resource Management for the Commonwealth of Virginia has issued Policy 1.60, labeled "Standards of Conduct." The grievant is challenging her Group II Discipline issued under that policy. Group II offenses are those "that significantly impact business operations." The letter of the grievant set in motion a chain of events. The most serious of these events was the investigation commenced by the Human Resource Director. The school President contacted her at her home upon his receipt of the letter on December 29. Her investigation began in earnest when the school re-opened on January 3. The investigation consumed an estimated minimum of 40 hours of administrative and supervisory time during a crucial period of the school year. This investigation of unfounded allegations certainly qualifies as a substantial or significant disruption of the operations of the college. Therefore, the letter clearly qualifies as misconduct subject to a Group II Written Notice. It also supports the issuance of the Notice of Improvement Needed.

Pursuant to §4.1 (B) of the GPM, a claim of retaliation is grievable if the grievant is punished for exercising any right otherwise protected by law. Section 2.2-3000.A of the Code of Virginia states, "employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management." The grievant also has referred me to §40.1- 51.2:1 of the Code. To establish a claim for retaliation, an employee must also show that she suffered a materially adverse action and that a causal link exists between the materially adverse action and the protected activity. DEDR Ruling No. 2010-2714. Both the issuance of a Formal Written Notice and a Notice of Improvement Needed can qualify as a materially adverse employment action. DEDR Ruling 2007-1669.

Here, the grievant could be terminated from employment by the agency if she is issued another Group II Written Notice while the subject Notice remains active (i.e., until February 28, 2014). If the grievant is subsequently found to have

fallen out of compliance with the Notice of Improvement Needed, that non-compliance could possibly serve as the basis for that second Group II Written Notice. Therefore, the actions taken by the agency on February 28 clearly fall within the definition of a materially adverse action against the grievant. Similarly, there is no question that the agency would not have taken the disciplinary actions but for the letter of December 27, 2010.

The crux of the retaliation claim by the grievant is that she was engaging in protected activity when she sent the letter. For purposes of this decision, I assume that the complaint of the grievant about the air fresheners themselves was protected speech under statutory and constitutional provisions further assume for purposes of this decision that the accusation by the grievant that Employee X was trying to kill her through the mechanism of the air fresheners, when viewed in isolation from the rest of the letter, was obvious hyperbole. Finally, I assume that the grievant made the complaints regarding the air fresheners with good faith concerns for her health and safety.

I cannot, however, view the statements regarding the air fresheners in isolation. The other allegations contained in the letter against Employee X and the supervisor must be read as a whole. The grievant made wholly unfounded accusations against Employee X, accusing her of attempting to poison her, larceny, and other mischief. She now acknowledges that those allegations were wrong. These allegations and the use of the word "persecute" in two different locations in the letter add color to the primary allegation regarding the air fresheners. That allegation was unfounded.

Freedom of speech is a fundamental right. The exercise of that right is not absolute. It must be done consistently with the rights of other individuals. Thomas v. City of Danville, 207 Va. 656, 152 S.E. 2d 265 (1967). By including the untrue statements about Employee X in the letter, the grievant abused whatever privilege she may have enjoyed. I cannot find that the disciplinary actions of the agency were in retaliation for the letter. Clearly, they were the result of the letter, but that is a vastly different question than the issue argued by the grievant.

The mitigation of punishment by a hearing officer is addressed by the Rules for Conduction Grievance Hearings. Section VI (B) of those Rules requires me to give deference to the right of management to exercise its good faith business judgment in employee matters and the agency's right to manage its operations. I may mitigate the discipline only if it is unreasonable.

Certain actions of the agency in the course of this grievance and otherwise lead me to question whether deference should be given in this matter. Initially the grievant was accused of misuse of states resources and misuse of state time. Those violations were dropped from this proceeding prior to the hearing. At the hearing, the agency introduced evidence regarding alleged violations by the grievant of policies and procedures arising subsequent to her filing this grievance.

> Although I allowed that evidence to be heard, at the conclusion of the agency's case-in-chief struck that evidence as being irrelevant.
>
> The work history of the grievant has been relatively lengthy and contains a record of good service to the faculty at the school. I find credible the testimony of the grievant that she was not thinking clearly when she wrote the letter. These are mitigating factors considered by me.
>
> On the other hand are the aggravating factors of the extreme seriousness of the allegations made by the grievant and the need for an extensive investigation. The agency issued this discipline to the grievant approximately eight weeks after the investigation began. It did not act rashly or precipitously.
>
> Despite my concerns over whether the school attempted to bolster its case by pointing out whatever shortcomings it could find in the performance of the grievant, I do not find it acted unreasonably in issuing the two disciplinary matters before me. Its case on those matters was sufficiently strong to support the charges. Although others may have reached a different conclusion and imposed other sanctions, the school acted within its discretion.

In his DECISION, the hearing officer stated the following:

> For the reasons stated herein, I uphold the issuance of the Group II Written Notice and the Notice of Improvement Needed.

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.

Concerning the hearing decision, DHRM concludes that the hearing officer did not violate any human resource management policy. Rather, it appears that the grievant is disagreeing with the hearing office's assessment of the evidence and the conclusions he drew as a result of that assessment. Therefore, this Agency has no basis to interfere with the application of this decision.

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