

Issues: Group II Written Notice (failure to report without notice, failure to follow policy, abuse of State time), Group III Written Notice (falsifying a document), and Termination; Hearing Date: 08/09/11; Decision Issued: 09/06/11; Agency: DRS; AHO: Ternon Galloway Lee, Esq.; Case No. 9650; Outcome: Partial Relief; **Administrative Review: AHO Reconsideration Request received 09/21/11; Reconsideration Decision issued 10/05/11; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 09/21/11; EDR Ruling No. 2012-3112 issued 12/07/11; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 09/21/11; DHRM letter issued 12/09/11 declining to review.**

DECISION OF HEARING OFFICER

In the matter of

Case Number: 9650

Hearing Date: August 9, 2011

Decision Issued: September 6, 2011

SUMMARY OF DECISION

The Agency had found Grievant violated the Agency's "Outside Employment" and "Leave" policies, failed to report to work without notice, and abused state time. It also found Grievant falsified records regarding mileage expenses he claimed to have incurred while conducting business for the state on March 21 and 25, 2011. The Hearing Officer found the evidence insufficient to show (i) Grievant falsely claimed a travel expense for March 25, 2011 and (ii) Grievant engaged in outside employment with [business name]. The Hearing Officer did find Agency bore its burden in showing Grievant engaged in all other misconduct alleged. The Hearing Officer then upheld the Agency's discipline.

PROCEDURAL HISTORY

On April 27, 2011, the Agency issued Grievant a Written Notice of disciplinary action with removal identifying three Group II offenses and one Group III offense. The Written Notice described the nature of the offense and evidence as follows:

[Grievant] violated policy by failing to inform his supervisor or requesting approval of employment outside of the agency. He violated the state and agency leave policy by not reporting to work or submitting leave slips for missed time. He falsified state records by requesting reimbursement for mileage that was not incurred.

The written notice then referenced that it attached the due process notices for the details.

On May 26, 2011, the Grievant timely filed a grievance to challenge the Agency's action. The Grievant was dissatisfied with the Third Resolution Step's outcome and requested a hearing. On July 5, 2011, the Department of Employment Dispute Resolution ("EDR") assigned a hearing officer to this appeal. The Hearing Officer held a pre-hearing conference ("PHC") on July 26, 2011, and subsequently issued a scheduling order.¹

The Hearing Officer scheduled the hearing for August 9, 2011, the first date available between the parties and the Hearing Officer. Prior to commencing the hearing, the Hearing Officer held a subsequent PHC to address objections to certain exhibits offered

¹ The Hearing Officer admitted as evidence in this matter the scheduling order mentioned here.

by Grievant. During the hearing, the Hearing Officer admitted the Hearing Officer's exhibits one through ten, the Agency's exhibits one through nine, and the Grievant's exhibits B and E through U.²

At the hearing both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party.

During the proceeding, the Grievant was represented by his attorney ("Grievant's Advocate") and the Agency was represented by its advocate ("Agency's Advocate").

APPEARANCES

Advocate for Agency
Witnesses for the Agency (2 witnesses, including the Agency's Representative)
Advocate for Grievant
Grievant
Witnesses for the Grievant (6 witnesses, including the Grievant)

ISSUE

Was the Written Notice citing Group II and Group III offenses with termination warranted and appropriate under the circumstances?

BURDEN OF PROOF

In disciplinary actions, 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. (§ 5.8 of the Grievance Procedure Manual ("GPM")). 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 all the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

1. The Department of Rehabilitation Services ("DRS"/"Agency") employed Grievant for 31 years until his termination on May 2, 2011. (Testimony of JS; A Exh. 12; G Exh. J).
2. At the time of his termination, Grievant was employed by the Agency as a vocational rehabilitative counselor ("counselor") where his responsibilities included, among others, (i) meeting with disabled individuals who had applied for services and (ii) developing individual employment plans for them. Grievant's workplace was DRS's

² The Agency objected to Grievant's proposed exhibit's A, C, and D. After hearing arguments, Grievant withdrew those exhibits for consideration of admission. Thus, the Agency's objection became moot.

field office in N, VA located at XXX GRR, N, VA. His scheduled work hours were 7:30 a.m. to 4:15 p.m. (Testimony of JS; Testimony of Grievant; A Exh. 4).

3. Grievant's Employee Work Profile ("EWP") established his responsibilities. The EWP required Grievant to provide employment services to customers who had disabilities, primarily serious mental illnesses. These customers sought the Agency's assistance in helping them acquire employment with employers seeking to hire them. The EWP indicates the Agency expects a counselor's provision of employment services to result in 24 Agency eligible customers becoming rehabilitated; that is, employed and independently living. The EWP required a counselor's cases to be closed timely and effectively. Another core responsibility required Grievant to document the provision of services to customers and the continuation of services to be provided. Clear and thorough case documentation was expected immediately following action on a case within 24 hours, but not later than five calendar days after the action. Documentation was to be maintained electronically in the AWARE software system.³ Under the EWP, the Grievant was expected to request assistance when needed to maintain his electronic file. (A Exh. 2).

In addition, Grievant was required to effectively manage his case load by, among other things, using a required monthly planning day and case staffing to identify actions needed and moving the case towards employment outcome. In managing his caseload, Grievant was expected to develop 40 Individual Plans for Employment ("IPE"). (A Exh. 2).

Grievant's core responsibilities also included his managing resources to be used to provide customers with services and Grievant acquiring knowledge of community resources essential to meeting customers' needs and for his professional growth. (A Exh. 2).

4. On Greivant's last annual performance evaluation dated October 23, 2010, he received an overall "contributor" rating. He was evaluated in 12 areas, eight of them were in his core responsibility areas. Grievant received a "below contributor" rating for the core responsibility regarding employment outcome. In this area, the EWP indicates the Agency expected Grievant to successfully rehabilitate 24 customers during a performance period. Grievant's evaluation indicated that he had successfully rehabilitated 9. Grievant also received a "below contributor" rating for the core responsibility regarding caseload management/services outcome. Grievant had developed 23 IPEs, but the Agency expected 40 during the performance period. In the core responsibility areas of caseload management and case documentation, Grievant received a "contributor" rating. Also his supervisor noted on the evaluation that he had great difficulty documenting his work. (G Exh. F/1; Testimony of JS).

Grievant received a rating of "major contributor" for the core responsibilities

³ The evidence shows "Aware" is a software system that the counselors like Grievant used to document their caseload activity. Counselors are frequently out of the office doing field work, making home visits, and visiting other agencies and the Agency expected them to document their work activity. Aware was typically used daily by counselors. (Testimony of JS).

“Resource Management” and “Knowledge of Community Resources.” Further Grievant received a “contributor” rating for the core responsibility “File Management.” His supervisor at the time, JS, noted on the evaluation that he had difficulty in the area of “Electronic Management” but was showing improvement. (G Exh. F; Testimony of JS).

By written comment on the evaluation, Grievant disagreed with the “below contributor” ratings, stating that he lacked accommodations for six months and missed several months from work due to short term disability.⁴ (G Exh. F/4).

Grievant’s work performance until his termination was average to below average and his productivity was deficient. (G Exhs. F and N; Testimony of JS).

On June 10, 2010, Grievant’s supervisor at the time, JS, formally referred him to the employment assistant program (“EAP”) noting that the reasons for Grievant’s referral was

- Unacceptable quality
- Not following company policies and procedures
- Failure to benefit from supervision, coaching, or corrective counseling
- Ineffective communication
- Personal problems impacting work
- Other concern that affects work performance

Grievant disagreed with many of the reasons cited for his referral. (G Exh. N).

The completed EAP referral form also noted that Grievant’s superior had taken steps to assist Grievant in improving his work performance by counseling him and holding informal meetings twice a month with him. The completed referral also stated it expected Grievant’s work behavior to change in the following ways:

- (i) improved documentation consistent with policy guidelines;
- (ii) improved communication regarding daily activities outside the office via “Aware” documentation;
- (iii) use of the “Sign Out Board” and verbal communication with supervisors as well as use of the outlook calendar; and
- (iv) improved focus and stability on Grievant’s job as a counselor.

(G Exh. N).

Investigation of Grievant

5. On or about March 7, 2011, the Agency engaged the services of Investigator KC to investigate three employees, one of which was Grievant. These employees were chosen for investigation because of their poor work performance. Management had determined

⁴ Grievant testimony and other evidence presented show he was without the Dragon software accommodation for several months in 2010. (Testimonies of G, JS, and HF).

these three employees had the most difficulty completing their work and they spent a lot of time in the field with few results. Management then approved investigations of these employees' daily activities during their scheduled work hours. (Testimony of JS; A Exh. 4)

6. In conducting his investigation of Grievant, Investigator KC conducted stationary and mobile observations of Grievant during Grievant's work hours on March 8, 17, 18, 21, and 25, 2011. He also communicated with JS on his observations during his surveillance. (A Exh. 4)

7. KC's investigation on March 8, 2011 revealed the following :

Grievant arrived at his office complex and place of employment on March 8, 2011, at 8:59 a.m. and exited it at 1:57 p.m. Grievant arrived at [department store] at 2:16 p.m. and went in [department store]. He returned to his vehicle at 2:30 p.m. with a small bag and arrived at his home at 2:59 p.m. Grievant had approved leave beginning 3:30 p.m. on March 8, 2011. (A Exh. 4/3; Testimony of G).

8. The investigation on March 17, 2011 revealed the following:

On March 17, 2011, Grievant reported to his office complex work location at 9:32 a.m. and he exited his office complex at 12:43 p.m. Grievant took approved leave that afternoon and worked for his personal business teaching a firearms training class from 2:00 p.m. to 3:30 p.m. (A Exh. 4/4; Testimony of KC; Testimony of Grievant).

9. The investigation on March 18, 2011 revealed the following:

The investigator arrived at Grievant's residence at 6:00 a.m. and observed a newspaper in the driveway. At 10:12 a.m. the investigator drove by Grievant's residence again and observed the newspaper in the same location. The investigator had not observed the Grievant's vehicle so he drove first to the address provided as the location of Grievant's personal business. The Grievant's vehicle was not located at that address.⁵ Investigator KC then drove to Grievant's place of work and arrived there at 10:45 a.m. Grievant's vehicle was not found. Investigator waited until 12:24 p.m., but Grievant did not arrive. Investigator KC then left the office and drove back to Grievant's residence. He arrived there at 12:45 p.m. and observed the newspaper no longer in the driveway. Investigator did not observe the Grievant's vehicle. At 2:00 p.m., Investigator KC departed Grievant's residence. The investigator then telephoned Grievant's office. A receptionist answered and stated "[Grievant] had not been in the office all day ...he did not have any notes to where he was working on this day." (A Exh. 4/5; Testimony of KC).

10. The investigation on March 21, 2011, revealed the following;

Grievant arrived at his office complex at 9:00 a.m. on March 21, 2011, and he left the office at 1:37 p.m. Grievant drove to [fitness center] and walked in with a gym bag.

⁵ The address was for a mailbox.

He was observed exercising on equipment at the facility from 2:00 p.m. to 3:30 p.m. He then entered [the grocery store,] and came out with bags that he loaded in his vehicle. Grievant then drove home and arrived there at 4:15 p.m. (A Exh. 4/7-8).

11. Investigator KC did not have direct surveillance of Grievant on March 25, 2011 (A Exh. 4).

Reporting to Work and Leave- Agency Requirement

12. The Agency's annual leave policy ("Policy No 4.10") requires employees to request and receive approval from their supervisors to take annual leave. It also instructs employees to make such request as far in advance as possible. Further this policy provides in relevant part that "[i]f an employee could not have anticipated the need for a leave of absence, the employee should request approval for the leave as soon as possible after the leave begins." (A Exh. 9/4).

13. Grievant was not approved for any leave on March 8, 2011. Grievant was not approved for leave from 7:30 a.m. to 9:32 a.m. on March 17, 2011. After March 17, 2011, Grievant did not submit a request for leave because of his absence from work on March 17, 2011, from 7:30 a.m. to 9:32 a.m. (A Exh. 4; Testimony of JS; A Exh. 10/2).

14. Prior to March 21, 2011, Grievant had not requested leave nor had he been approved for leave on March 21, 2011. After the fact, Grievant did not submit a request for missed time from work on March 21, 2011. (A Exhs. 4, 10 and 11; Testimony of Grievant).

15. Supervisor approval is required for a counselor to work from home. (Testimonies of YS, LH, and JS).

16. Under Standards of Conduct Policy No. 1.60 ("Policy No.1.60") failing to report to work as scheduled and leaving work without permission are Group II offenses. (A Exhs. 5,6; Testimony of JS).

17. By March 2011, Grievant had exhausted all his sick leave and a total of two weeks of annual leave. Because he had no remaining sick leave, he was using annual leave as sick leave. (Testimony of G).

Travel Voucher

18. On April 4, 2011, Grievant submitted a Travel Expense Reimbursement Voucher seeking reimbursement for mileage from using his personal vehicle on official state business for among other days, March 21, 2011. (A Exh. 3).

19. Grievant did not use his personal vehicle for official state business on March 21, 2011. (A Exh. 4; Testimony of G; G Exh. K)

Outside Employment

20. In March 2011, in addition to being employed by the Agency, Grievant was self-employed with [business name], a firearms business. In this employ he provides training to individuals about firearms on Thursday afternoons at 2:00 p.m. and on Saturdays. ⁶ (A Exhibit 4; Testimony of KC; Testimony of G).

21. The Agency's outside employment Policy No. 16 precludes employees of the Agency from engaging in other employment during the hours, for which they are employed by DRS. Also, any employee seeking outside employment must obtain prior approval for such from his/her immediate supervisors and division director before pursuing the outside employment. Agency policy requires the employee to use the "Employment Outside of the Agency" form to request approval to engage in outside work. (A Exh. 7).

22. On or about May 11, 2007, Grievant completed an "Employment Outside of the Agency" form. (G Exh. H).⁷

23. No outside employment form was found in Grievant's personnel file. Grievant did not receive approval to work outside of the Agency. (Testimony of JS; G Exh. H).

24. On March 17, 2011, Grievant held a firearms training class at his residence from 2:00 p.m. to 3:30 p.m. Grievant had been approved for leave during the time he taught the class. (Testimony of Investigator KC; A Exh. 4/4; Testimony of Grievant).

Telework and Working from home

25. Under Agency Policy No. 31, the Agency has established procedures for permitting certain employees to telework. Under this work arrangement, known as "teleworking," "managers/supervisors direct or permit employees to perform their usual job duties away from their traditional workplace, in accordance with their same performance expectations and other DRS approved or agreed-upon terms. The teleworking agreement is written and sets forth the details and terms and conditions of this work arrangement. The commissioner of DRS or his designee must approve the telework agreement." (A Exh. 8/1).

26. By policy DRS management has the sole discretion to designate positions for teleworking and allow employees to telework where such arrangements support DRS's business needs. (A Exh. 8/2).

⁶ The agency alleged Greivant also held outside employment with [business name], the evidence was insufficient to determine that Grievant was also self employed by this personal business.

⁷ The evidence is insufficient to determine if Grievant submitted the completed form to appropriate Agency management. The Agency contends it never saw the form. Further in Grievant's response to due process notices, Grievant acknowledges uncertainty as to whether he filed the form. In contrast, after Grievant was terminated he stated he definitively remembers filing the form with his supervisor, but the Agency failed to respond. (A Exh. 11/2; Testimony of G).

27. By policy a teleworker must have obtained among other requirements, at least a “contributor” job performance rating. (A Exh. 8/2).

28. Under the Agency’s telework policy the Agency has determined characteristics of employees that make them suitable for teleworking. They include the following:

- Require minimal supervision
- High level of job knowledge and skill
- Self-motivated
- Demonstrates a high level of productivity
- Comfortable with the idea of working alone
- Can establish priorities and manage their time
- Knows job goals and objectives
- Effectively communicates with supervisor, co-workers and customers
- Successful in current position
- Understands State/Agency and related policies and procedures
- Able to develop and/or understand objective measures of productivity and produce information relevant to these measures

29. The policy also details the procedures to request telework. They include the following:

- (i) The employee requesting teleworking must provide a written request to their supervisor/manager and include a copy of the “Telework - Checklist Considerations form.”
- (ii) If the employee is recommended for telework by the supervisor, a “Telework Agreement” must be completed by the supervisor/manager and signed by the employee and designated DRS management. The original of the Agreement must be submitted to the Human Resources Division for the employee’s official personnel file.⁸ The manager and employee should retain copies.
- (iii) DRS management is responsible for determining what equipment is necessary to be provided to the employee to successfully fulfill his/her required duties. A list of the equipment, furniture, or supplies is required to be listed in the “Telework Agreement” prior to final approval.
- (iv) Management has the right to designate a position to Telework status based

⁸ Grievant contends he was approved for telework in 2007, but the Agency failed to maintain the original agreement in his personnel file. A close reading of the policy indicates that it does not specify which party, the employee or the employer, is required to submit the original telework agreement to Human Resources. Thus, if not submitted by either party no original would be maintained in the employee’s personnel file. (A Exh. 8/4). In the instant case the evidence does not show either party submitted the original agreement to Human Resources.

on the needs of the Agency.

(A Exh. 8)

30. Under a telework agreement (“2007 Telework Agreement”) signed and dated October 26, 2007, by Grievant; October 27, 2007, by Grievant’s supervisor; and November 8, 2007, by the Agency Head or Designee, Grievant was approved to telework. (G Exh. U).

31. The Agency may terminate the employee’s participation in telework at any time. (A Exh. 8/4)

32. On or about February 8, 2011, Grievant requested approval to telework. On or before February 8, 2011, Grievant was no longer approved to telework under any prior telework agreement. Grievant’s February 8, 2011 request was denied due to his poor productivity and symptoms of Attention Deficit Disorder (“ADD”). (G Exh. G/1; Testimony of JS).

33. Grievant’s February 8, 2011 telework request was not a request for accommodations under the American with Disabilities Act (“ADA”). (A Exh. 11/4).

34. Under Agency procedures, ADA accommodations are submitted on Certificate of Disability forms. On February 8, 2011, Grievant had prior experience requesting ADA accommodations on the correct form. (G Exh. L).

35. Long before the onset of any disciplinary proceedings, Grievant had submitted a request for ADA accommodations on a Certificate of Disability form and the Agency had granted each requested accommodation, which included installing the voice activated software system Dragon in his computer, providing clerical assistance to aid Grievant in submitting his documentation, and allowing Grievant to use his own vehicle to travel for state business. On or about 2001 the Agency had installed the Dragon software in Grievant’s home computer as well. (G Exh. L; Testimony of JS).

Other

36. Grievant has multiple health problems to include Attention Deficit Disorder (“ADD”), carpal tunnel syndrome, degenerative arthritis in knees, chronic depression, anxiety disorder, spasms in neck, and spinal stenosis. He had been determined a person with a disability under the ADA due to his ADD and the Agency had provided ADA accommodations he requested. (Testimony of Grievant; G Exhs. L,T; Testimony of JS).

37. The Agency’s field office in N, VA has had four managers since the summer of 2009. Grievant’s manager and supervisor since January 2011 was SG. PH was Grievant’s manager from September 2009 to January 2010. AW became the manager January 2010 and vacated the position several months later. JS then became the acting manager from September 2010, to December 2010.

38. The parties agreed a hearing was held on or about 1995/1996⁹ but neither the Grievant nor the Agency could produce a Hearing Officer decision. The Hearing Officer in the instant case finds insufficient evidence exists to substantiate Grievant's assertions regarding the content or orders contained in any prior grievance decision.

39. Grievant's 1997 and 1998 performance evaluations demonstrate that Grievant received an overall performance rating of "Exceeds Expectations." Grievant's 2008 performance evaluation reports Grievant earned an overall "contributor rating." (G Exh. F).

DETERMINATIONS 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/her 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).

Va. Code § 2.2-3000 (A) 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 resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating

⁹ The exact date was not known.

unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

On April 27, 2011, Agency management issued the Grievant a Written Notice citing Group II and Group III offenses with termination. Specifically the Written Notice alleged Grievant had engaged in three Group II offenses- failure to report to work without notice, failure to follow instructions and/or policy, and abuse of state time. The Written Notice also alleged Grievant had falsified records, a Group III offense. In describing the nature of the offense, the Written Notice stated the following:

[Grievant] violated policy by failing to inform his supervisor or requesting approval of employment outside of the agency. He violated the state and agency leave policy by not reporting to work or submitting leave slips for missed time. He falsified state records by requesting reimbursement for mileage that was not incurred.

The Hearing Officer examines the evidence to determine if the Agency has met its burden.

I. Analysis of Issue before the Hearing Officer

A. Did the employee engage in the behavior described in the Written Notice and did the behavior constitute misconduct?

1. Did the Grievant hold outside employment? If so, was that behavior misconduct?

In pertinent part, the Agency's policy governing outside employment provides that "[e]mployees shall not engage in other employment during the hours for which they are employed by [the Agency]." Agency policy also requires an employee to request approval for outside work on the "Employment Outside of the Agency" form. If outside work is approved, the approval form is retained in the employee's personnel file. The evidence shows that no approval form was found in Grievant's personnel file.

The evidence shows that Grievant's normal work hours with DRS were from 7:30 a.m. to 4:15 p.m. Also, the evidence shows Grievant was self-employed with [business name], and in this employment he provided firearms training to individuals. Grievant held some classes at his residence on Thursday afternoons at 2:00 p.m., a time for which he was regularly scheduled to work for DRS. On Saturdays Grievant provided class participants an opportunity to practice shooting. Specifically, the evidence shows that on Thursday, March 17, 2011, at 2:00 p.m. Grievant held a firearms training class at his residence.

The evidence does show Grievant completed the outside work form, but it does not indicate Grievant was ever approved for outside employment.

Further, evidence presented by Grievant does not demonstrate the he offered or submitted the form to the Agency. At the hearing, Grievant contends he was sure he presented the form to his supervisor. However, in his April 24, 2011 response to the Agency's due process notices he acknowledges his uncertainty about presenting the outside work form to the Agency. He states in pertinent part the following:

I thought I filed the paperwork years ago, but apparently it was not process (sic). I will try to look for my original application. If I can find it; but with my ADD, and with so much going on. (sic) It is possible I made an oversight on making sure the application for external employment was filed. (A Exh. 11/2).

Grievant also testified that during the time he completed the form he was very ill and having neck problems.

The Hearing Officer is cognizant of Grievant's claim that the Agency loses forms and items from personnel files. Nevertheless, considering Grievant's conflicting statements, and Grievant's initial response expressing uncertainty about submitting the form, and his admission that he was ill when he completed the form, the Hearing Officer can not find Grievant actually submitted the outside work form to the Agency. Moreover even if he did, the evidence does not show Grievant was approved for such work.

Moreover, the Hearing Office notes the evidence shows Grievant's outside employment interfered with his employment at DRS. Particularly, Grievant's, testimony revealed that his conducting the class on March 17, 2011, caused him to have a "bad day" which necessitated his using the tens unit¹⁰ before reporting to work at DRS and caused him to report tardy to work. Specifically when asked at the hearing about arriving at work at 9:32 a.m. on March 17, 2011, Grievant stated the following:

"Came in later because that was a bad morning. I knew I had something going on later that day. The class so (sic) it was a bad day, was doing the tens."

Considering the above, the Hearing Office finds Grievant engaged in outside work during hours he was employed by the Agency. Grievant's evidence was insufficient to establish he actually submitted the outside employment request to his supervisor for approval. Outside employment was not approved by the Agency. Furthermore it interfered with his employment at DRS.¹¹ Thus, the Hearing Officer finds Grievant

¹⁰ According to the Grievant, the tens unit was a medical device used for muscle stimulus to reduce pain.

¹¹ Having made the above finding, the Hearing Office notes that Grievant contends he was on leave during the time he conducted the class. However, the fact remains that Grievant was unable to show he submitted to his superior a request for outside employment. Also, for the sake of argument, even if he made the submission, Grievant had not been approved to engage in outside employment. Yet he did so anyway. The Hearing Officer also finds no merit in Grievant's contention that he did not violate the outside employment policy because the class was taught not to make money but as a community service. Grievant has acknowledged his work with [business name] was outside employment. Agency policy requires

engaged in the conduct alleged and it was a violation of the Agency's outside Employment Policy.

2. Did the Grievant fail to report to work or not submit leave slips for missed time? If so, were Grievant's actions misconduct?
 - a. Did the Grievant fail to report to work?

The evidence shows that on several days during March 2011, Grievant failed to report as scheduled to his place of employment, the office complex located at XXX GRR, N, VA. The evidence shows that Grievant's scheduled work hours were 7:30 a.m. to 4:15 p.m. Further, the undisputed facts show Grievant arrived at his place of employment at 8:59 a.m. on March 8, 2011; at 9:32 a.m. on March 17, 2011; and at 9:00 a.m. on March 21, 2011. What's more, at 2:00 p.m. on March 18, 2011, a receptionist at Grievant's place of employment reported that Grievant had not reported to the office that day and had not left any notes regarding where he was working that day. Also, the facts show Grievant did not report to his place of employment on March 25, 2011.

Grievant defends his absence from the work place by making numerous assertions. He contends that he teleworked or worked from home. Further, Grievant contends that in 2007, management approved him to telework and that approval was continuous and therefore remained effective in March 2011. He alleges approval to work at an alternation site by claiming management's position was that a counselor could work from any place so long as he/she got the job done. Grievant too claims office staff always knew his whereabouts.

Below, the Hearing Officer studies Grievant's claims.

First, the Hearing Officer considers Grievant's assertion that he had approval to telework in March 2011. The evidence shows Grievant sought approval to telework on or about February 11, 2011 ("2011 telework request"), but the request was denied by management due to Grievant's poor productivity and Attention Deficit Disorder symptoms.

Grievant also claims that the Agency had previously approved him to telework in 2007 and that approval had not been terminated as of March 2011. The Hearing Officer finds Grievant's claim of prior and therefore continuous approval unsubstantiated and any prior approval revoked.

Particularly, the Hearing Officer notes that when Grievant responded on April 24, 2011, to management's due process notices regarding alleged misconduct, he stated, in pertinent part, the following regarding his 2011 telework request:

A few weeks ago, I turned in a request for telework. However, I never heard back from anyone, so I assumed that I would be

approval for such and he did not obtain it.

able to telework on a very part-time basis and as a reasonable accommodation when my medical condition flares up, or to catch up. If I'm not approved I will put in a request as an ADA accommodation.

The Hearing Officer finds Grievant's April 24, 2011 response shows he was aware by February 11, 2011, if not before, that he was not then a worker approved for telework under any prior telework agreement. Further, any telework relevant to the instant case that he claims to have engaged in was not with his employer's approval.¹²

In addition, the Hearing Officer notes that Grievant's supervisor before his firing was SG. The evidence shows she became Grievant's supervisor in January 2011. When she asked Grievant for his work schedule, he informed her it was from 7:30 a.m. to 4:15 p.m. By his own admission, Grievant never informed SG that he had been approved to telework. The Grievant testified that he assumed SG knew he teleworked. The Hearing Officer finds this testimony self serving and not credible. Thus, the Hearing Officer finds Grievant's claim that his approval to telework in 2007 continued in March 2011, was not substantiated.

Moreover, as noted before, Grievant's work schedule was from 7:30 a.m. to 4:15 p.m. For the sake of argument, even if the Agency had approved Grievant to telework March 2011, the evidence shows Grievant was not working during a portion of his work schedule on March 21, 2011. This is so because on that day Investigator KC personally observed Grievant exercising at the fitness center from 2:00 p.m. to 3:30 p.m.

Second, the Hearing Officer considers Grievant's claim that he worked from home. The evidence shows Grievant could not substantiate with documentation that he had worked at home. Although the evidence shows Grievant provided monthly summary reports, the evidence also demonstrates that Grievant's EWP required more as counselors were expected to document specific work activities on each of their customers. Grievant's documentation failed to meet this expectation.

Grievant contends more detailed documentation was not provided because he did not use the Aware software system for input of information on his cases because of its incompatibility with the Dragon software system.¹³ Grievant contends usage of an

¹² Grievant also claimed at the hearing that his "2011 telework request" was an ADA accommodation request ("ADA request"). The Hearing Officer finds Grievant's April 24, 2011 response also shows his 2011 telework request was not an ADA request as he specifically comments in that April 24, 2011 response that if his 2011 telework request is denied, he would submit it as an ADA accommodation request. The Hearing Officer also notes another reason for finding the 2011 telework request was not an ADA request. That is, the evidence shows that Agency policy requires an ADA request to be submitted on a Certificate of Disability form. Grievant who had prior experience submitting ADA requests did not submit the 2011 telework request on the Certificate of Disability form.

¹³ The Agency had installed the latter system to provide an ADA accommodation to Grievant. The Hearing Officer also notes Grievant's claim that the Agency's installation of Dragon software on Grievant's home computer shows it approved Grievant to work from home. The Hearing Officer finds this installation does not substantiate Grievant's claim.

alternative software system that was compatible with Dragon for documentation of his caseload activities. Even so, the Hearing Officer finds Grievant has failed to produce the requisite documentation from his use of the alternative software system. Further, the evidence does not show Grievant requested assistance from management to meet his documentation requirements upon his determining that even though his Dragon system was operating, it hindered him from producing documentation on Aware. Neither does the evidence show he informed management of any need to use an alternative system for documentation. Also the Hearing Officer notes, regarding Grievant's claim to have worked from home and documented his activities on the alternative system, that Grievant could have provided hard copies of his documentation to substantiate his claimed work. But, he did not.

Further, the Hearing Officer notes Grievant presented several witnesses to corroborate that he had difficulty using Aware and therefore used an alternative software system for documentation. None substantiated Grievant's claim. For instance, the evidence shows that Grievant's witness DS had no first hand knowledge of any difficulties Grievant encountered with Aware. In fact, the evidence shows the extent of DS' knowledge of Grievant's ability or inability to use Aware for documentation was Grievant had told DS that he had problems with Aware. Also, the Hearing Officer notes this witness had not worked with Grievant for over two years as she retired from the Agency as a counselor in 2008.

Similarly, the testimony of Grievant's witness YS failed to affirm Grievant's claim regarding his difficulties using Aware which hindered his ability to provide adequate documentation for his caseload activities. YS testified that she had knowledge that counselors could log onto an alternative system and work in a limited way using it. But she stated she had only checked her e-mails from this alternate system. The Hearing Officer notes also that while in March 2011 YS remained employed as a counselor with the Agency, her place of employment was at a different location than Grievant's. Therefore it is reasonable to conclude that she had limited knowledge of any difficulties he encountered completing or documenting his work.

Considering the above, the Hearing Officer finds Grievant could not support with appropriate documentation that he worked from home, and further neither could he substantiate that documentation was lacking because of his difficulties using Aware. Nor as discussed below could Grievant demonstrate his supervisor had approved him to work from home.

Third, the Hearing Officer considers Grievant's claim that the Agency's work policy is in effect "the Agency does not care where you work just so the work is done." Grievant presented several witnesses to support his contention. Rehabilitative counselor YS testified. She stated that she was initially hired by the Agency in 1993, and at that time she was told by management that it did not matter where she did her work so long as it was done. She further stated that the climate has changed and the present protocol is a counselor must obtain approval to work from home. The evidence also shows YS' supervisor who requires this protocol is PH, a superior who directly supervised Grievant

from September 2009 to January 2010. Thus, the Hearing Officer finds YS's testimony does not substantiate Grievant's claim that a counselor can work from any location and prior supervisory approval is not necessary to work from an alternative site.

Another witness, LH testified for the Grievant. The evidence shows that LH retired as a rehabilitative counselor for the Agency in 2006. Her testimony corroborated that of YS. LH testified that when she worked out of her home it was with supervisory approval. Further, she stated the major protocol was to obtain supervisory approval to work from home.

The Hearing Officer finds Grievant unable to substantiate his claim that approval to work from home is not required and management does not care where a counselor works just so the counselor completes his/her work.

Fourth, Grievant claims he did notify the office of his whereabouts. He presents witness PM to substantiate this claim. In examining Grievant's claim, the Hearing Officer notes the following direct examination, in part, of this witness.

Attorney Question: Did you communicate with him (Grievant) on a regular basis (parenthetical added)?

Witness PM: Yes sir.

Attorney Question: and e-mail back and forth to each other?

Witness PM: Yes sir.

Attorney Question: And did he e-mail you telling you what he was doing sort of keeping you abreast of what his activities were?

Witness PM: Yes sir.

Attorney Question: Did he do that on a regular basis?

Witness PM: Yes sir.

Attorney Question: On a daily basis?

Witness PM: Sometimes daily.

Attorney Question: And then in addition to that did he talk to you on the phone on a

daily basis giving updates
and things like that, where he
was and what he was doing?

Witness PM: Yes sir.

Attorney Question: Would he sometimes call in when
he was out of the office and ask
you or others to put something
on the board or something of that
nature?

Witness PM: Yes sir.

Attorney Question: And did it happen sometimes
in the office that if somebody
were to call in that their
message wouldn't necessary make
it to the board?

Witness PM: Yes.

Having noted the above testimony on direct examination of Grievant's witness, the Hearing Officer finds this witness's credibility was lessened because rather than voluntarily providing information, she merely agreed to conclusory information (not otherwise substantiated) provided to her by Grievant's attorney. Also, this witness testified that her work hours were 9:00 a.m. to 5:45 p.m. As previously mentioned, the contrary evidence shows that on March 8 and 21, 2011, Grievant arrived at the office at 8:59 a.m. and 9:00 a.m., respectively. Thus, PM would not have been at the office and in a position to communicate with Grievant regarding his whereabouts prior to his arrival.

Unlike PM's testimony, Investigator KC testified that on March 18, 2011, one of the five days he conducted surveillance of Grievant during his work hours, he placed a telephone call to Grievant's office at 3:30 p.m. and the receptionist reported that Grievant had not reported to the office that day and Grievant had no notes indicating his whereabouts. Similarly, the evidence indicates that on March 25, 2011, Grievant failed to inform his supervisor of his whereabouts during his scheduled work hours. Although Grievant contends or suggests he called in and informed PM that he was working from home and/or attending appointments, PM could not remember if she worked on March 18 and 25, 2011.

The Hearing Officer observed the demeanor of all witnesses including PM and Investigator KC. Further, KC's responses did not merely agree to conclusory questions asked by the Agency's advocate, but provided independent factual testimony and they were also consistent with his report documenting the activities of Grievant during five days. Also, as noted above, PM could not recall if she worked on March 18 and 25, 2011.

Thus, HO gives greater weight to KC's testimony. In addition, the Hearing Officer notes by Grievant's own admission, he did not always inform his supervisor of where he was working or of his whereabouts. For example, Grievant testified that he did not notify his supervisor that he was teleworking on March 18 and 25, 2011, the days PM could not recall if she worked. Further, he testified that he did not inform his supervisor that he was coming to work late on March 17, 2011. In addition, he admitted not informing his superior JS that he teleworked or had a flexed schedule. He was also evasive when asked on cross examination if he informed his immediate supervisor SG if he had a flexed work schedule or teleworked.

After considering Grievant's defenses and the evidence, the Hearing Officer finds Grievant did not report to work as scheduled. Further, he did not obtain approval as required by Agency policy to telework or work from home. Neither did Grievant as required by Agency policy keep his supervisor and the office informed of his whereabouts. Thus, the Grievant engaged in the conduct alleged and it was misconduct.

b. Did the Grievant fail to submit leave slips for missed work?

As discussed earlier, Grievant reported to work 1.5 to 2 hours late on March 8, 17, and 21, 2011. Grievant also left work early on March 21, 2011. Grievant did not request or obtain leave to report to work late on March 8, 17, and 21, 2011, neither did he have permission to leave early on March 21, 2011.

Further, Grievant did not request leave after the fact for his early departure from work on March 21, 2011.

Thus, the evidence, establishes the Grievant failed to submit leave slips for missed work.¹⁴ Further his behavior shows an abuse of state time and failure to follow instructions.¹⁵ His behavior violated the Agency's Annual Leave policy.

3. Did Grievant falsify records? If so, was this misconduct?

The Agency presented evidence that shows on March 21, 2011, Investigator KC arrived at Grievant's residence at 6:30 a.m. The investigator observed Grievant leave his residence in Grievant's vehicle at 8:26 a.m. Grievant arrived at his office at 9:00 a.m. At 1:37 p.m., Investigator KC observed Grievant leaving the office complex in his vehicle. Grievant drove to the [fitness center] went inside, changed clothes, and exercised. Grievant left the facility at 3:30 p.m. He then went in [the grocery store] and came out with bags which he loaded in his car. The investigator observed Grievant arrive at his residence at 4:15 p.m. The investigator left the residence at 4:30 p.m.

¹⁴ Grievant contends he worked at home after hours to makeup time missed. Yet as noted earlier here, he lacks documentation to support his claim.

¹⁵ The Hearing Officer also notes that the evidence shows Grievant had exhausted his sick leave by March 2011, and he had already taken two weeks of annual leave.

Agency also presented evidence that shows Grievant submitted a travel expense reimbursement voucher on April 4, 2011, claiming field work on March 21, 2011. On the voucher in the column requesting travel details, Grievant entered the following information:

Travel G and C: [city], [city]
[business name], [business name], [city] (A Exh. 3)

Grievant signed the following certification on the voucher:

I hereby certify that expenses listed below were incurred by me on official business of the Commonwealth of Virginia and include only such expenses as were necessary in the conduct of this business.

Grievant requested \$13.00 for mileage reimbursement for field work on March 21, 2011.¹⁶

Grievant contends he made a mistake. He further states that when he was completing the travel voucher he determined before its submission he had left out documentation regarding travel he conducted on March 9, 2011. Further, he contends instead of listing it for March 9, 2011, he entered it as an expense for March 21, 2011.

The Hearing Officer finds Grievant was basically caught in the act of requesting reimbursement for an expense that he did not incur. His explanation is not acceptable. Further, he failed to inform the Agency of his date “adjustment.” The facts are undisputed that he did not travel to conduct state business on March 21, 2011. In fact on that date, he showed up for work 1.5 hours late; left work over 2 hours early; exercised for 1.5 hours at the fitness center; upon reasonable inference drawn from the evidence, shopped at the supermarket; and arrived home 15 minutes before he was scheduled to leave his job.¹⁷

In deliberating whether Grievant engaged in the conduct alleged by the Agency, the Hearing Officer has considered all the evidence of record. After taking the evidence into account, the Hearing Officer finds Grievant untrustworthy as he repeatedly failed to follow Agency policies to include those relating to teleworking, outside employment, leave, and giving proper notice to superiors. Accordingly the Hearing Office finds Grievant’s action regarding the reimbursement voucher was consistent with other problem behaviors he exhibited. Further she finds his explanation regarding why he claimed travel time for March 21, 2011, contrary to the agency requirements of honesty.

¹⁶ The Agency also contends Grievant falsified records by asking for mileage reimbursement on March 25, 2011, when he did not travel to conduct business on that day. The Hearing Officer finds the evidence is insufficient to determine if Grievant engaged in this conduct as the evidence shows Investigator KC was unable to conduct direct surveillance of Grievant the entire work day.

¹⁷ The Hearing Officer notes that the evidence shows Grievant’s home is approximately 30 minutes from his place of employment. Thus, his arrival home 15 minutes before the end of his work day further shows his failure to work as scheduled. The Hearing Officer also notes that she is cognizant of Grievant’s testimony regarding having a flare up and needing physical therapy on March 21, 2011, instead of March 22, 2011, the date Grievant had requested sick leave. The Hearing Officer did consider this testimony in her deliberations.

Thus, the Hearing Office finds the Agency has shown by a preponderance of the evidence that Grievant falsified a record when he submitted the April 4, 2011 voucher claiming mileage for March 21, 2011, when he had not traveled on state business that day.¹⁸ That behavior violates Standards of Conduct 1.60.

B. Was the Agency’s Discipline consistent with law and policy?

The State Standards of Conduct Policy No. 1.60 classifies misconduct under three categories: Group I Offenses, Group II Offenses, and Group III Offenses. The Agency disciplined Grievant for engaging in Group II offenses and a Group III offense. Under Policy 1.60 multiple Group II offenses may warrant discharge as well as one Group III offense. The evidence shows that in the instant case, Grievant engaged in several Group II offenses and one Group III offense. The Agency terminated Grievant. The Grievant has presented no evidence showing the Agency’s action was inconsistent with law and policy and the Hearing Officer finds none.

Further, the Hearing does not find the Agency’s action was retaliatory as claimed by Grievant. The evidence shows that like two other employees, Grievant’s productivity was deficient. Grievant spent a lot of time outside the office with no documentation to support it. He, like the other two low productivity employees, was investigated during his working hours to determine how he was spending his time. The results were discussed previously here.

II. Mitigation

Under statute, hearing officers have the power and 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.”¹⁹ EDR’s *Rules for Conducting Grievance Hearings* provides that “a hearing officer is not a ‘super-personnel officer’” therefore, “in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy.”²⁰ More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

- (i) the employee engaged in the behavior described in the Written Notice,
- (ii) the behavior constituted misconduct, and
- (iii) the agency’s discipline was consistent with law and

¹⁸ The Hearing Officer is also cognizant of Grievant’s claim that as the Agency made a clerical mistake in calculating the number of miles Grievant claimed to have traveled on his travel voucher, he also made a clerical mistake in claiming the mileage for the wrong date. For reason already discussed here, the Hearing Officer finds the Agency has met its burden in showing Grievant claimed mileage for which he did not travel to conduct state business.

¹⁹ Va. Code Section 2.2-3005 (c)(6)

²⁰ *Rules for Conducting Grievance Hearings* VI(A)

Policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.²¹

Thus the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

The Hearing Officer has found the Agency has shown by a preponderance of the evidence that Grievant engaged in Outside Employment without submitting an "Employment Outside of the Agency" form and also without obtaining approval for his external work with [business name]. The evidence shows Grievant's behavior violated Agency Policy No. 16.

Also, the Hearing Officer has found the Agency has met its burden and shown Grievant failed to report to work as scheduled and has not submitted leave slips for missed time. The evidence shows Grievant's behaviors violated Agency Policy 4.10. Grievant's behaviors establish the following Group II offenses under the Standards of Conduct:

- (i) Failure to report to work without notice; and
- (ii) Failure to follow instructions and/or policy

Moreover, the evidence shows Grievant abused state time.

Furthermore, the Hearing Officer has found the Agency has shown by preponderance of the evidence that Grievant falsified a record when he submitted a travel voucher requesting mileage reimbursement for March 21, 2011, a day Grievant did not use his personal vehicle to conduct state business. Under the Standards of Conduct, Grievant's behavior is a Group III offense.

The Grievant has submitted evidence regarding his health and disabilities, his need for accommodations, his 31 years of service to the Agency, difficulty using and or delayed ability to use the Dragon software, and some of his evaluations. Further, he argues that at his age he is unlikely to find other employment or comparable employment. The Hearing Officer has considered all the evidence and arguments. Having done so, she can not find the Agency acted unreasonably.

DECISION

For the reasons stated herein, the Hearing Officer finds the Grievant engaged in Group II offenses when he failed to follow agency policies and procedures. He failed to request and obtain approval for outside employment, submit leave slips for missed time from work, and report to work as scheduled. Moreover, Grievant abused state time. Further the Hearing Officer finds Grievant falsified a record, a Group III offense, when he

²¹ *Rules for Conducting Grievance Hearing VI(B)8*

requested reimbursement for travel expenses that did not occur on March 21, 2011. Accordingly, the Hearing Officer upholds the Agency's discipline.

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 review 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 decisions 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. Request should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 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 EDR. This request must state the specific requirement of the grievance procedure that the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decisions so that it complied with the grievance procedure. Requests should be sent to the EDR Director, Main Street Centre, 600 East Main, 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 final decisions, a party may appeal on the ground 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 Directory before filing a notice of appeal.

ENTERED this 6th day of September, 2011.

Ternon Galloway Lee, Hearing Officer

cc: Agency Advocate
Agency Representative
Grievant's Advocate
Grievant
EDR's Hearings Program Director

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of

Case Number: 9650

Reconsideration and Reopening Decision

Issued: October 5, 2011

I. Procedural History

A. Introduction

After conducting the grievance hearing in the above-referenced matter, I issued a decision on September 6, 2011, upholding the Agency’s discipline because I determined Grievant (i) engaged in outside employment with [business name], (ii) failed to report to work as scheduled or submit leave slips for missed time, and (iii) falsified a record.

B. Reconsideration/Reopening Request

Grievant has timely requested I reconsider or reopen my September 6, 2011 ruling (“September decision”).

II. 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.

A. Outside Employment

First, Grievant contends my determination that he violated the Agency's outside employment policy was inconsistent with state policy.

As noted in the September decision, the evidence establishes that Agency Policy No. 16 which bears the title "Outside Employment" requires an employee to request and obtain approval to engage in outside employment. Further, this policy precludes employees from performing outside employment during their normal hours with the Agency. Grievant was unable to show that he requested (let alone obtained approval) for outside work. But as noted in the September decision and again below, Grievant engaged in outside employment anyway. He therefore violated the Agency's policy.

Grievant himself acknowledges that the activities he performed with a firearms business, [business name], constituted outside employment. This is so because the evidence shows Grievant completed an outside employment work form requesting approval for self-employment with this business.²²

Grievant was unable to establish that he submitted to the Agency and obtained its approval to work for this business. Nevertheless, Grievant held some classes for his "outside employment" at his residence on Thursday afternoons at 2:00 p.m., a time for which he was regularly scheduled to work for DRS. An investigation of Grievant's whereabouts during his normal work hours revealed that on Thursday, March 17, 2011, at 2:00 p.m. Grievant held such a class. Moreover, on Saturdays, Grievant provided class participants an opportunity to practice shooting.

Grievant contends his activities amounted to minimal community service which state policy permits. He argues my determination that Grievant violated the Agency's outside employment policy is inconsistent with state policy. I am not convinced. Grievant does not cite to this alleged state policy he claims exists. Also, Grievant argues the March 17 class was taught on his leave time. Even assuming the accuracy of this statement, it still remains Grievant engaged in outside work during his normal work hours with the Agency, a practice prohibited by Agency policy. For the reasons previously noted, I find Grievant's activities with [business name] constituted outside employment. Grievant had knowledge of the Agency's policy regarding outside work and he engaged in it without approval from the Agency. Accordingly, my determination of Grievant's violation is consistent with applicable policy.

B. Prior Grievance Hearing/Telework

Next I turn to Grievant's arguments regarding teleworking and accommodations. Grievant contends that the 1995/1996 hearing decision gave him the right to telework, modify or flex his schedule, and attend physical therapy when he experienced flare ups. Grievant argues also that his right and permission to telework have never been revoked.

²² Grievant also requested approval to engage in outside self-employment with [business name]; but, the evidence was insufficient to show Grievant performed activities for this business.

He further claims that the Agency's 2001 installation of Dragon on his home computer establishes the Agency had approved Grievant to work from home.

Essentially, Grievant restates the arguments that he made during the hearing or could have made. He also asserts what he considers to be the correct facts. He disagrees with credibility findings I made regarding Grievant's testimony and the weight it was given. Thus, he describes my determinations as a mischaracterization of legal principles. I considered all the evidence and observed the demeanor of all witnesses including Grievant. My determinations were based on the evidence and material issues of the case and I decline to adopt Grievant's suggested ones.

Further Grievant argues I should have given more weight to witness PM's testimony and accepted it to confirm Grievant notified the office of his whereabouts.

As noted in my decision issued on September 6, 2011, I had an opportunity to observe the demeanor of all witnesses, including PM. Further, I considered all the evidence. I gave greater weight to the testimony of the Agency's witness, Investigator KC, than Grievant's witness PM. I also stated why the investigator's testimony was given greater weight. I find no reason to alter that determination now.²³

C. Falsification of Record

Grievant also contends that he did not falsify a record. Grievant asserts he incurred an expense on March 9, 2011, but instead of submitting that expense as a March 9 one, he submitted it as a March 21, 2011 expense. Grievant makes the same argument he made at the hearing or could have made. I have considered the argument and the evidence. For the reasons noted in the September decision, I find the Agency has met its burden and shown by a preponderance of the evidence that Grievant falsified a record when he submitted a voucher for reimbursement for travel expenses for March 21, 2011. The undisputed evidence shows Grievant did not travel on state business that day. Yet he requested reimbursement for travel expenses. Not until he was caught in the act of requesting reimbursement for a day that he incurred no expenses for state business did he claim the expense was for another day. Again, my determination that Grievant falsified a record was based on the evidence and material issue(s) of the case and I decline to adopt Grievant's suggestion that he did not falsify a record.

D. Other

²³ I gave less credibility to PM's testimony for several reasons. For example, on two days Grievant claimed to have notified PM or someone in the office of his whereabouts, PM did not recall if she worked those days. Also, on two other days in March when Grievant arrived to his place of work over one hour late, PM would not have been in the office and in a position to communicate with Grievant regarding his whereabouts because her work shift had not started. In addition, I found witness PM's credibility was lessened in part because on direct examination this witness merely agreed to conclusory information provided to her by Grievant's counsel. In his request for reconsideration counsel for the Grievant asserts that he chose to move the testimony of PM along at a quicker pace because many hours had gone by and he recognized that the Hearing Officer had to travel back to Williamsburg. I note that at no time did I request that either party quicken his/its pace so that I could travel back to Williamsburg, sooner rather than later.

Grievant also argues that he had been employed by the Agency for 31 years at the time of his termination. Further, he contends the discipline is not reasonable because Grievant has multiple and severe disabilities and was employed by an agency charged with caring for the disabled.

The evidence shows that Grievant violated multiple standards of conduct. Several were Group II offenses and one was a Group III offense. Grievant would have me announce that a disabled employee of DRS has the right to disregard and violate multiple agency standards of conduct and avoid appropriate disciplinary action because (i) the employee is a disabled worker and (ii) the Agency provides services to disabled individuals. This I am unwilling to do.

I affirm my finding in the September decision that the Agency's discipline was consistent with law and policy. Further, I find no reason to alter my finding that the discipline was reasonable.

E. Request to Reopen

Grievant has also requested I reopen the hearing if the September 6, 2011 ruling is affirmed. It has been. Thus Grievant's reopening request is now addressed.

As noted previously here, Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis...” to grant the request.

Counsel for Grievant contends reopening is necessitated for two reasons. First he asserts that Grievant's testimony was dismissed. Such is not the case as I considered all the evidence, observed the demeanor of all the witnesses and gave each witness' testimony, including Grievant's, the weight I determined appropriate. Second Counsel for Grievant asserts reopening the hearing is necessary because the 1995/1996 decision is missing. He states that he has vivid recollection of this hearing; that he was not able to testify at the hearing held on August 9, 2011; and that he is now available to testify and will not be counsel for Grievant for purposes of the second hearing if granted.

Testimony by Counsel for Grievant regarding the 1995/1996 hearing is not evidence discovered since the date of the hearing decision, September 6, 2011. Further, I note that Counsel for the Grievant initially listed himself as a witness for the initial hearing which was held on August 9, 2011. The Agency objected to Counsel testifying. I held an in person pre-hearing conference (PHC) on August 9, 2011, prior to the commencement of the hearing to hear arguments, among others, on that objection. At that time and before ruling on the objection, I referenced Rule 3.7 of the *Rules of Professional Conduct* and instructed Counsel for the Grievant to review the rule and then inform me if he still proposed to testify at the hearing. The issue of Counsel testifying at the hearing was not raised again by either party and Counsel did not pursue testifying. The Grievant (who was also present at the 1995/1996 hearing) did testify. Among other subjects, Grievant

testified about the 1995/1996 hearing and how the Hearing Officer in that case found in his favor and granted him certain rights which I have already discussed here. As previously referenced, I considered that testimony as well as all other evidence in the case.

In his request for reopening, Counsel for Grievant represents that if this case is reopened, his testimony will address his recollection of the 1995/1996 hearing. I note that Grievant has already provided testimony regarding the hearing. Thus, it appears counsel's testimony would be merely cumulative or impeaching. Further, it does not appear that the evidence is such that it would (i) produce a new outcome if the case were retried or (ii) require the September Decision to be amended.

Considering the above, I find the reasons for reopening a decision are not applicable.²⁴

III. Ruling

For the reasons noted above, I deny Grievant's request to reconsider and or reopen this matter.

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 final decisions, a party may appeal on the ground 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.

Entered this 5th day of October 2011.

/s/

Ternon Galloway Lee, Hearing Officer

²⁴ Further, I note the request to reopen the hearing and allow Counsel for Grievant to testify presents ethical concerns. Although counsel states he would not represent Grievant for purposes of a second hearing, if granted, he sat through the entire hearing on September 9, 2011 and would have the benefit of knowing the testimony of all witnesses who testified at that hearing. In addition, he would be in the position of both advocate and witness except in that second hearing.

December 9, 2011

[Grievant]

RE: **Grievance of [Grievant] v. Department of Rehabilitative Services**
Case No. 9650

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, your request does not identify where the hearing decision violates any such policy. Rather, it appears that you are disagreeing with how the hearing officer assessed the evidence and with the resulting decision. We must therefore respectfully decline to honor your request to conduct the review.

Sincerely,

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