Issues: Group II Written Notice (providing false/misleading information), Group II Written Notice (failure to follow instructions) and Termination (due to accumulation); Hearing Date: 11/14/11; Decision Issued: 11/17/11; Agency DJJ; AHO: Cecil H. Creasey, Jr.; Case No. 9710; Outcome: Partial Relief; **Administrative Review: AHO Reconsideration Request received 12/02/11; AHO Reconsideration Decision issued 12/13/11; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 12/02/11; EDR Ruling No. 2012-3186 issued 01/27/12; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 12/02/12; DHRM letter issued 01/31/12 declining to review; Judicial Review: Appealed to Circuit Court in Powhatan County 02/28/12; Outcome pending.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION

In the matter of: Case No. 9710

Hearing Date: November 14, 2011
Decision Issued: November 17, 2011

PROCEDURAL HISTORY

Grievant was a security captain for the Department of Juvenile Justice ("the Agency"), with at least 16 years of service with the Agency as of the offense dates. On September 14, 2011, the Grievant was charged with a Group II Written Notice for providing false and misleading information to an investigator on July 7, 2011. Also on September 14, 2011, the Grievant was charged with a Group II Written Notice for failure to undergo a polygraph examination as directed on September 1, 2011. The discipline for the second Group II Written Notice (polygraph examination) was job termination. The Grievant had no other active Written Notices.

Grievant timely filed a grievance to challenge the Agency's disciplinary action. The outcome of the resolution steps was not satisfactory to the Grievant and he requested a hearing. On October 26, 2011, the Department of Employment Dispute Resolution ("EDR") appointed the Hearing Officer. During a pre-hearing conference, the grievance hearing ultimately was scheduled for the first date available between the parties and the hearing officer, November 14, 2011, on which date the grievance hearing was held, at the Agency's facility.

Both sides submitted documents for exhibits that were, without objection, accepted into the grievance record, and they will be referred to as Agency's or Grievant's Exhibits. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant
Counsel/Advocate for Grievant
Representative for Agency
Counsel/Advocate for Agency
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

The Grievant requests rescission or reduction of the Group II Written Notices, reinstatemant, and applicable relief.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .
> To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Agency relied on the Standards of Conduct, promulgated by the Department of Human Resource Management, Policy 1.60, which defines Group II offenses to include acts of misconduct of a more serious [than a Group I offense] and/or repeat nature that require formal disciplinary action. This level is appropriate for offenses that significantly impact business operations and/or constitute neglect of duty, insubordination, the abuse of state resources, violations of policies, procedures, or laws. An example of a Group II offense is failure to follow supervisor's instructions or comply with written policy. Agency Exh. 7.

The Agency's administrative directive, No. 05-009.2, *Staff Code of Conduct*, provides, among other professional expectations, that "[r]efusal to cooperate with or provide requested information during an investigation or providing false or misleading information to investigators" may result in disciplinary action. Agency Exh. 6.

The Agency's administrative directive, No. 04-805, *The Use of Polygraph Examinations in Investigations*, states that employees are required to cooperate with internal investigations and to undergo polygraph examinations when directed. Agency Exh. 8.

Regarding a charge of falsification, the Agency must prove by preponderant evidence that Grievant knowingly supplied incorrect information with the intention of defrauding, deceiving or misleading the agency. *See Naekel v. Department of Transportation, 782 F.2d 975, 977 (Fed. Cir. 1986*).[1] Accordingly, the issue before the Hearing Officer is whether Grievant reported false or misleading information in his interview responses and, if so, whether the Grievant had the intent to deceive the Agency. Intent is a state of mind which is generally proven by circumstantial evidence. *Riggin v. Department of Health and Human Services, 73 M.S.P.R. 50, 52 (1982*). Thus, a Hearing Officer may consider plausible explanations for a Grievant's provision of incorrect information in determining whether the misrepresentation was intentional. *See Nelson v. U.S. Postal Service, 79 M.S.P.R. 314*. Likewise, the absence of a credible explanation for the misrepresentation can constitute circumstantial evidence of intent to deceive. *Id.* Intent may also be inferred when a grievant makes a misrepresentation with a reckless disregard for the truth or with a conscious purpose to avoid learning the truth. *Id*.

The Offenses

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

The Agency employed Grievant as a security captain, with at least 16 years of service with the Agency. The Grievant has no other active disciplinary actions, with a history of performance reviews establishing a contributor rating and various commendations. On the

[1] Other Hearing Officer Decisions apply the same test based on dictionary definitions of falsification. *See, e.g.*, Case No. 8975. (Black's Law Dictionary defines "falsify" as "To counterfeit or forge; to make something false; to give a false appearance to anything.") (The New Webster's Dictionary and Thesaurus defines falsify as "To alter with intent to defraud, to falsify accounts, to misrepresent, to falsify an issue, to falsify the course of justice.")

evening of June 14, 2011, the Grievant, as shift commander, was present with a counselor who asked for assistance because she had locked her cell phone in a state vehicle. The Grievant telephoned the Assistant Superintendent at home after hours to inquire about the vehicle key locked in his office, but the Assistant Superintendent's response was to wait until the next day. Unable to access the locked vehicle by key, the Grievant and the counselor obtained the lock out kit ("slim jim") from the facility key room. A senior corrections officer ("Officer F") who was nearby and skilled at using the slim jim volunteered to help. Once at the subject vehicle, they determined that the slim jim was broken and they abandoned the attempt to unlock the vehicle to retrieve the cell phone.

This same vehicle was delivered to the central garage for an updated inspection on June 20, 2011, when it was ultimately observed to have damage around the passenger side door, vandalized as if someone tried to gain entry. From this, the Inspector General's office initiated an investigation. Upon notification of this damage, the Assistant Superintendent recalled the incident on June 14, 2011. During the course of the investigation, the investigator focused on the June 14, 2011, incident and the internal investigator interviewed the Grievant, the counselor, and Officer F.

On July 1, 2011, the Grievant, at the request of the Assistant Superintendent, wrote an email to the Assistant Superintendent, stating he "did not see or hear of anyone vandalizing any of the State Vehicles. On 07-01-11 [the Assistant Superintendent] asked me if I had knowledge of any state vehicle being vandalized and I informed him that I did not." Agency Exh. 14.

Testifying for the Agency were the internal investigator, special agent for the Office of Inspector General, the Regional Program Manager, and Officer F.

During his interview with the internal investigator on July 7, 2011, the Grievant stated that no one actually used the slim jim on the vehicle because the slim jim was broken. The counselor, during her interview, testified that she changed her mind that evening and abandoned the effort to enter the car for her cell phone, without anyone attempting to enter the vehicle. Officer F, during his interview, stated that he did, in fact, attempt to use the slim jim on the vehicle to unlock the door, but quickly realized that the tool was broken. During a subsequent interview, the counselor recanted her previous statements and stated that the Grievant and Officer F used the slim jim on the vehicle in an attempt to unlock it for her, but she was more focused on worry about getting home without her cell phone and did not pay close attention to what they were doing. In a second interview, the Grievant again stated that he did not recall seeing or knowing that Officer F actually used the slim jim on the vehicle.

During his grievance hearing testimony, Officer F testified that the Grievant may not have seen his actual effort using the slim jim on the vehicle, and the Grievant may not have known of the actual attempt with the slim jim. Officer F recalled not much more than voicing at the time that the slim jim was broken, recognizing that the Grievant and the counselor were engaged in conversation. Officer F testified that his slim jim attempt could have taken less than a minute, but no more than one or two minutes. Officer F also testified that his use of the slim jim was at the bottom of the passenger side window; not at the top of the door where the vehicle damage was visible in photographs. Grievant Exh. Officer F also testified that, throughout the

incident, the Grievant and counselor were engaged in conversation and other activity. Then, Officer F and the Grievant were engaged in conversation topics for a time wholly unrelated to the vehicle. The counselor did not testify at the grievance hearing.

The Regional Program Manager testified to the high standards for agency employees, the "high stakes" environment, and, especially, the trust factor for security and leadership personnel like the Grievant. The Regional Program Manager and investigators advanced the conclusion that it was not reasonable, thus not believable under the circumstances, for the Grievant not to recall seeing or knowing that Officer F actually used the slim jim on the vehicle in an attempt to unlock it on June 14, 2011. On this basis, the Agency disciplined the Grievant for giving false or misleading information during an investigation. The Regional Program Manager testified that the Group II Written Notice for providing false and misleading information to an investigator, alone, rendered the Grievant unemployable at the Agency because of his untrustworthiness, and that he considered mitigation and other options, such as demotion, before settling on termination.

I find the Grievant's explanation plausible that he did not consider this event significant, his memory of it was not precise, and that he did not recall seeing or knowing that Officer F actually used the slim jim on the vehicle. The evidence and circumstances do not support a finding that the recollection Grievant provided to the Agency investigator was false or misleading. Disregarding the Grievant's assertions, the best evidence of what the Grievant saw or knew comes from Officer F's testimony. Officer F's testimony, while establishing that he did use the slim jim on the vehicle, did not help the Agency show by a preponderance of the evidence that the Grievant concealed his recall or recollection of the event on the evening of June 14, 2011. Officer F testified that the Grievant may not have seen or knew about his use of the slim jim. At best, Officer F's testimony is equivocal as to what he communicated to the Grievant.

In viewing the overall circumstances, as the Agency must have done in reaching its conclusion that the Grievant was being untruthful, there is no apparent motivation shown for the Grievant knowingly to give false or misleading information. It is not as though the Grievant conveniently forgot that he, himself, actually used the slim jim. Similarly, there seems to be no benefit to the Grievant in not recalling this precise fact of Officer F actually using the slim jim, unsuccessfully, for perhaps less than a minute. Contrary to the Agency's assertion, the insignificance of the event at issue weighs in favor of the plausibility of the Grievant's lack of notice or recall; not against him. The Agency's evidence of the Grievant's state of mind when stating what he did not recall of this event rises no higher than suspicion of evasive behavior. The circumstantial evidence presented does not preponderate in showing that the Grievant made false or misleading statements to the investigator.

Relative to its investigation, the Agency provided a written memorandum to the Grievant, dated September 1, 2011, directing him to submit to a polygraph examination. The memorandum stated the Grievant had until September 15, 2011, to agree or refuse.The Grievant signed his refusal to comply on the same date, September 1, 2011. Agency Exh. 10. The Grievant testified that he believed the request was unfair unless every other employee involved had to submit to a polygraph test. The Grievant also asserted that other employees are not disciplined for refusing the polygraph test, rendering his discipline disparate treatment.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings,* § VI; *DeJarnette* v. *Corning,* 133 F.3d 293, 299 (4th Cir. 1988).

Based on the evidence, I find that the Grievant was credible in his description of the June 14, 2011, event as an insignificant occurrence. I find the Grievant credible in his inability to recall or remember the detail of whether Officer F actually used the slim jim on the vehicle. Thus, I find the Agency has not borne its burden of proof that the Grievant provided false and misleading information to an investigator on July 7, 2011. Even the Agency witnesses characterized the incident as relatively insignificant and expressed surprise that the Grievant would be untruthful about such a matter. The Agency, according to its witnesses' rationale, concluded if the Grievant was willing to lie about such a minor event, he was untrustworthy and unemployable at the Agency. From the totality of the circumstances presented, including the grievance hearing testimony from Agency witnesses, I find the Agency has not borne the burden of proving the Grievant provided false and misleading information to an investigator.

Also, based on the evidence, I find the Grievant did, in fact, refuse to submit to the polygraph examination as directed. The Grievant's explanations for refusing do not provide legal excuse for compliance with Agency directives. The offense, unless circumstances warrant mitigation, satisfies the Group II level of discipline as a failure to follow supervisor's instructions or comply with written policy.

Pursuant to applicable policy, management has the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id*.

The Grievant argues, reasonably, that the Agency could have exercised discipline along the continuum short of a Group II Written Notice. The Agency had the discretion to elect less severe discipline. Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution…." Va. Code § 2.2-3005. Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution." Under the *Rules for Conducting Grievance Hearings,* "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating

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

Grievant contends the disciplinary action should be mitigated or that the discipline was disparate treatment. Grievant contends his otherwise good work history, service and performance should provide enough consideration to mandate a lesser sanction than a Group II. However, length of service, alone, is insufficient for a hearing officer to overrule an agency's mitigation determination. EDR Ruling No. 2007-1518 (October 27, 2009) held:

> Both length of service and otherwise satisfactory work performance are grounds for mitigation by agency management under the Standards of Conduct. However, a hearing officer's authority to mitigate under the *Rules for Conducting Grievance Hearings* is not identical to the agency's authority to mitigate under the Standards of Conduct. Under the *Rules for Conducting Grievance Hearings*, the hearing officer can only mitigate if the agency's discipline exceeded the limits of reasonableness. Therefore, while it cannot be said that either length of service or otherwise satisfactory work performance are *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which these factors could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings,* § VI; *DeJarnette* v. *Corning,* 133 F.3d 293, 299 (4th Cir. 1988).

The Agency presents a position in advance of its role as guardian of public and institutional integrity regarding the security of the facility. The Grievant's refusal to submit to a polygraph examination as directed is a breach of responsibility and policy and warrants disciplinary action. The hearing officer accepts, recognizes, and upholds the Agency's important role in safeguarding the public and offenders in its charge, as well as the valid public policies promoted by the Agency and its policies. I find that the Agency has a vested interest in maintaining a high level of trustworthiness and integrity among its security force and leadership. However, I find the Agency has not borne its burden of proving that this Grievant provided any

false and misleading information as charged, thus the Group II Written Notice for that offense must be reversed. The Grievant's regrettable refusal to submit to the polygraph examination came on the heels of the allegation and investigation of misconduct, but that is not a justified excuse for refusing the direction to take the polygraph test. I find the Grievant has not shown disparate treatment regarding discipline for his refusal of the polygraph test. Accordingly, I find no mitigating circumstances that render the Agency's action regarding the Group II Written Notice for refusing the polygraph test outside the bounds of reasonableness.

DECISION

For the reasons stated herein, the Agency's issuance of the Group II Written Notice for false and misleading information is **reversed**; and, the Agency's issuance of the Group II Written Notice for failure to submit to the polygraph examination is **upheld**. Because the single Group II Written Notice does not support job termination, the Grievant is **reinstated** to his former position, or if occupied, to an objectively similar position. The Grievant is awarded full **back pay** from which any interim earnings must be deducted (which includes unemployment compensation and other income earned or received to replace the loss of state employment). The Grievant is restored to full benefits and seniority. Grievant is further entitled to seek a reasonable **attorney's fee**, which cost shall be borne by the agency.

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804)371-7401.

3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance

procedure. Requests should be sent to the EDR Director, Main Street Centre, 600 East Main Street, Suite 301, Richmond, VA 23219 or faxed to (804)786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision.** (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.

Cecil H. Creasey, Jr.
Hearing Officer

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 9710

Hearing Date:	November 14, 2011
Decision Issued:	November 17, 2011
Reconsideration:	December 13, 2011

RECONSIDERATION DECISION OF HEARING OFFICER

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.

The Agency seeks reconsideration of the original hearing decision by request dated December 1, 2011. The Agency restates arguments that it made during the hearing or that it could have made during the hearing.

The request for reconsideration does not identify any newly discovered evidence meeting the above standard or any incorrect legal conclusions. I consider the issues raised by the Agency on reconsideration to be the same that were addressed in the original decision. The Written Notice charged the grievant with providing "false and misleading information to an investigator . . ." The falsification analysis is appropriate to such a charge. The contention that a grievant should have known certain information might be relevant to other types of offenses, but one must be shown to have knowingly falsified or mislead to justify the allegations of the written notice. That factual determination was resolved in the grievant's favor. The requesting party restates the arguments and evidence presented at the hearing. For this reason, the request for reconsideration is **denied.**

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.

Cecil H. Creasey, Jr.
Hearing Officer

January 31, 2012

RE: **Grievance of [Grievant] v. Department of Juvenile Justice**
Case No. 9710

Dear [Parties]:

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. The Department of Juvenile Justice identified the agency's administrative directives, No. 05-009.2, *The Staff Code of Conduct*, and No. 04-805, *The Use of Polygraph Examinations in Investigations*, as relevant to this case. In addition, the agency referenced DHRM Policy 1.60, *Standards of Conduct*, as being applicable. While all three cites were relevant in this instance, it is clear from his decision that the hearing officer decided the case on the basis of the evidence and the credibility of the witnesses. It appears that the agency is disagreeing with how the hearing officer assessed the evidence and with the resulting decision. We must therefore respectfully decline to honor the agency's request to conduct the review.

Sincerely,

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