Issue: Group III Written Notice with Termination (absence in excess of 3 days without permission); Hearing Date: 12/12/11; Decision Issued: 12/13/11; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9714; Outcome: Full Relief; **Administrative Review: EDR Ruling Request received 12/28/12; EDR Ruling No. 2012-3216 issued 02/17/12; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 12/28/12; DHRM Ruling issued 03/09/12; Outcome: Remanded for clarification; Remand Decision issued 04/09/12 providing clarification – Original Decision Affirmed.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9714

Hearing Date: December 12, 2011
Decision Issued: December 13, 2011

PROCEDURAL HISTORY

Grievant was removed from employment on May 23, 2011 for absence in excess of three workdays without prior authorization or satisfactory reason.

On June 13, 2011, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On October 11, 2011, the EDR Director issued Ruling No. 2012-3119 qualifying the grievance for a hearing. On November 8, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision in this case due to the unavailability of a party. On December 12, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Advocate
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Letter of Dismissal?

2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?

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

BURDEN OF PROOF

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

FINDINGS OF FACT

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

The Department of Corrections employed Grievant as a Corrections Officer at one of its Facilities until his removal effective May 23, 2011. He had been employed by the Agency for approximately 5 years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Grievant was charged with criminal conduct in another state. On December 29, 2010, the Agency received a letter from Grievant's Attorney indicating that criminal charges were pending against Grievant. The Human Resource Officer determined that Grievant had been charged with two felonies. She called Grievant and asked about the charges. Grievant stated that the charges would be dismissed.

On January 3, 2011, the Warden Senior sent Grievant a letter stating:

> We have been informed that you have felony charges pending in [State] court system. As a result you are being suspended effective December 30, 2010, pending the outcome of the Court's action. If you would like to use your leave balances to cover the suspension, notify [Human Resource Officer] in Human Resources Department. Your charges are of such a nature that to continue you in your assigned position could constitute

> negligence in regards to this agency's duties to the public and to other state employees.
>
> ***
>
> Please keep me apprised of all court dates, as well as, all pertinent matters concerning your status at [telephone number].

The criminal charges were scheduled to be heard in January 2011. Grievant called the Facility to report that the trial date have been changed to February 14, 2011. On February 15, 2011, Grievant called the Facility to report that the trial date has been rescheduled for March 14, 2011. Although Grievant's court date had been continued until April 11, 2011, Grievant did not call the Facility and report the new court date. Because the Agency had not heard from Grievant, the Human Resource Officer sent Grievant a letter dated May 17, 2011 stating:

> You were placed on suspension effective December 29, 2010 pending the outcome of your charges in the [State] court system. The last court date that you provided us with has passed. We are requiring updated documentation regarding your case. As you are aware, an absence in excess of three days without prior authorization or satisfactory reason is a violation of the Standards of Conduct; a Group III offense.
>
> If you intend to continue employment with [Facility] please contact me at [telephone number] within 24 hours following receipt of this letter to arrange a disciplinary meeting to discuss your situation. If we do not hear from you by May 23, 2011 we will consider your failure to respond to be an indication of your resigning from state service.[1]

The letter was sent to Grievant at the address he had provided the Facility. In July 2010, Grievant had moved to another address. Grievant did not inform the Facility of the new address. Grievant did not receive the letter until May 25, 2011. He contacted the Facility and was informed that because he had failed to respond to the letter within the time frame permitted, he was removed from employment.

Grievant's Attorney drafted a letter dated December 7, 2011 stating:

> I represent [Grievant] who was charged with the misdemeanor of larceny before the [District Court]. We were able to resolve the matter by the Court entering a prayer for judgment. A prayer for judgment is not a conviction but means that the case will be dismissed after a year.[2]

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[1] Agency Exhibit 1.

[2] Agency Exhibit 6.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."[3] Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

Although the Agency did not issue Grievant a Written Notice, the Hearing officer construes the Agency's action to be the issuance of a Group III Written Notice with removal.

"Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy" is a Group II offense. On January 3, 2011, the Warden Senior sent Grievant a letter instructing Grievant to "keep me apprised of all court dates, as well as, all pertinent matters concerning your status". Grievant was aware of the instruction and provided the Facility with updates regarding his scheduled court dates through March 15, 2011. Grievant failed to inform the Facility of changes in his court dates after that date thereby acting contrary to the instruction of the Warden Senior. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice of disciplinary action. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to 10 workdays. Accordingly, the Hearing Officer will authorize suspension of Grievant for 10 workdays as part of the disciplinary action.

The Agency contends that Grievant engaged in a Group III offense. Under the Agency's Standards of Conduct, Group III offenses include "[a]bsence in excess of three days without proper authorization or a satisfactory reason." In order to establish that an employee is absent from work in excess of three days, an agency must show that the employee was scheduled to work for at least four work days and then failed to report to work. In this case, the Agency suspended Grievant effective December 30, 2010, but never removed the suspension. The Agency did not instruct Grievant to report to work. The Agency has not established that Grievant was absent in excess of three workdays because Grievant was never instructed him to report to work. The only instruction given to Grievant was to communicate his status with the Facility. Failure to follow a supervisor's instruction is a Group II offense, not a Group III offense. Nothing about this case would justify elevation of the Group II offense to a Group III offense.

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

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

Resolution…."[4] Under the *Rules for Conducting Grievance Hearings,* "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Grievant was suspended without pay in accordance with Operating Procedure 135.1(XVII)(C) (April 15, 2008) which authorized the Agency to suspend without pay an employee charged with a criminal offense for a period of not to exceed 90 calendar days. The Human Resource Officer testified that the 90 day period ended on March 30, 2011. On April 1, 2011, the Agency issued a revised Operating Procedure 135.1. Section VI(D)(5) addresses removal from the work place for alleged criminal conduct and states that "[i]f the nature of the charges allow, and at the conclusion of the 90 day period there has been no resolution of the criminal charge, the employee will be placed on or returned to Pre-Disciplinary Leave with Pay (for a maximum of 15 days total for this action). The policy further provides that at, "the conclusion of the Pre-Disciplinary Leave period, a decision regarding employment status must be made pending resolution of the charge.

Based on the Agency's Standards of Conduct, the Agency was authorized to suspend Grievant without pay from December 30, 2010 until March 30, 2011. Thereafter the Agency was obligated to begin paying Grievant even while he remained on Pre-Disciplinary Leave with Pay for a maximum of 15 days.

Although the disposition of Grievant's case in the District Court may provide a basis for disciplinary action, that matter has not been addressed by the Agency and was not a basis for the Agency to take disciplinary action in this case. The issue is not ripe for the Hearing Officer to review until the matter is properly before a Hearing Officer following the Agency's consideration.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **reduced** to a Group II Written Notice of disciplinary action with a 10 workday suspension.

[4] Va. Code § 2.2-3005.

The Agency is ordered to **reinstate** Grievant to Grievant's same position prior to removal, or if the position is filled, to an equivalent position.

The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue. The Agency need not provide Grievant with back pay during the period of suspension from December 30, 2010 until March 30, 2011. The Agency may also reduce the amount of back pay to account for an additional 10 workdays of disciplinary suspension authorized under the Group II Written Notice.

APPEAL RIGHTS

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

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

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

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

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

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

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

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[5]

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

S/Carl Wilson Schmidt

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Carl Wilson Schmidt, Esq.
Hearing Officer

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

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of
The Department of Corrections

March 9, 2012

The agency has requested an administrative review of the hearing officer's decision in Case No. 9714. For the reasons stated below, the Department of Human Resource Management (DHRM) remands this decision to the hearing officer. The agency head of DHRM, Ms. Sara R. Wilson, has directed that I conduct this administrative review.

In his PROCEDURAL HISTORY, the hearing officer stated the following:

> Grievant was removed from employment on May 23, 2011 for absence in excess of three workdays without prior authorization or satisfactory reason.
>
> On June 13, 2011, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On October 11, 2011, the EDR Director issued Ruling No. 2012-3119 qualifying the grievance for a hearing. On November 8, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision in this case due to the unavailability of a party. On December 12, 2011, a hearing was held at the Agency's office.

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In his FINDINGS OF FACT, the hearing officer, in relevant part, stated the following:

> After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:
>
> The Department of Corrections employed Grievant as a Corrections Officer at one of its Facilities until his removal effective May 23, 2011. He had been employed by the Agency for approximately 5 years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.
>
> Grievant was charged with criminal conduct in another state. On December 29, 2010, the Agency received a letter from Grievant's Attorney indicating that criminal charges were pending against Grievant. The Human Resource Officer determined that Grievant had been charged with two felonies. She called Grievant and asked about the charges. Grievant stated that the charges would be dismissed.

On January 3, 2011, the Warden Senior sent Grievant a letter stating:

> We have been informed that you have felony charges pending in [State] court system. As a result you are being suspended effective December 30, 2010, pending the outcome of the Court's action. If you would like to use your leave balances to cover the suspension, notify [Human Resource Officer] in Human Resources Department. Your charges are of such a nature that to continue you in your assigned position could constitute negligence in regards to this agency's duties to the public and to other state employees.
>
> ********
>
> Please keep me apprised of all court dates, as well as, all pertinent matters concerning your status at [telephone number].

The criminal charges were scheduled to be heard in January 2011. Grievant called the Facility to report that the trial date have been changed to February 14, 2011. On February 15, 2011, Grievant called the Facility to report that the trial date has been rescheduled for March 14, 2011. Although Grievant's court date had been continued until April 11, 2011, Grievant did not call the Facility and report the new court date. Because the Agency had not heard from Grievant, the Human Resource Officer sent Grievant a letter dated May 17, 2011 stating:

> You were placed on suspension effective December 29, 2010 pending the outcome of your charges in the [State] court system. The last court date that you provided us with has passed. We are requiring updated documentation regarding your case. As you are aware, an absence in excess of three days without prior authorization or satisfactory reason is a violation of the Standards of Conduct; a Group III offense.
>
> If you intend to continue employment with [Facility] please contact me at [telephone number] within 24 hours following receipt of this letter to arrange a disciplinary meeting to discuss your situation. If we do not hear from you by May 23, 2011 we will consider your failure to respond to be an indication of your resigning from state service."

The letter was sent to Grievant at the address he had provided the Facility. In July 2010, Grievant had moved to another address. Grievant did not inform the Facility of the new address. Grievant did not receive the letter until May 25, 2011. He contacted the Facility and was informed that because he had failed to respond to the letter within the time frame permitted, he was removed from employment.

Grievant's Attorney drafted a letter dated December 7, 2011 stating:

> I represent [Grievant] who was charged with the misdemeanor of larceny before the [District Court]. We were able to resolve the

> matter by the Court entering a prayer for judgment. A prayer for judgment is not a conviction but means that the case will be dismissed after a year."

The hearing officer stated the following in his CONCLUSIONS OF POLICY:

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

Although the Agency did not issue Grievant a Written Notice, the Hearing officer construes the Agency's action to be the issuance of a Group III Written Notice with removal.

"Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy" is a Group II offense. On January 3, 2011, the Warden Senior sent Grievant a letter instructing Grievant to "keep me apprised of all court dates, as well as, all pertinent matters concerning your status". Grievant was aware of the instruction and provided the Facility with updates regarding his scheduled court dates through March 15, 2011. Grievant failed to inform the Facility of changes in his court dates after that date thereby acting contrary to the instruction of the Warden Senior. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice of disciplinary action. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to 10 workdays. Accordingly, the Hearing Officer will authorize suspension of Grievant for 10 workdays as part of the disciplinary action.

The Agency contends that Grievant engaged in a Group III offense. Under the Agency's Standards of Conduct, Group III offenses include "[a]bsence in excess of three days without proper authorization or a satisfactory reason." In order to establish that an employee is absent from work in excess of three days, an agency must show that the employee was scheduled to work for at least four work days and then failed to report to work. In this case, the Agency suspended Grievant effective December 30, 2010, but never removed the suspension. The Agency did not instruct Grievant to report to work. The Agency has not established that Grievant was absent in excess of three workdays because Grievant was never instructed him to report to work. The only instruction given to Grievant was to communicate his status with the Facility. Failure to follow a supervisor's instruction is a Group II offense, not a Group III offense. Nothing about this case would justify elevation of the Group II offense to a Group III offense.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action."

Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution .... ,, Under the *Rules for Conducting Grievance Hearings, "[a]* hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A nonexclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Grievant was suspended without pay in accordance with Operating Procedure 135.1 (XVII) (C) (April 15, 2008) which authorized the Agency to suspend without pay an employee charged with a criminal offense for a period of not to exceed 90 calendar days. The Human Resource Officer testified that the 90 day period ended on March 30, 2011. On April 1, 2011, the Agency issued a revised Operating Procedure 135.1. Section VI (D) (5) addresses removal from the work place for alleged criminal conduct and states that "[i]f the nature of the charges allow, and at the conclusion of the 90 day period there has been no resolution of the criminal charge, the employee will be placed on or returned to Pre-Disciplinary Leave with Pay (for a maximum of 15 days total for this action). The policy further provides that at, "the conclusion of the Pre-Disciplinary Leave period, a decision regarding employment status must be made pending resolution of the charge.

Based on the Agency's Standards of Conduct, the Agency was authorized to suspend Grievant without pay from December 30, 2010 until March 30, 2011. Thereafter the Agency was obligated to begin paying Grievant even while he remained on Pre-Disciplinary Leave with Pay for a maximum of 15 days.

Although the disposition of Grievant's case in the District Court may provide a basis for disciplinary action, that matter has not been addressed by the Agency and was not a basis for the Agency to take disciplinary action in this case. The issue is not ripe for the Hearing Officer to review until the matter is properly before a Hearing Officer following the Agency's consideration.

In his DECISION, the hearing officer stated the following:

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **reduced** to a Group II Written Notice of disciplinary action with a 10 workday suspension. The Agency is ordered to **reinstate** Grievant to Grievant's same position prior to removal, or if the position is filled, to an equivalent position.

The Agency is directed to provide the Grievant with **back pay** less any

interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue. The Agency need not provide Grievant with back pay during the period of suspension from December 30, 2010 until March 30, 2011. The Agency may also reduce the amount of back pay to account for an additional 10 workdays of disciplinary suspension authorized under the Group **II** Written Notice.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In its appeal to DHRM, the agency enumerated the following:

> 1. Grievant was employed at a paramilitary security level three prison. The information concerning the resolution of criminal charges against him in another state was of vital importance to his continued employment with the Agency.
>
> 2. Grievant had not provided the Agency with information concerning his last court date as instructed by Ms. Johnson. This would normally be a Group II offense for failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy.
>
> 3. The deadline to give Ms. Johnson an update was May 23, 2011. "If we do not hear from you by May 23, 2011, we will consider your failure to respond to be an indication of your resigning from state service." Grievant called Ms. Johnson two days after the deadline. This would also be considered a Group II offense for failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy.
>
> 3. Grievant was responsible for providing the Agency with his new address, which he had since July, 2010. 'This would be considered a Group II offense for failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy.
>
> 4. The Hearing Officer concluded that the Agency had not established that Grievant was absent in excess of three workdays because Grievant was never instructed to report to work. Grievant had not reported to work since

December 29, 2010. He was instructed, in writing, which was sent to the address he provided his employer, to contact the Agency by May 23, 2011. The letter was sent on May 17th. He did not do so. His excuse was that he had moved to another address. Grievant indicated he moved in July of 2010.

5. The Hearing Officer has exceeded his authority in requiring the Agency to instruct an employee to report to work when his status is unknown pending criminal charges. The Hearing Officer has also exceeded his authority in construing that the Agency has issued a Group III Written Notice, which should be reduced to a Group II.

6. The Hearing Officer misapplied policy when he determined that the changes to Operating Procedure 135.1, Section VI (D) (S) on April 1, 2011, applies to this case. We submit that the policy provisions in effect on December 20, 2010, apply to this matter.

While the agency listed seven issues, the DHRM will address the only issue that is policy-related – item no. 6 (listed as no. 6, but is actually no. 7). Concerning the agency's appeal on that item, we have determined that the policy provisions effective at the time of the infraction must prevail here. That being said, having been reinstated, the relief granted to the grievant must be based on the policy in effect at the time when the grievant was suspended, in this case the policy in effect as of December 20, 2010.

Therefore, we are remanding this decision to the hearing officer and directing that he make it consistent with DHRM's determination.

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

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 9714-R

Reconsideration Decision Issued: April 9, 2012

RECONSIDERATION DECISION

The DHRM Director remanded this decision to the Hearing Officer and stated:

> While the agency listed six issues, the DHRM will address the only issue that is policy-related – item no. 6. Concerning the agency's appeal on that item, we have determined that the policy provisions effective at the time of the infraction must prevail here. That being said, having been reinstated, the relief granted to the grievant must be based on the policy in effect at the time when the grievant was suspended, in this case the policy in effect as of December 20, 2010.

The award of back pay is at the discretion of the Hearing Officer. When determining the amount of back pay to award in this grievance, the Hearing Officer reduced the award of full back pay with the assumption that the Agency would have suspended Grievant for the maximum period of time allowable under the Agency's Standards of Conduct.

Grievant was suspended without pay in accordance with Operating Procedure 135.1 (XVII) (C) (April 15, 2008) which authorized the Agency to suspend without pay an employee charged with a criminal offense for a period of not to exceed 90 calendar days. The Human Resource Officer testified that the 90 day period ended on March 30, 2011. At conclusion of the 90 day period there had been no resolution of the criminal charge. Thus, the employee should have been placed or returned to pre-disciplinary leave with pay until the charge had been resolved.

The Agency is ordered to **reinstate** Grievant to Grievant's same position prior to removal, or if the position is filled, to an equivalent position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee

received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue. The Agency need not provide Grievant with back pay during the period of suspension from December 30, 2010 until March 30, 2011. The Agency may also reduce the amount of back pay to account for an additional 10 workdays of disciplinary suspension authorized under the Group **II** Written Notice.

APPEAL RIGHTS

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

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

Judicial Review of Final Hearing Decision

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

S/Carl Wilson Schmidt

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Carl Wilson Schmidt, Esq.
Hearing Officer