

Issue: Group III Written Notice with Suspension (failure to follow instructions/policy);
Hearing Date: 03/31/15; Decision Issued: 04/27/15; Agency: DOC; AHO: Lorin A.
Costanzo, Esq.; Case No.10533; Outcome: No Relief – Agency Upheld.

**COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

DECISION OF HEARING OFFICER

In the matter of: Grievance Case No. 10533

**Hearing Date: March 31, 2015
Decision Issued: April 27, 2015**

PROCEDURAL HISTORY

Grievant was issued a Group III Written Notice with 40 work hour suspension on November 20, 2014 (offense dates: 9/16/14 and 10/3/14) for *Failure to Follow Instructions and/or Policy* (Written Notice Offense Code 13) and *Disruptive Behavior* (Written Notice Offense Code 37). The Written Notice indicated:

Violation of OP 135.1 Standards of Conduct. On two occasions [Grievant] failed to follow the instructions of her supervisor regarding count procedure which could have resulted in a weakening of security and contributed to a disruption in the count process.¹

Matters proceeded through the resolution steps and when matters were not resolved to her satisfaction Grievant, on 10/12/14, requested qualification of her grievance for hearing. On 12/13/14 the Agency Head indicated, "Disciplinary actions qualify for a hearing" and the Grievance was qualified for Hearing. Undersigned was appointed hearing officer effective January 12, 2015.

Extension: At pre-hearing conference the parties jointly moved for an extension of the 35 day period for a hearing to be held and the extension was granted. The hearing date was originally set for March 4, 2015 but continuance was requested by Grievant's counsel. For cause shown, there being no objection by Agency Advocate, the hearing date was continued to March 31, 2015.

Authority/Brief due by 4/6/15: At the hearing on March 31, 2015 Grievant requested Hearing Officer to address matters that Hearing Officer had concerns as to his jurisdiction to address. Grievant's counsel was afforded opportunity, until 5:00 PM April 6, 2015, to submit in writing any authority/brief (with copy to Agency Advocate). Agency Advocate would then be afforded opportunity to respond in writing if any such written authority/brief were submitted.

ISSUES

1. Whether the Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the disciplinary action taken by the Agency was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense).

¹ Tab 2.

4. Whether there were mitigating circumstances justifying reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?
5. Whether the Agency engaged in workplace harassment?
6. Whether the Agency retaliated against Grievant?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its action against Grievant was warranted and appropriate under the circumstances. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence more convincing than the opposing evidence. Grievant has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline.²

HEARING

The following appeared at hearing held at Facility on March 31, 2015:

Grievant
Grievant's Attorney
Agency Advocate
Agency Party
Witnesses

Exhibits were admitted, *en masse*, by agreement. Agency's Exhibits consist of one binder of exhibits tabbed 1 through 13. No exhibits were admitted by Grievant. One Joint Exhibit was admitted at hearing.

FINDINGS OF FACT

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

01. Grievant is employed as a Correctional Officer at Facility and has been so employed for nearly three years. Grievant's duties include making counts of inmates and calling in the required information for *Count*.

02. *Count* is an activity held at Facility at least 5 times a day. *Count* involves taking a physical count of the inmates and calling in pod numbers/locations where inmates were counted, the number of inmates counted, and the names of Officers making the *Count*. There is no written Policy requiring an Officer to report this required information in a set order of presentation. Master Control announces *Count* and the various areas where inmates are located would call in information. Not all posts require calling in a *Count*.³

² Office of Employment Dispute Resolution, DHRM, *Grievance Procedure Manual*, Sections 5.8 and 9.

³ Testimony.

03. Captain is employed at Facility and his duties include acting as *Watch Commander* and receiving and recording on paper *Count* information called in by Officers.

04. On 9/16/14 Captain instructed Grievant, as he had previously instructed other Correctional Officers at Facility, that *Count* is to be called in using a set order of presenting information. Grievant was instructed to first state the pod number/location, second state the number of inmates counted, and third state the name of Officers making the *Count*.⁴

05. On 9/16/14, during a telephone call with Captain discussing calling in *Count* Grievant stated "whatever [Captain's last name]" and hung the phone up. Upon Captain's call back to her, Grievant hung up on him again. Captain subsequently radioed her but could not reach her. Captain called the Control Room and was able to reach Grievant. When Captain asked her why she hung up the telephone, her reply was, "I got stuff to do, are you done" and then she again hung up the phone. After these matters, Captain instructed Grievant to come to the Watch Office after breakfast where he met with Grievant in the presence of two supervisors.⁵

06. On October 3, 2014 Grievant called in her assigned pod *Count*. However, she did not called in *Count* as instructed with the information presented in the order she was instructed. Captain asked if she had forgot about the count issues discussed and Grievant stated "whatever [Captain's last name]" and hung the phone up. On a call back she hung-up the phone on Captain again. Captain had Lt. M. have her come to the front and Captain met with Grievant in the presence of Lt. M. Grievant was instructed to complete an employee statement as to why she could not follow his instructions and why she was insubordinate towards him.⁶

CONCLUSIONS

The Department of Corrections, pursuant to Va. Code §53.1-10, has promulgated its own *Standards of Conduct* patterned on the state Standards, but tailored to the unique needs of the Department. The *Standards of Conduct* (Operating Procedure Number 135.1, Effective Date: 2/1/2014) divide unacceptable behavior into three groups, according to the severity of the behavior. Group I offenses include types of behavior less severe in nature, but which require correction in the interest of maintaining a productive and well-managed work force. Group II offences include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal. Group III offenses include acts and behaviors of such a serious nature that a first occurrence normally should warrant removal.⁷

Count:

Facility is charged with providing for inmate security and accountability. *Count* is a process used to confirm and document inmate population and location and considered one of the most important functions at Facility. Typically, *Count* is announced from Master Control and, in response, Correctional Officers at certain posts are required to make a physical count of inmates at their location and call in three pieces of information. Officers call in the locations where the inmates were counted, the number of inmates counted, and the officers making the count. This information is recorded when called in on a paper form and is recorded in the computer system.

⁴ Agency Ex. Tab 6 and testimony.

⁵ Agency Ex. Tab 5.

⁶ Testimony.

⁷ Agency Ex. Tab 1.

Each Facility has the latitude to conduct its *Count* process in the manner best suited for that particular Facility. Agency does not have one Policy applicable to all Facilities addressing *Count*. There is no Policy providing for the order that the required *Count* information is to be called in.

Group III:

As a result of information obtained during the Warden's investigation of matters occurring September 16, 2014 and October 3, 2014 disciplinary action was taken. Warden was concerned, although instruction were provided by Captain to Grievant on how *Count* was to be called in, Grievant chose not to follow the directive given her.⁸ Warden felt strongly about the importance and need of conducting *Count* and following the chain of command.

Warden gave consideration to Grievant's admission she didn't like Captain but Warden believed that even if you do not like the person you need to respected the position. From 9/16 to 10/3 of 2014 Grievant called in *Count* as instructed but on 10/3, when Captain was taking *Count*, she called in *Count* differently. Warden expressed concern Grievant was hanging up on Captain and intentionally calling in *Count* to make Captain mad. He also had problem with Grievant's statement to him that she couldn't remember how to call in *Count*.

Instructions:

During shift change on September 16, 2014, Captain told Grievant on the telephone how he wanted her to call *Count* in and set out the specific order the three pieces of required information were to be called in. Grievant was instructed to state first the location where inmates were counted, next state the number of inmates counted, and lastly state the Officers making the count. During the conversation Grievant told him "whatever", called Captain by his last name only, and hung up. Captain called Grievant back and Grievant again hung up on him. Captain then radioed Grievant but there was no answer. Captain called the Control Room, an Officer answered, Captain asked to speak with Grievant, and Grievant then came on the phone. Grievant was asked why she hung-up. Grievant replied that she had stuff to do, asked if Captain was done, and then hung up the phone. Captain then radioed for Grievant to come to the Watch Office after breakfast where Grievant met with Captain in the presence of another Captain and Lieutenant.

It is not contested Grievant was instructed on 9/16/14 by Captain on how he wanted *Count* to be called in by her. Furthermore, Captain explained the reason he wanted a set order to be used. He indicated the set order would help facilitate the accurate recording of the information on the form use to document and tabulate the various *Counts* being called in by Officers.

Language and Actions:

Grievant does not contest she hung-up on Captain but states this was done due to her fear she was going to be cussed at. Grievant had also stated that she understood the phone call to be over and thus hung-up. Grievant contended about a month and a half or so prior to 9/16/14 Captain cussed at her when he said for her to get her "shit" and go on and then said, "I am not kidding get your shit and go on". She indicates this gave rise to her fear she would be cussed at. Captain denies cussing at Grievant.

A number of witnesses addressed language and actions of both Grievant and Captain. On 9/16/14 C/O B. heard Grievant calling in *Count* and Captain informing her of how he wanted *Count* called in. He testified Grievant hung up on Captain and Captain called her back telling her she's not to hang up on him when he is explaining something to her. He testified Grievant stated to

⁸ Agency Tab 3.

Captain she called the *Count* in, said what was the difference, and then she hung up the phone again. C/O B. confirmed Grievant hanging up the telephone on Captain three times. He was in Master Control on 9/16/14, was aware of allegations Captain called Grievant names, but stated that Captain never cussed her.⁹

Captain denies cursing or yelling at Grievant on 9/16/14. He told Grievant how to call in *Count* in and attempted to explain he wanted it done a certain way due to recording the information on the paper form. Grievant hung-up on Captain in mid conversation. After hang-ups, she was directed to come to Watch Office and discussed matters. Captain testified he did not curse her or yell at her.

On 9/16/14 C/O S. was in the pod when Grievant was calling in *Count* from the pod phone. He heard Grievant telling Captain, "I ain't doing this" and observed she hung-up on Captain. He was aware Captain asked Grievant to call him on the radio and testified she refused to call him stating, "I ain't calling him I done hang up on him once".¹⁰

On 9/16/14 C/O C. stated Captain notified Grievant to call the *Count* line and Grievant stated, "I am not going to fucking call him back". She did, however, call Captain after a second request and was heard saying, "I already called my count in [Captain's last name]" after which she hung-up. Captain asked her to call the *Count* desk via radio and she was heard stating, "I'm not calling him back". C/O C. called and told Captain that Grievant was in the control room and Captain asked that Grievant call him at the *Count* desk. Grievant picked up the phone. Once off the phone Grievant was described as being irate and saying, "It doesn't say anywhere in my post orders that I have to call count in any specific way". C/O C further heard Grievant state, "He thinks just because he is a fucking Captain, he thinks he runs shit."¹¹

On 9/16/14 Lt. was present in the Work Office when Grievant came in and met with Captain and discussed hanging up on Captain. He stated he did not have his attention on their entire conversation and he does not recall derogatory statements or statements made that would constitute a hostile work environment by either party.¹²

On 9/16/14 Sgt. B. was at the Count Desk and observed that Grievant called in *Count* and Captain stated he would not accept *Count* being called in the way she called it in. During his statement the phone was disconnected. He observed that Captain called the control booth and spoke to C/O C. and said to him, "Tell that fucking bitch to call me." Sgt. B. testified he knew Grievant and worked with her for approximately a year.¹³

On 9/16/14 Unit Mgr. was in the Watch Office when Captain and Grievant discussed matters including Grievant hanging the phone up on him when Captain was trying to explain the *Count* procedures. Grievant's demeanor was described as aggravated over the issue and she interrupted Captain several times. He heard Grievant beginning to raise her voice and interrupt Captain. He further noted that Captain mentioned that he was so mad he could pull her up. When Captain said this he did not raise his voice. He testified Captain did not raise his voice or curse at any time.¹⁴

⁹ Agency Ex. Tab 6.

¹⁰ Agency Ex. Tab 7.

¹¹ Agency Ex. Tab 8.

¹² Agency Ex. Tab 9 & 10.

¹³ Joint Exhibit

¹⁴ Agency Ex. Tab 12 and Testimony.

On 10/3/14 at shift change *Count* Captain and Sgt. P were taking *Count*. Grievant called in *Count* but did not present the information in the order previously instructed. Captain addressed having discussed *Count* before with her and Grievant hung-up on Captain in mid conversation. At a meeting this date Grievant was asked why she could not follow instructions and Captain indicated Grievant stated she didn't like him. Captain discussed the chain of command and respecting the position. Captain told her she needed to do a report on matters, e-mail it, and he would discuss it with Warden. Captain testified he did not curse or shout at Grievant

On 10/3/14 Sgt. P. observed that Grievant called in *Count* by calling in the name first and she was stopped. She was asked by Captain if she remembered the proper way to call *Count* in as previously discussed. Sgt. P. noted Grievant was calling her *Count* in backwards. Captain was explaining what was expected in calling *Count* in and Grievant interrupted Captain. Grievant said, "Yeh [Captain's last name] can I go now?" and "I'm gonna go now [Captain's last name]" and "I'm gonna hang up the phone now [Captain's last name]". Grievant hung up the phone while Captain was still talking. Captain redialed and Grievant answered and was told not to hang the phone up on him again. Grievant replied "I have equipment I need to get now [Captain's last name]". She hung-up again while Captain was trying to talk to her about the way to call her *Count* in. Sgt. P. stated at no point did Captain use any profane, demeaning or derogatory language during this incident. Sgt. P. opined she was irritated. He also noted that there were times she didn't do the job exactly the way she was asked but also indicated that she did the job.¹⁵

On 10/3/14 Lt. M. was asked by Captain to get Grievant to come up to Front Search. Captain wanted to have a talk with her as she just hung up on Captain, and this was not the first time. Lt. M. was asked, per policy, to observe at the meeting. Lt. M. confirmed that there was conversation about hanging up and Grievant said she thought the conversation was over when she hung-up. He stated Captain did not curse, demean, or holler. He noted when Grievant called Captain by his last name only, she was told to address him as Captain.

On 10/3/14, after the meeting, Captain directed Grievant to write an employee statement concerning her actions and have it turned in.

On 10/6/14 Grievant stated she wanted to file a report directly to HR, he escorted Grievant escorted to Training Department where she typed her statement, and he escorted her to HR when the HR Manager arrived.

Lt. M. did not witness Captain having said, as alleged by Grievant, "If I could have gotten my hands on you I would have yanked you up and choked the life out of you". Lt. M. testified he did not have knowledge if the statement was made or not.¹⁶

Workplace Harassment:

Grievant contends she was subjected to Workplace Harassment by Captain alleging:

- At Front Search Captain said to her, "Get your shit and go on, we don't have time!" and "I'm not kidding, get your shit and go on!"
- She heard Captain instruct Officer, "Tell that little bitch to call me back right fucking now."

¹⁵ Agency Ex. Tab 11 and Testimony.

¹⁶ Agency Ex. Tab 13 and Testimony.

- Captain told her, “If I could have gotten my hands on you when you hung up on me, I’d have yanked you up and choked the life out of you! Also Captain yelled at her.”¹⁷

The Commonwealth strictly forbids harassment of any employee, applicant for employment, vendor, contractor or volunteer on the basis of an individual’s race, sex, color, national origin, religion, sexual orientation, gender identity, age, veteran status, political affiliation, genetics, or disability. Furthermore The Commonwealth will not tolerate any form of retaliation directed against an employee or third party who either complains about harassment or who participates in any investigation concerning harassment.¹⁸

DHRM Policy 2.30 provides the following definitions:

Workplace Harassment:

Any unwelcome verbal, written or physical conduct that either denigrates or shows hostility or aversion to wards a person on the basis of race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability, that: (1) has the purpose or effect of creating an intimidating, hostile or offensive work environment; (2) has the purpose or effect of unreasonably interfering with an employee’s work performance; or (3) affects an employee’s employment opportunities or compensation.

Sexual Harassment:

Any unwelcome sexual advance, request for sexual favors, or verbal, written or physical conduct of a sexual nature by a manager, supervisor, co-workers or non-employee (third party).

- **Quid pro quo** – A form of sexual harassment when a manager/supervisor or a person of authority gives or withholds a work-related benefit in exchange for sexual favors. Typically, the harasser requires sexual favors from the victim, either rewarding or punishing the victim in some way.
- **Hostile environment** – A form of sexual harassment when a victim is subjected to unwelcome and severe or pervasive repeated sexual comments, innuendoes, touching, or other conduct of a sexual nature which creates an intimidating or offensive place for employees to work.

To establish a claim for harassment, Grievant must prove: (i) the conduct was unwelcome; (ii) the harassment was based on a protected classification; (iii) the harassment was sufficiently severe or pervasive to create an abusive work environment; and (iv) there is some basis for imposing liability on the employer.

The determination of the sufficiency of an environment’s hostility or abusiveness is made by considering the totality of the circumstances, including the “frequency of the discriminatory conduct”; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”¹⁹ As a general matter, infrequent, isolated remarks or episodes will not be found to create hostile work

¹⁷ Tab 4, Employee’s Statement

¹⁸ DHRM Policy 2.30.

¹⁹ Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993)

environment.²⁰ However, if the conduct is sufficiently severe, one incident can alter the employee's conditions of employment without repetition. The present case does not rise to such level.

There is insufficient evidence to find, as alleged, that Captain said to Grievant, "If I could have gotten my hands on you when you hung up on me, I'd have yanked you up and choked the life out of you" or that Captain yelled at her.

Based upon the totality of the evidence in this cause, including the statements of Grievant and witnesses, the following is found. Grievant has shown the conduct was unwelcome. However, Grievant has not shown that the unwelcome conduct was directed at her based on any protected classification including her sex. Grievant has not proven the harassment was sufficiently severe or pervasive to create an abusive work environment. In a case as this where the alleged harasser is the employee's supervisor, employers are presumptively liable for all acts of harassment. Grievant has not met her burden. There is insufficient evidence to find that the alleged conduct and/or statements rise to the level of sexual harassment or violate the Commonwealth's workplace harassment policy which is predicated upon Title VII.

Retaliation

Grievant contends that she was subject to Retaliation for making a claim of workplace harassment by Captain with HR on October 6, 2014.

§9 of the *Grievance Procedure Manual* defines *Retaliation* as "Adverse employment actions taken by management or condoned by management because an employee participated in an activity recognized as protected in §4.1(b). §4.1(b) of the *Grievance Procedure Manual* addresses the following matters:

1. Unfair application or misapplication of state and agency personnel policies, procedures, rules, and regulations;
2. Discrimination on the basis of race, color, religion, political affiliation, age, disability, national origin, or sex;
3. Arbitrary or capricious performance evaluation;
4. Retaliation for participating in the grievance process, complying with any law or reporting a violation of such law to a government authority, seeking to change any law before Congress or General Assembly, reporting an incidence of fraud, abuse, or gross mismanagement, or exercising any right otherwise protected by law;
5. Informal discipline

To establish retaliation Grievant must show (1) she engaged in a protected activity; (2) she suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected activity. If an Agency presents a nonretaliatory business reason for the adverse employment action, retaliation is not established unless the Grievant shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation.²¹ Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.²²

²⁰ See *Quinn v. Green Tree Credit Corp.*, 159F.3d 759, 768 (2nd Cir. 1998)(citing *Carrero v. New York City Housing Authority*, 890 F.2d 569,577-578 (2nd Cir. 1989).

²¹ *E.g.*, *EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 405 (4th Cir. 2005); *Rowe v. Marley Co.*, 233 F.3d 825, 829 (4th Cir: 2000).

²² See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

While evidence indicates Grievant engaged in a protected activity in filing a report of Workplace Harassment and she suffered an adverse employment action in that she was issued a Group III Written Notice there is insufficient evidence to find a nexus or causal link existing between the protected activity and the adverse employment action. Warden testified he found out Grievant had filed a complaint with HR after he had begun his investigation on the *Count* situation which was reported to him. During his investigation Warden became aware of the matters occurring on 9/16/14 and 10/3/14 which ultimately led to the present disciplinary matters.²³

Grievant was instructed to call in her *Count* information in a set order but did not do so on October 3, 2014. There was a business purpose expressed in calling in the required information in a fixed order and Grievant was informed of the business purpose. The evidence indicates a number of times Captain's telephone calls at work were ended/hung-up on by Grievant when Captain was discussing matters.

Upon consideration of the totality of the evidence presented in this cause, Agency has presented a legitimate non-retaliatory business reason for the adverse action and there is insufficient evidence to find that Agency's stated business reason was a mere pretext or excuse for retaliation.

Mitigation:

§ 2.2-3005 of the Code of Virginia provides Hearing Officers shall 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 Human Resource Management pursuant to § 2.2-1202.1.

The hearing officer is to determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. To do this, the hearing officer reviews the evidence *de novo* (afresh and independently, as if no determination had yet been made) to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct; and (iii) whether the disciplinary action taken by the agency was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense).

If the agency does not prevail as to any of the elements (i) through (iii) above, the disciplinary action should not be upheld. If the agency prevails on all three elements, the hearing officer must then consider whether the grievant has shown, by a preponderance of the evidence, that there were nevertheless mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether any aggravating circumstances exist which would overcome the mitigating circumstances. Furthermore, in reviewing agency-imposed discipline, the hearing officer must give due consideration to the management's right to exercise its good faith business judgment in employee matters, and the agency's right to manage its operations.

Therefore, 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 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.

²³ Testimony of Warden.

Grievant does not contest she was instructed to present Count information in a set pattern. Grievant does not contest she hung-up a number of times on Captain who was discussing Agency business/*Count*. Testimony addressed the importance of *Counts* and the need for multiple *Counts* to be taken by Facility each day to ensure security and accountability of inmates. Taking into consent the totality of the evidence and the circumstances Grievant's discipline is not found to exceed the limits of reasonableness.

DECISION

For the reasons stated above, based upon consideration of all the evidence presented in this cause the Hearing Officer finds:

1. Grievant engaged in the behavior described in the Written Notice.
2. The behavior constituted misconduct.
3. The disciplinary action taken by the Agency was consistent with law and policy.
4. Mitigating circumstances justifying reduction or removal of the disciplinary action are not found.
5. Agency is not found to have engaged in workplace harassment.
6. Retaliation is not found.
7. Agency has met its burden that the action against Grievant was warranted and appropriate under the circumstances.

For the reasons stated above, based upon consideration of all the evidence presented in this cause the Agency's issuance to Grievant of a Group III Written Notice with 40 hour suspension is ***upheld***.

APPEAL RIGHTS

As the *Grievance Procedure Manual (effective date: July 1, 2012)* 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.

A. Administrative Review:

A hearing officer's decision is subject to administrative review by both EDR and Director of DHRM based on the request of a party. Requests for review may be initiated by electronic means such as facsimile or e-mail. A copy of all requests for administrative review must be provided to the other party, EDR, and the Hearing Officer.

A party may make more than one type of request for review. All requests for administrative review must be made in writing and ***received by*** the reviewer within 15 calendar days of the date of the original hearing decision. "***Received by***" means delivered to, not merely postmarked or placed in the hands of a delivery service.

1. A challenge that the hearing decision is inconsistent with state or agency policy is made to the Director of DHRM. This request must refer to a particular mandate in state or agency policy with which the hearing decision is inconsistent. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests must 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 or e-mailed.

2. Challenges to the hearing decision for noncompliance with the grievance procedure and/or the Rules for Conducting Grievance Hearings, as well as any request to present newly discovered evidence, are made to EDR. This request must state the specific requirement of the grievance procedure with which the hearing decision is not in compliance. The Office of Employment Dispute Resolution's ("EDR's") authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests must be sent to the Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, VA 23219, faxed to EDR (EDR's fax number is 804-786-1606), or e-mailed to EDR (EDR's e-mail address is edr@dhrm.virginia.gov).

B. Final Hearing Decisions:

A hearing officer's 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.

C. Judicial Review of Final Hearing Decision:

Once an original hearing decision becomes final, either party may seek review by the circuit court on the ground that the final hearing decision is contradictory to law. A notice of appeal must be filed with the clerk of the circuit court in the jurisdiction in which the grievance arose within 30 calendar days of the final hearing decision.

S/ Lorin A. Costanzo

Lorin A. Costanzo, Hearing Officer

copies e-mailed to: Grievant's attorney
Agency Advocate
EDR