Issue: Administrative Review and Compliance Ruling/ hearing decision appeal; request to stay implementation; Ruling Date: July 19, 2006; Ruling #'s 2006-1341, 2006-1374; Agency: Northern Virginia Community College; Outcome: hearing officer in compliance, stay of implementation out of compliance.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW AND COMPLIANCE RULING OF DIRECTOR

In the matter of Northern Virginia Community College
Ruling No. 2006-1341 and 2006-1374
July 19, 2006

Northern Virginia Community College (NVCC or the agency) has requested that this Department administratively review the hearing officer's decision in Case Number 8299/ 8300/ 8301/ 8302. In its request, NVCC claims that the hearing officer (1) erred in reducing the Group II Written Notice for unsatisfactory attendance to a Group I Written Notice; (2) erred by failing to treat as separate Group I offenses the numerous incidents that NVCC had grouped into a single Group II for unsatisfactory performance; and (3) improperly excluded evidence. Additionally, NVCC requests a "stay" of implementation of the hearing officer's April 21, 2006 hearing decision.

FACTS

Prior to her removal on December 19, 2005, the grievant was employed as a Human Resource Manager with NVCC.[1] The grievant received three written notices and initiated three separate grievances challenging the disciplinary actions.[2] The grievant also initiated a grievance challenging her performance evaluation.[3] The four grievances were qualified and consolidated for a single hearing which was held on March 29-30, 2006.[4]

In his April 21, 2006 hearing decision, the hearing officer reduced the October 25, 2005 Group II Written Notice for unsatisfactory work performance and failure to follow her supervisor's instructions to a Group I Written Notice.[5] The hearing officer also reduced the December 19, 2005 Group II Written Notice for unsatisfactory attendance to a Group I Written Notice.[6] The hearing officer upheld the December 19, 2005 Group II Written Notice for failure to perform assigned work and imposed a five workday suspension.[7] Additionally, the hearing officer ordered that the grievant be reinstated and

[1] *See* Decision of Hearing Officer Case Number 8299 / 8300 / 8301 / 8302, issued April 21, 2006.
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*

awarded backpay.[8] Finally, the agency was ordered to revise the grievant's performance evaluation to reflect an overall rating of "Contributor."[9]

On April 24, 2006, NVCC requested this Department to temporarily stay the hearing officer's April 21st order. In support of its request, the agency asserts that it recently discovered that the grievant falsified her NVCC application for employment (as well as attachments thereto). NVCC claims that had it known of the alleged misrepresentation at the time, it would not have hired the grievant and intends on terminating her if she is reinstated to her previous position. Further, NVCC claims that United States Supreme Court case law supports its position that it should not be required to reinstate the grievant until the issue regarding the grievant's alleged misrepresentation(s) has been resolved.

On May 5, 2006, the agency sought a reconsideration decision from the hearing officer as well as administrative reviews of the hearing officer's decision from this Department and the Department of Human Resource Management (DHRM). In his May 10, 2006 reconsideration decision, the hearing officer found that "[t]he Agency's request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, the Agency's request for reconsideration is **denied**."[10]

DISCUSSION

Administrative Review

By statute, this Department has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions…on all matters related to procedural compliance with the grievance procedure."[11] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[12]

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[13] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[14] Further, hearing officers have the duty to receive probative evidence and to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs.[15] Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine

[8] *Id.*
[9] *Id.*
[10] Reconsideration Decision of Hearing Officer, Case No. 8299/ 8300/ 8301/ 8302-R, issued May 10, 2006 (emphasis in original).
[11] Va. Code § 2.2-1001(2), (3), and (5).
[12] *See Grievance Procedure Manual* § 6.4(3).
[13] Va. Code § 2.2-3005.1(C)(ii).
[14] *Grievance Procedure Manual* § 5.9.
[15] Va. Code § 2.2-3005(C)(5).

the witnesses' credibility, and make findings of fact. Further, as long as the hearing officer's findings are based upon evidence in the record and the material issues of the case, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings.

Group II Written Notice for Unsatisfactory Attendance

In support of its assertion that the hearing officer erred by reducing the Group II Written Notice for unsatisfactory attendance to a Group I Written Notice, NVCC argues that (1) the hearing officer should have given deference to management's decision to issue a Group II Written Notice in this particular case;[16] (2) it was inappropriate for the hearing officer to find that NVCC's failure to call the grievant and instruct her to come to work was a mitigating factor;[17] and (3) the hearing officer should have taken judicial notice of and considered DHRM Policy 4.30 in deciding whether to uphold the Group II Written Notice for unsatisfactory attendance.

In cases involving discipline, the hearing officer must 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 facts *de novo*" to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct, (iii) whether the agency's discipline was consistent with law and policy and, finally, (iv) 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.[18] However, "a hearing officer is not a 'super-personnel officer'…. Therefore, in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."[19] Similarly, "[i]n reviewing agency-imposed discipline, the hearing officer must give due consideration to management's right to exercise its good faith business judgment in employee matters, and the agency's right to manage its

[16] In its request for administrative review, NVCC asserts that the hearing officer erred "by substituting his judgment for the agency head as to the effect that this particular absence had on NVCC's operations, which is a decision best left to those public officials responsible for covering critical tasks for absent employees and managing the entire workforce" and that the grievant's absence on December 15th "merited a more severe sanction than the relatively modest Group I that the Hearing Officer preferred."

[17] In his April 21st decision the hearing officer opines that "[t]o the extent Grievant's behavior on an especially important day was an aggravating factor, the Agency's failure to call Grievant early in the morning is a mitigating factor. Once the Supervisor read Grievant's email stating that Grievant would not be at work, the Supervisor could have called Grievant and instructed her to come to work." Decision of Hearing Officer Case Number 8299 / 8300 / 8301 / 8302, issued April 21, 2006. In his reconsideration decision, the hearing officer contends that his comment regarding NVCC's failure to contact the grievant "was for the purpose of emphasis and to address a possible, but untenable, argument of the [a]gency." Reconsideration Decision of Hearing Officer, Case No. 8299/ 8300/ 8301/ 8302-R, issued May 10, 2006.

[18] *See Rules for Conducting Grievance Hearings*, § VI(B).

[19] *Rules for Conducting Grievance Hearings*, § VI(A).

operations."[20] Accordingly, in disciplinary cases, a hearing officer must give due deference to management's decision if that decision is consistent with law and policy.

In this case, the hearing officer found that the grievant engaged in the behavior described in the December 19, 2005 Group II Written Notice for unsatisfactory attendance and that such behavior constituted misconduct.[21] Accordingly, NVCC satisfied the first two elements of its burden of proof with regard to the disciplinary action. However, the hearing officer determined that the agency-imposed discipline was inconsistent with policy. In his decision, the hearing officer finds that, "[t]he agency has established that Grievant's attendance on December 15, 2005 was unsatisfactory" and "DHRM Policy 1.60 lists unsatisfactory attendance as a Group I offense, not as a Group II offense."[22] Under such circumstances, the hearing officer was under no obligation to give due consideration to the level of offense meted out by NVCC management and acted within his authority to reduce the Group II Written Notice for unsatisfactory attendance to a Group I.[23]

With regard to the agency's contention that the hearing officer's mitigation analysis was flawed, this Department finds that the hearing officer did not mitigate the Group II Written Notice down to a Group I Written Notice but rather, as stated above, the disciplinary action was reduced from a Group II Written Notice to a Group I offense for consistency with state policy.[24] Moreover, the hearing officer expressly states in his decision that he "finds no mitigating circumstances exist to reduce the disciplinary action."[25]

Finally, NVCC contends that "Footnote 4 of the Hearing Officer's decision wrongly presumes that Grievant did not violate any written leave policy because NVCC did not require pre-approval for unplanned leave."[26] NVCC goes on to say that it does

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[20] *Rules for Conducting Grievance Hearings*, § VI(B).
[21] *See* Decision of Hearing Officer, Case No. 8299/ 8300/ 8301/ 8302, issued April 21, 2006.
[22] Decision of Hearing Officer, Case No. 8299/ 8300/ 8301/ 8302, issued April 21, 2006.
[23] It should be noted that whether the hearing officer's decision is to reduce the Group II Written Notice to a Group I in this particular case is consistent with policy is not for this Department to decide, but rather is an issue for the Director of DHRM. Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2 (a)(2). Only a determination by DHRM could establish whether or not the hearing officer erred in his interpretation of state and agency policy. In addition to her appeal to this Department on procedural grounds, the grievant has properly appealed to DHRM on the basis of policy. If DHRM finds that the hearing officer's interpretation of policy was not correct, DHRM may direct the hearing officer to reconsider his decision in accordance with its interpretation of policy. *Grievance Procedure Manual* § 7.2 (a)(2).
[24] Mitigation should only be considered in a disciplinary case where a hearing officer has concluded that the agency has satisfied its burden of showing that the grievant engaged in behavior constituting misconduct and that the disciplinary action was consistent with law and policy. *See Rules for Conducting Grievance Hearings* § VI(B).
[25] *See* Decision of Hearing Officer, Case No. 8299/ 8300/ 8301/ 8302, issued April 21, 2006.
[26] It appears that NVCC has incorrectly referenced footnote 4. Footnote 4 of the April 21st hearing decision states: "This illustration assumes the agency chose not to terminate the employee because of receiving two Group II Written Notices or receiving one Group III Written Notice." Decision of Hearing Officer, Case No. 8299/ 8300/ 8301/ 8302, issued April 21, 2006. Footnote 7, however, states "Grievant did not violate

have a policy, modeled after DHRM Policy 4.30, that requires pre-approval of leave and that the hearing officer should have taken judicial notice of and considered DHRM Policy 4.30 in deciding whether to uphold the Group II Written Notice for unsatisfactory attendance. More specifically, NVCC contends that the grievant violated DHRM Policy 4.30 because she did not submit a request for leave before taking leave, nor did she receive approval from NVCC for the desired leave.[27]

In his reconsideration decision, the hearing officer responds to NVCC's contention that he improperly failed to consider Policy 4.30 by stating: "Grievant notified the Supervisor by email prior to the beginning of her scheduled work time.[28] Grievant's method of notification was consistent with the Agency's customary employee practice of notifying supervisors of unexpected absences. In addition, Grievant notified the Supervisor prior to the time Grievant's leave actually began."[29] The hearing officer further opines that:

> [n]othing in DHRM Policy 4.30 prohibits an employee from sending an email to establish notice of an unscheduled absence. Grievant's email was successful in notifying the Supervisor that Grievant planned to be absent from work on December 15, 2005. The Supervisor had actual notice that Grievant would be absent on December 15, 2005. One of the objectives of DHRM Policy 4.30 is to ensure that supervisors are aware of when their employees may not be at work. Grievant satisfied that objective by sending an email to the Supervisor. Grievant's email was consistent with how the Agency permitted its employees to notify the Agency of unscheduled absences.[30]

Based on the foregoing, it appears that the hearing officer did consider state and agency policy in deciding this case. Whether the hearing officer's interpretation of those policies is correct is an issue for DHRM to address, not this Department.

Group II Written Notice for Unsatisfactory Performance

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any written leave policy because the Agency did not require pre-approval for unplanned leave. By sending an email to the Supervisor, Grievant complied with the Agency's expectation for notice of absence." Decision of Hearing Officer, Case No. 8299/ 8300/ 8301/ 8302, issued April 21, 2006. Based upon the argument presented by NVCC, it appears that footnote 7 is being challenged and not footnote 4 as indicated. Accordingly, this Department will assume for purposes of this ruling that NVCC is actually challenging the hearing officer's finding in footnote 7, not footnote 4.

[27] DHRM Policy 4.30 says "[b]efore taking a leave of absence from work, whether with or without pay, employees should request and received their agencies' approval of the desired leave." DHRM Policy 4.30 III(A), *Leave Policies – General Provisions* (effective 9-16-93, updated 4-2004).

[28] At 6:22 a.m. on December 15th the grievant sent her supervisor an e-mail from her home saying, "I will not be in the office today, Thursday, December 15th due to the road conditions and the weather." Decision of Hearing Officer, Case No.: 8299/ 8300/ 8301/ 8302, issued April 21, 2006.

[29] Reconsideration Decision of Hearing Officer, Case No. 8299/ 8300/ 8301/ 8302-R, issued May 10, 2006.

[30] *Id.*

On October 25, 2005, NVCC issued the grievant a Group II Written Notice for unsatisfactory work performance,[31] which cites several instances of unsatisfactory performance in support of its charge.[32] Acknowledging that unsatisfactory performance is listed as a Group I offense under state policy, the hearing officer reduced the October 25, 2005 Group II Written Notice to a Group I Written Notice.[33] The hearing officer however also recognized in his decision that the agency could have issued separate Group I Written Notices for the several instances of unsatisfactory performance cited.[34] Based upon this acknowledgment, NVCC argues that the hearing officer erred by "not treating as separate Group I offenses the numerous offenses that NVCC had grouped into a single Group II offense for unsatisfactory performance." NVCC also asserts that the hearing officer erred by failing to identify the particular behavior that was upheld as a Group I offense. The agency's claims are addressed below.

"When the grievance involves a disciplinary matter, the hearing officer may uphold or reverse the disciplinary action challenged by the grievance, or, in appropriate circumstances, modify the action."[35] As such, in this case, the hearing officer could have modified the agency's action in the manner specified by the agency but was not required to do so. Accordingly, we find no abuse of discretion by the hearing officer in failing to treat the listed instances of unsatisfactory performance as separate Group I offenses.[36] It should be noted, however, that a hearing officer's discretion in modifying the disciplinary action is not without limitation. In particular, a hearing officer does not have the authority to impose a greater discipline than that imposed by the agency.[37] In other words, if the

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[31] The October 25, 2005 Group II Written Notice also charged the grievant with failure to follow her supervisor's instructions. In his decision, the hearing officer determined this charge to be unfounded, thus leaving only the charge of unsatisfactory performance remaining on the October 25th Group II Written Notice. *See* Decision of Hearing Officer Case Number 8299 / 8300 / 8301 / 8302, issued April 21, 2006.

[32] The October 25, 2005 Group II Written Notice states: "[the grievant] continues to make serious errors in [c]ompensation documentation. She does not pay attention to details, which often results in confusion with employees' status and salary. Important documents are often lost or misplaced. These types of errors negatively impact the department's credibility in its efforts to compensate employees fairly and equitably. See attached."

[33] *See* Decision of Hearing Officer, Case No. 8299/ 8300/ 8301/ 8302, issued April 21, 2006.

[34] In his decision, the hearing officer states: "[t]he Agency presented evidence of several separate and unrelated deficiencies in Grievant's work performance. The Agency could have treated these errors separately and issued separate Group Notices for the various offenses. Instead, the Agency aggregated separate behavior into one group notice." Decision of Hearing Officer Case Number 8299 / 8300 / 8301 / 8302, issued April 21, 2006.

[35] *Rules for Conducting Grievance Hearings* § VI(A).

[36] It should be noted that whether several Group I offenses can be combined into a single Group II level of offense under policy is not an issue for this Department to address. Rather, the Director of DHRM (or her designee) has the authority to interpret all policies affecting state employees, and to assure that hearing decisions are consistent with state and agency policy. Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2 (a)(2). Only a determination by DHRM could establish whether or not the hearing officer erred in his interpretation of state and agency policy. In addition to her appeal to this Department on procedural grounds, the grievant has properly appealed to DHRM on the basis of policy. If DHRM finds that the hearing officer's interpretation of policy was not correct, DHRM may direct the hearing officer to reconsider his decision in accordance with its interpretation of policy. *Grievance Procedure Manual* § 7.2 (a)(2).

[37] *See Grievance Procedure Manual* § 5.9.

hearing officer had in his discretion treated the listed instances of unsatisfactory performance in this case as separate Group I offenses, those Group I offenses could not in the aggregate exceed the equivalent of a Group II Written Notice, the original disciplinary action imposed by the agency.

Moreover, as to the agency's contention that the hearing officer did not identify the particular behavior that was upheld as a Group I offense, the hearing officer finds that:

> Grievant was asked by the Supervisor to calculate a ten percent salary increase for a particular employee. Grievant informed the Supervisor of what Grievant considered to be the correct salary, but Grievant's calculation was wrong. Grievant's work performance was inadequate because she was expected to correctly calculate the salary increase but made an incorrect calculation. The Agency also presented evidence of Grievant's typographical errors on documents including documents she drafted for the Supervisor's signature. The agency has presented sufficient evidence to support the issuance of a Group I Written Notice.[38]

As such, this Department finds that the hearing officer did identify the particular behavior (i.e., miscalculation of salary and typographical errors) that was upheld as a Group I offense for unsatisfactory performance.

Exclusion of Evidence

The agency asserts that the hearing officer erred by excluding evidence that the grievant falsified state applications and attachments thereto when she was hired and when applying for subsequent position openings with NVCC. The agency claims that this evidence should have been allowed as it "bore directly on [the grievant's] credibility and the remedies available to her." In his reconsideration decision, the hearing officer states that the evidence sought to be introduced was rejected because

> Grievant had not been disciplined for falsification of documents. Grievant had not been issued a written notice for falsifying documents. Grievant had not received notice that the Agency intended to present evidence relating to falsification of documents…. The issue before the Hearing Officer did not include whether Grievant falsified employment documents, and, thus, evidence regarding that issue was not relevant. Furthermore, the evidence offered by the Agency was not relevant to Grievant's credibility. The Hearing Officer assessed Grievant's credibility while Grievant testified. To the extent Grievant's testimony differed from the testimony of the Agency witnesses, the Hearing Officer resolved the conflict in favor of the Agency. To be sure, if the Hearing Officer had resolved the conflict

[38] Decision of Hearing Officer Case Number 8299 / 8300 / 8301 / 8302, issued April 21, 2006.

> in favor of the Grievant, then no disciplinary action whatsoever would have been upheld. In this case, the Agency correctly concluded that Grievant's behavior justified taking disciplinary action, but the Agency failed to properly utilize the Standards of Conduct to assign an appropriate level of disciplinary action.[39]

This Department finds no abuse of discretion by the hearing officer in excluding the evidence in question. First, as correctly noted by the hearing officer, the issue of whether the grievant had falsified documents was not an issue qualified by the agency head, the EDR Director, or the Circuit Court and thus it was not before the hearing officer for adjudication.[40] Moreover, while the evidence the agency sought to introduce could have a bearing on the grievant's credibility in this case, the hearing officer's failure to allow such evidence was harmless at best as the hearing officer found in favor of the agency in its issuance of disciplinary action. In other words, the hearing officer essentially found that the grievant's testimony lacked credibility or he would have ruled in her favor rather than in favor of the agency.

Compliance Issue – Stay of Implementation of Hearing Officer's Decision

According to Va. Code § 2.2-3006(C), "[t]he hearing officer's final decision shall be effective from the latter of the date issued or the date of the conclusion of any administrative review and judicial appeal, and shall be implemented immediately thereafter, unless circumstances beyond the control of the agency delay such implementation."[41] Moreover, once the hearing officer's decision is final, the grievant may seek implementation of the final decision by way of petition to the circuit court in the locality in which the grievance arose.[42]

In this case, NVCC has requested an administrative review from this Department as well as DHRM. Further, once this Department and DHRM issue its determinations, there is the possibility of a judicial review as well.[43] Accordingly, an order staying the implementation of the hearing officer's April 21st decision is unnecessary as there is no requirement that it be implemented at this point in the process. Moreover, as stated above, the Circuit Court, not this Department, is responsible for making determinations on implementation of a hearing officer's final decision[44] and any arguments relating to implementation should be addressed to that forum.[45]

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[39] *See* Reconsideration Decision of Hearing Officer, Case Number 8299/ 8300/ 8301/ 8302-R, issued May 10, 2006.
[40] *See Rules for Conducting Grievance Hearings* § I ("Any issue not qualified by the agency head, the EDR Director, or the Circuit Court cannot be remedied through a hearing.")
[41] Va. Code § 2.2-3006(C).
[42] *See* Va. Code § 2.2-3006(D); *Grievance Procedure Manual* § 7.3(c).
[43] *See* Va. Code § 2.2-3006(B) and (C); *Grievance Procedure Manual* § 7.3(a) and (b).
[44] *See* Va. Code § 2.2-3006(D); *Grievance Procedure Manual* § 7.3(c).
[45] This Department deems it significant to note that unlike the present case, the employee in the *Nashville Banner* case was an at-will employee, and that the application of the "after-acquired evidence" rule articulated in *Nashville Banner* to the present case could effectively cut off the grievant's due process rights

APPEAL RIGHTS AND OTHER INFORMATION

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.[46] Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.[47] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[48] This Department's rulings on matters of procedural compliance are final and nonappealable.[49]

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Claudia T. Farr
Director

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by denying her the opportunity to challenge the charges of misrepresentation alleged against her. *See* McKennon v. Nashville Banner Pub. Co, 513 U.S. 352 (1995).

[46] *Grievance Procedure Manual*, § 7.2(d).

[47] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).

[48] *Id. See also* Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 445, 573 S.E. 2nd 319, 322 (2002).

[49] Va. Code § 2.2-1001 (5).