Issues: Group II Written Notice (unsatisfactory job performance), Group II Written Notice (failure to follow instructions) and Termination (due to accumulation); Hearing Date: 03/06/07; Decision Issued: 03/08/07; Agency: Department of Medical Assistance Services; AHO: David J. Latham, Esq.; Case No. 8526; Outcome: Group II (unsatisfactory job performance) – Full relief, Written Notice rescinded, Group II (failure to follow instructions) – No relief, agency upheld in full, Termination – No relief, agency upheld in full; **Administrative Review: EDR Ruling Request received 03/23/07; EDR Ruling #2007-1611 issued 04/12/07; Outcome: Remanded to AHO; Reconsideration Decision issued 05/02/07; Outcome: Original decision affirmed; Administrative Review: DHRM Ruling Request received 03/23/07; DHRM Ruling issued 05/22/07; Outcome: HO's decision affirmed.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:
Case No: 8526

Hearing Date: March 6, 2007
Decision Issued: March 8, 2007

PROCEDURAL ISSUES

In her written grievance, grievant listed as an issue, *inter alia*, an alleged arbitrary and capricious performance evaluation. The last performance evaluation done for grievant was an interim evaluation signed on June 30, 2006. This evaluation was more than 30 days prior to the filing of the grievance and is, therefore, not grievable. In any case, grievant did not offer any testimony or evidence on this issue at hearing. For these reasons, this issue will not be addressed in this decision.

At hearing, the agency raised the issue of grievant's inappropriate use of medical records. This issue is not mentioned on either of the Written Notices. It appeared to the hearing officer that this issue was first raised by the second-step respondent to the grievance.[1] Because this appeared to have been discovered subsequent to the issuance of the disciplinary actions, the hearing officer ruled that the evidence was inadmissible because it occurred after the fact, and because it was not directly related to the issues mentioned on the Written Notices. The agency did not raise an objection to this ruling and, therefore, no evidence was heard on this issue. However, subsequent close reading of the extensive documentation proffered by the agency reveals that the agency head

[1] Agency Exhibit 3. Second Resolution Step Response, January 4, 2007.

had discovered grievant's inappropriate use of medical records *prior* to issuing discipline and terminating grievant's employment on October 3, 2006.

Since no evidence was received on this issue, the hearing officer did not give any weight to the issue in making this decision. Because this decision upholds the agency decision to remove grievant from state employment, it would serve no useful purpose to reopen the hearing solely to take evidence on this issue. However, if as the result of subsequent reviews it becomes necessary for the hearing officer to reconsider the decision, he would have no alternative but to reopen the hearing to take evidence on this one issue.

APPEARANCES

Grievant
Attorney for Grievant
One witness for Grievant
Manager of Department
Advocate for Agency
Two witnesses for Agency

ISSUES

Was the grievant's conduct such as to warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

Grievant filed a grievance from two Group II Written Notices – one for violating management directives,[2] and one for unsatisfactory work performance.[3] As the result of an accumulation of active written notices, grievant was removed from state employment effective October 3, 2006. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[4] The Department of Medical Assistance Services (Hereinafter referred to as "agency") has employed grievant as a health care compliance specialist for five years. Grievant has one prior active disciplinary action – a Group II Written Notice for violating management directives.[5]

In late July 2006, an employee observed grievant enter her supervisor's office and begin to look through paperwork on the supervisor's desk. When the supervisor returned to her office, the employee reported to the supervisor what she had seen. The supervisor reported the incident to her manager. Because

[2] Agency Exhibit 1. Group II Written Notice, October 3, 2006.
[3] Agency Exhibit 2. Group II Written Notice, October 3, 2006.
[4] Agency Exhibit 3. Grievance Form A, filed November 9, 2006.
[5] Agency Exhibit 8. Group II Written Notice, July 7, 2006.

the supervisor left for vacation the following day, the manager and the Human Resource Director jointly counseled grievant about the inappropriateness of looking through paperwork on a supervisor's desk. Grievant asserted that she had dropped off paperwork for the supervisor, however, upon returning to her office, the supervisor had checked her inbox and did not find any paperwork from grievant. They advised grievant that a repetition of such behavior could result in termination of employment.[6] Grievant apologized for her action.

Partially as a result of the above incident, the supervisor placed an inbox outside her office door and directed grievant and the other analysts to place all paperwork in the box outside her door. On September 18, 2006, the supervisor met with grievant to review her work schedule and directed grievant to place all work and letters in the box located outside the supervisor's office. Shortly thereafter, the supervisor left her office and closed the door as she left. When the supervisor returned to her office, she found grievant inside her office. Grievant asserted she had delivered documents to the supervisor and placed them in the inbox on the supervisor's desk.

Grievant had been counseled on numerous occasions to adhere to the work schedule of hours to which she was assigned. Grievant had over a long period of time developed a tardiness problem in arriving at work. She had also developed a habit of sometimes staying in the building for long periods of time after she had said she was leaving the building. In February 2006, the supervisor counseled grievant against this behavior and specifically established work hours of 9:30 a.m. to 6:00 p.m. During the spring of 2006 grievant was late to work by more than 15 minutes which resulted in two more verbal counseling sessions. On June 1, 2006, the Human Resource Director met with grievant, who requested to change her hours to 8:30 a.m. to 5:00 p.m. This was documented along with instructions that grievant was not to arrive late, leave early, or stay late unless she notified the department manager.[7] Despite these instructions, grievant continued to arrive late at work and leave work up to three hours after she said she was leaving, sometimes as late as 9:00 p.m.[8]

Because of these ongoing problems, the manager directed grievant to e-mail her upon arrival at work and again when leaving. Grievant complied with this request. After arriving at work, grievant would boot up her computer and the software programs, which took several minutes each day. The manager utilized the time the e-mail was sent as the time of grievant's arrival. This resulted in the supervisor thinking that grievant arrived later than she actually had.[9] Consequently, grievant believed she was being charged for more leave time than was appropriate when she was tardy arriving at work.

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[6] Agency Exhibit 1. Documentation of counseling, July 28, 2006. [Document's date is erroneously typed as 2005]

[7] Agency Exhibit 6. E-mail from Human Resource Director to grievant, June 1, 2006.

[8] Agency Exhibit 6. Attachment to Standards of Conduct Violation, July 7, 2006. See also Agency Exhibit 7, Memorandum from Manager to grievant, June 2, 2006.

[9] Agency exhibit 6. E-mail string, June 27/28, 2006.

On August 30, 2006, grievant submitted a letter from her physician who stated that grievant had migraine headaches on occasion and suggested that grievant be allowed to remain in her work space for up to 90 minutes after taking medication because she did not feel comfortable driving during that period.[10] The agency advised grievant that it could not accommodate the physician's suggestion if such occasions occurred near the end of the day because of potential liability concerns. Grievant was advised that she would have to arrange an alternate means of transportation because she would not be allowed to remain alone in the building after the close of business. When grievant incurred absences as a result of headaches, she was allowed to take leave as requested. Grievant retroactively requested FMLA leave for migraine headaches for eight days in August and September 2006 and was approved for FMLA leave.[11]

For several years, grievant had not been completing her hospital audit reviews on a timely basis; her performance evaluations for 2002, 2003 & 2004 include comments about this deficiency.[12] Although the quality of her reviews was satisfactory, she did not complete them within the required time frames. Grievant was assigned 22 hospitals, each of which grievant was to audit annually. For the one-year period from June 2005 through June 2006, grievant audited only ten hospitals. As a result, grievant's supervisor gave grievant an Interim Evaluation on June 30, 2006 pointing out that grievant had 12 more audits to complete.[13] The evaluation included a specific schedule that grievant was directed to comply with in order to complete all outstanding audits by September 15, 2006. Grievant agreed in writing to comply with the audit schedule. From July through September 2006, grievant completed the remaining 12 audits but did not complete them according to the agreed-upon schedule.[14]

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the

[10] Grievant Exhibit 10. Letter from physician, August 30, 2006.
[11] Grievant Exhibit 11. FMLA leave request, September 13. 2006.
[12] Grievant Exhibit 3, Section C, Performance Evaluation, October 4, 2002. See also: Grievant Exhibit 5, Section 3, Performance Evaluation, October 22, 2003; Grievant Exhibit 6, Section 2, Performance Evaluation, October 14, 2004.
[13] Agency Exhibit 5. Interim Evaluation Form, June 30, 2006. [NOTE: The supervisor attached a narrative of Notice of Improvement Needed/Substandard Performance to the evaluation form but the Notice was not on the prescribed form. Human Resources noticed this when reviewing grievant's file in September 2006 and required the supervisor to reissue the Notice on the prescribed form – See Grievant Exhibit 12, *Notice of Improvement Needed/Substandard Performance*, September 19, 2006. This was a procedural error and of no substantive importance in making this decision since grievant was fully apprised of her performance problems on June 30, 2006.]
[14] Agency Exhibit 6. E-mail from supervisor to grievant, July 17, 2006.

need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

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

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

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions the employee must present her evidence first and must prove her claim by a preponderance of the evidence.[15]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management promulgated *Standards of Conduct* Policy No. 1.60. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Policy No. 1.60 provides that Group II offenses 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 from employment.[16] Failure to follow a supervisor's instructions is a Group II offense. Inadequate or unsatisfactory work performance is a Group I offense.

The agency has shown that grievant failed to follow supervisory instructions. First, after being found looking through the supervisor's inbox in July 2006, grievant was counseled not just by her manager but also by the Human Resources Director and warned that any repetition could result in her discharge. In September, grievant entered her supervisor's closed office only minutes after being specifically directed to leave any paperwork in the box located outside the supervisor's office. Second, after unambiguous and repeated

[15] § 5.8, EDR *Grievance Procedure Manual*, effective August 30, 2004.
[16] Agency Exhibit 10. Department of Human Resource Management (DHRM) Policy 1.60, *Standards of Conduct*, effective September 16, 1993.

warnings to adhere to her scheduled hours, grievant continued to stay in the building into the evening, well past her scheduled departure time.[17] Finally, despite being directed in writing to complete hospital audits according to a specified list and schedule, grievant performed the audits out of order, completing some beyond the established deadlines. Grievant's continued refusal to comply with supervisory and management instructions constitutes a Group II offense.

Grievant argued that a reason for her delays in completing work was that interruptions from her supervisor interfered with her train of thought. Grievant's argument is not persuasive. All supervisors must, of necessity, speak with their subordinates about work matters; it is part and parcel of any work environment. Grievant has not shown that her supervisor spoke with her any more than the other compliance specialists. Grievant's work was not interrupted any more frequently than the average specialist yet the other specialists were able to complete their audit reviews on a timely basis.

The agency has not borne the burden of proof to show unsatisfactory work performance. The supervisor's September 2006 memorandum alleging substandard performance asserts that the June 30, 2006 interim evaluation documented "poor quality."[18] However, careful reading of the interim evaluation (and the attached notice of improvement) reveals no mention of the quality of grievant's work. The sole issue addressed was grievant's failure to *timely* complete hospital audits. In fact, grievant's manager testified that the quality of grievant's audits was not in question. In her September 22nd memorandum, the supervisor states that the reviews had many mistakes but no evidence of mistakes was offered as evidence.

Of course, it is correct that grievant's failure to complete audits timely and according to schedule can, in the absence of other factors, be considered unsatisfactory work performance. Similarly, failure to adhere to a schedule of work hours is unsatisfactory performance. However, these issues have already been addressed in the Group II Written Notice for failure to follow supervisory instructions and cannot, therefore, be readdressed in a separate concurrent disciplinary action.[19]

Mitigation

The normal disciplinary action for a Group II offense is a Written Notice, or a Written Notice and up to 10 days suspension. The normal disciplinary action for an accumulation of two or more Group II offenses is removal from state

[17] Agency Exhibit 6. E-mail from supervisor to grievant, August 24, 2006.
[18] Agency Exhibit 5. Memorandum from supervisor to file, September 22, 2006.
[19] Both failing to complete work timely and, failing to adhere to a work schedule would be Group I offenses IF they had occurred without prior specific supervisory instructions. However, when the problems are ongoing, and there has been repeated counseling and unambiguous instructions to correct the offensive actions, an employee's continued failure to comply with those instructions rises to the level of a Group II offense.

employment. The *Standards of Conduct* policy provides for the reduction of discipline if there are mitigating circumstances such as (1) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or (2) an employee's long service or otherwise satisfactory work performance. In this case, grievant does not have long state service. Her performance had been generally satisfactory through 2004 however, she has a prior active disciplinary action for unsatisfactory work performance. Based on the totality of the evidence, the hearing officer concludes that the agency's decision to terminate employment was within the tolerable limits of reasonableness.[20]

DECISION

The disciplinary action of the agency is modified.

The Group II Written Notice for inadequate and unsatisfactory work performance issued on October 3, 2006 is hereby RESCINDED.

The Group II Written Notice for continued violation of management directives, and grievant's removal from state employment due to the accumulation of disciplinary actions on October 3, 2006, are hereby UPHELD.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar days** from the date this 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. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

[20] *Cf.* Davis v. Dept. of Treasury, 8 M.S.P.R. 317, 1981 MSPB LEXIS 305, at 5-6 (1981) holding that the Board "will not freely substitute its judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 400
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 one copy of any appeal to the other party and one copy to the Director of the Department of Employment Dispute Resolution. 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.[21] 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.[22] You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution.

[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/David J. Latham

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David J. Latham, Esq.
Hearing Officer

[21] An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

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

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

RECONSIDERATION DECISION OF HEARING OFFICER

In re:

Case No: 8526-R

Hearing Date:	March 6, 2007
Decision Issued:	March 8, 2007
Reconsideration Decision Issued:	May 2, 2007

OPINION

The EDR director remanded this case and directed the hearing officer to consider the grievant's evidence regarding FMLA and ADA. At the outset, it should be noted that, in making the decision in this case, the hearing officer did consider all evidence presented by both parties. While the decision may not have addressed these issues as fully as other issues, the evidence was given consideration and assigned the evidentiary weight that it was due.

FMLA

The evidence demonstrated that grievant was under care by a physician for migraine headaches. Grievant did not demonstrate whether such care could be characterized as "continuing." Grievant provided no medical documentation showing how often she visited a physician or what care the physician provided. However, even if her care meets the definition of continuing care, the only medical documentation provided states that grievant had "migraine headaches and on occasion will have to take medications to relieve those headaches."[23] When grievant presented this note from the physician, the agency granted retroactive FMLA leave to cover her absences for eight days. The agency's evidence demonstrated that it attempted to accommodate grievant to the extent possible whenever she expressed concerns about her headaches. The agency

[23] Grievant Exhibit 10. Letter from physician, August 30, 2006.

changed grievant's working hours, at her request, on two occasions during the last three months of her employment.

Grievant has not shown that the agency denied her any leave that she requested for illness or under FMLA. She has not shown that her physician requested any leave that was not granted by the agency. Grievant has not shown that the agency used her medical leave as a negative factor in its decision to remove her from employment. Grievant is correct in observing that the temporal proximity between her FMLA leave and her removal from employment raises a question as to whether the agency's action was motivated by an unlawful motive. This possibility was considered and found wanting. The mere possibility that the agency could have been unlawfully motivated does not prove that it actually was so motivated.

To the contrary, the agency's testimony and evidence was preponderant in demonstrating that it had accommodated grievant to the extent possible in the past. An agency is not required to automatically accede to every physician suggestion for an accommodation unless the request is reasonable and capable of implementation. If a physician indicates that bright lights adversely affect an employee, it is reasonable to expect the agency either to dim the lights or remove light bulbs to accommodate an employee. If any employee requires an ergonomic keyboard to avoid carpal tunnel syndrome, it is reasonable to expect the agency to provide one. The request of grievant's physician that she be allowed to remain in her workspace for 90 minutes after taking medication was, by itself, reasonable and the agency agreed to allow grievant to do so providing the 90-minute period did not extend past the building closing hour. When grievant took her medication during the morning or early afternoon, the agency allowed grievant to remain in her workspace for 90 minutes before she went home.

However, grievant wanted the agency to also allow her to stay in the building past its closing hour. In other words, if she took medication at 4:30 p.m., she wanted to stay in the building until 6:00 p.m. The agency was concerned about doing so because grievant would be alone and if anything had happened to her, there would be no one to summon medical aid. The agency reasonably concluded that this was a potential liability situation to which it should not have to be exposed. Therefore, grievant had the option of leaving work and going home before taking her medication when headaches occurred late in the afternoon. Based on the totality of the evidence and testimony in this case, the hearing officer found the agency's accommodations to be reasonable and this one restriction to be equally reasonable, as well as consistent with FMLA law.

ADA

The evidence in this case does not support a finding that grievant has a disability as that term is defined by the ADA. The term "disability" means that the individual must have a physical or mental impairment that *substantially limits* one or more of the major life activities. To be "substantially limited" the grievant must

be *significantly restricted* in performing the activity. In this case, the applicable life activity is working. The evidence in the instant case does not demonstrate that grievant's occasional headaches are a *significant* restriction in performing her work. Many people experience headaches that preclude working for brief periods of time. But this does not constitute a significant restriction on the activity of working because such people are able to meet the minimum standards of their position over the course of time. Many people have occasional colds or influenza which may require them to use sick leave for one or more days per occasion. Colds or influenza are not classified as significant restrictions because they are occasional and do not restrict the individuals from performing their jobs at a satisfactory level over time.

Nonetheless, even if grievant's headaches could be considered a significant restriction, the evidence does not reflect that the agency discriminated against grievant for this reason. Certainly, there was no direct evidence that the agency discriminated on this basis and, in fact, witnesses testified that grievant's headaches were not a consideration in their decision to discipline grievant. Moreover, the agency proved that it had accommodated grievant on multiple occasions by changing her scheduled hours of work, granting retroactive FMLA leave, and allowing her to remain in her workspace for up to 90 minutes after taking medication before leaving to go home. As discussed *supra*, the agency granted all requested accommodations with the sole exception of allowing her to remain alone in the building after normal close of business. The agency has demonstrated that it was entirely reasonable to make this one exception to the accommodations it granted to grievant.

Mitigation

The hearing officer did consider grievant's headaches as a potentially mitigating circumstance but did not include a discussion in the mitigation section of the decision. The grievant presented very limited medical documentation (one brief letter from her physician) stating that she has occasional migraine headaches. Grievant's situation is no different from many other people who perform their work as directed despite occasional headaches, colds, flu, recurrent muscle spasms, or other conditions that may restrict their ability to work for brief periods of time but which do not constitute a *significant* restriction on the life activity of working. Moreover, the agency demonstrated that the reasons for the disciplinary action amounted to insubordinate behavior that easily outweighed any possible consideration that could be given to her medical condition. Grievant knowingly and deliberately ignored her supervisor's instructions not to enter her office, not to stay in the building past 5:00 p.m., and to perform audits in a specified order and by written deadlines. Such insubordinate behavior can in no way be attributed to grievant's headaches, but rather to her willful decision to not comply with supervisory instructions.

DECISION

The hearing officer has reconsidered the evidence and finds no basis to change the Decision issued on March 8, 2007 upholding the Group II Written Notice for continued violation of management directives and grievant's removal from state employment.

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 HRM, 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.[24]

S/David J. Latham

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David J. Latham, Esq.
Hearing Officer

[24] An appeal to circuit court may be made only on the basis that the decision was *contradictory to law,* and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Department of Medical Assistance Services

May 22, 2007

The grievant, through her representative, has requested an administrative review of the hearing officer's decision in Case No. 8526. The grievant is challenging the decision because she feels that there were various errors in the hearing decision that resulted in a decision that exceeded the limits of reasonableness. The agency head of the Department of Human Resource Management has requested that I respond to this appeal.

FACTS

Until she was terminated, the Department of Medical Assistance Services (DMAS) employed the grievant as a medical facilities inspector. The grievant was issued two Group II Written Notices on October 3, 2006, one for violating management directives and one for unsatisfactory work performance. She had another active Group II Written Notice which is not included in this appeal. Based on an accumulation of written notices, she was removed from state service, effective October, 3, 2006. She filed a grievance, and when she did not receive the relief she sought, she asked that her grievance be heard by an administrative hearing officer. In his decision, the hearing officer upheld the Group II Written Notice issued on October 3, 2006, for continued violation of management directives. He rescinded the Group II Written Notice for inadequate and unsatisfactory work performance also issued on October 3, 2006. The grievant remained terminated because she had one other active Group II Written Notice. The grievant appealed the hearing decision to the Department of Employment Dispute Resolution (EDR) and to the Department of Human Resource Management (DHRM). The EDR remanded the decision to the hearing officer for reconsideration. The hearing officer reconsidered the decision but the outcome did not change.

Concerning the Group II Written Notice issued on July 7, 2006, the agency stated:

> AnnGayle has been told numerous times that she must have set regular hours of work and that she cannot remain in the DMAS building past a specific time; she continuously violates this management directive. In addition, work performance is not meeting expectations as outlined in EWP.

The grievant did not challenge the above disciplinary action.

Concerning one Group II Written Notice dated October 3, 2006, the agency stated:

> AnnGayle continues to violate management directives. She was observed going through the direct supervisor desk on two occasions, even though supervisor had discussed this 30 minutes prior to observation.

The grievant had been directed not to enter the supervisor's office unless the supervisor was present. She, and other similarly situated employees, had been directed to place all materials intended for the supervisor in a box outside the door of the supervisor's office. The hearing officer upheld the agency's disciplinary action in this instance.

> Concerning the other Group II Written Notice dated October 3, 2006, the agency stated:
>
> AnnGayle continues to display inadequate and unsatisfactory work performance. Her work performance is not meeting expectations as outlined in her EWP. She has received numerous counseling sessions and her work remains substandard. AnnGayle received a Notice of Improvement Substandard Performance.

Based on the grievant not meeting the expectations as per her EWP, and later as per her work improvement plan, she was issued the Group II Written Notice. The hearing officer directed that the agency rescind this Group II Written Notice.

In summary, the grievant was removed from state employment based on an accumulation of written notices. While the hearing officer rescinded one of the Group II Written Notices she received on October 6, 2006, there were sufficient written notices to cause her to remain terminated.

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, this Department has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by this Agency or the agency in which the grievance is filed. Any challenge to the hearing decision must refer to a particular mandate or provision in policy. The 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 or provision.

Our review reveals that the issues raised by the grievant with DHRM – violation of FMLA and ADA, and consideration of her illness as a mitigating factor – were also raised in her appeal to EDR. That agency remanded the decision to the hearing officer who reconsidered the evidence but did not modify his position. Our review of the hearing decision revealed that the hearing officer did not violate any Department of Human Resource or Department of Medical Assistance policy when he made his determination in this case. Rather, it appears that the grievant disagrees with how the hearing officer

assessed the evidence, how much weight he accorded that evidence and the outcome of the hearing.

In summary, this Agency has determined that the hearing decision is consistent with state and agency policy. Therefore, we have no basis to interfere with the execution of this decision.

_____
Ernest G. Spratley