Department of
Employment Dispute Resolution

Rules for Conducting Grievance Hearings

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I. Overview of the Grievance Procedure

As provided in the employment dispute resolution statutes (Va. Code §§ 2.2-1000-1001; 3000-3008), the Commonwealth's policy, as an employer, is to encourage the resolution of employee problems and complaints through training, consultation, mediation, and the grievance procedure. The Department of Employment Dispute Resolution (EDR) is the state agency responsible for administering these programs.

The grievance procedure is a formal process through which most employees may seek resolution of a workplace dispute or concern.[1] An employee initiates a grievance by completing the Grievance Form A ("Form A") and submitting it to his or her immediate supervisor. The grievance can be initiated with a higher level supervisor if (i) the grievance alleges retaliation or discrimination by the immediate supervisor, (ii) the employee elects the expedited process, or (iii) the grievance challenges a disciplinary action initiated by someone other than the employee's immediate supervisor. The grievance then advances through the management resolution steps of the process.

The *Grievance Procedure Manual* lists the specific issues that qualify for hearing. Any issue not qualified by the agency head, the EDR Director, or the Circuit Court cannot be remedied through a hearing. Qualification determinations identify the issues to be resolved but do not determine the ultimate merits of the grievance.

II. Summary of the Hearing Officer's Duties and Powers

In addition to the actions listed in §5.7 of the *Grievance Procedure Manual*, the hearing officer is responsible for the following:

- Conducting the hearing in an equitable and orderly fashion.
- Recording the hearing verbatim, marking the exhibits received into evidence, and making them a part of the grievance record.
- Writing a decision that contains a statement of the issues qualified, findings of fact on material issues and the grounds in the record for those findings, conclusions of policy and law, any aggravating or mitigating factors that were pertinent to the decision, clearly defined order(s) and any recommendations when appropriate.
- Responding to requests for reopening the hearing or reconsideration of the decision.
- Revising the decision to conform to written policy if directed to do so by the Department of Human Resource Management.
- Correcting procedural errors regarding the conduct of the hearing, or revising the hearing decision to conform to the requirements of the grievance procedure, if directed to do so by the Director of the Department of Employment Dispute Resolution.

[1] Va. Code § 2.2-3001.

- In grievances challenging discharge, where the hearing officer orders reinstatement, awarding reasonable attorneys' fees, unless special circumstances would make an award unjust.

- Sending the grievance record, including the hearing tapes, to the grievant's agency when the decision is final.

- Avoiding the appearance of bias.

- Voluntarily disqualifying himself or herself and withdrawing from any case (i) in which he or she cannot guarantee a fair and impartial hearing or decision, (ii) when required by the applicable rules governing the practice of law in Virginia, or (iii) when required by EDR Policy No. 2.01, Hearing Officer Program Administration.

III. Planning for the Hearing

A. Scheduling

The hearing officer's appointment letter from EDR encloses an Appointment of Hearing Officer Form B ("Form B") listing the name, address, and telephone number of each party to the grievance. Following appointment, a hearing officer should promptly contact the parties to schedule the hearing and pre-hearing conference.

B. Time

The hearing is to be held and a written decision on the merits of a grievance issued no later than 35 calendar days after the date shown on the appointment letter, allowing for an additional three days from the date of appointment for mailing. The hearing officer may extend the 35-day time period for just cause – generally circumstances beyond a party's control such as an accident, illness, or death in the family. If an extension is granted, the reasons for the extension should be stated prominently in the written decision.

For circumstances within a party's control, the hearing officer should accommodate the party's scheduling wishes as flexibly as possible, but within the 35-calendar day period. For example, because mediation and/or settlement are generally within the control of the parties, failure to resolve the dispute through either of those processes usually does not constitute just cause for an extension of the hearing date. Thus, for instance, if settlement is being considered, the hearing date should be docketed as late within the 35-day period as possible to allow time for settlement negotiations. However, the hearing officer should advise the parties that absent an intervening event over which the parties have no control (e.g., the agency and the employee have reached a proposed settlement, but are awaiting any necessary Cabinet approval; accident; illness; death in family), the hearing *will* be conducted on the docketed date and that the parties should decide whether to settle before that date.

The hearing on a grievance may be divided into one or more sessions, but generally should last no longer than a total of 8 hours. A hearing may continue beyond 8 hours, however, if necessary to a full and fair presentation of the evidence by both sides.

C. Consolidation

At times, two or more pending grievances between the same employee and agency are qualified for hearing. At other times, two or more employees each file a grievance with the same agency challenging substantially similar management actions involving a single incident or set of circumstances. At the request of either party, or upon the EDR Director's own motion, the EDR

Director may order that grievances involving the same (1) factual background and (2) issues or policies be consolidated and heard before the same hearing officer at a single hearing, to be followed with a single decision addressing each of the qualified issues raised in the consolidated grievances. Where the grievances of two or more employees have been consolidated each employee shall receive a separate opinion. Consolidation of such grievances fosters consistent and efficient fact-finding, and thus a more equitable result.

If consolidation for hearing would be impracticable -- because, for example, the underlying grievances, while similar, are complex from a factual, legal or policy standpoint -- the EDR Director may direct that the grievances be heard by the same hearing officer, but with separate hearings and decisions.

Only the EDR Director or the Director's designee may order the consolidation of grievances for hearing. After a hearing officer has been appointed, EDR will not accept requests for consolidation for hearing except under extraordinary circumstances.

D. Pre-hearing Conference

The hearing officer shall schedule a pre-hearing conference, in person or by telephone. A pre-hearing conference presents an opportunity to improve the management of the hearing through prior discussion and the resolution of procedural and evidentiary issues. During the pre-hearing conference, the hearing officer may assist the parties by:

- Explaining procedures that will be followed at the hearing; establishing the date, time, and location of the hearing*;* and confirming the roles of the parties, their representatives, and the hearing officer.
- Clarifying the issue(s) qualified for the hearing.
- Preparing the parties for the presentation of evidence at the hearing, particularly in light of the inapplicability of the technical rules of evidence.
- Ruling on preliminary procedural and evidentiary requests.
- Encouraging the parties to stipulate to facts or exhibits not in dispute and the applicable policies or laws.
- Issuing, upon request of the parties, orders for the appearance of witnesses at hearing and the production of documents.
- Establishing the date for the exchange of witness lists and documents, and ruling on any objections to these.
- Explaining the standard of proof to be applied and the order of presentation for each party.
- Affording the parties the opportunity, upon request, to review the grievance record for completeness and accuracy.

Importantly, too, a pre-hearing conference allows the hearing officer to instill confidence in the parties that their hearing officer is an independent and neutral decision-maker. In this regard, it is essential that the hearing officer establish and maintain a tone of impartiality. Hearing officers should bear in mind, during the pre-hearing conference and throughout the hearing process, that an idle gesture or remark, or an *ex parte* conversation (meaning that one party is absent from the discussion), can be perceived as partiality, no matter how necessary and proper such communication may have been.

E. Orders

The hearing officer's authority to order discovery (procedures used by either party to prepare for the hearing by obtaining information about the case from the other party) is more limited than that of a court. For example, the grievance procedure does not require, and hearing officers may not order (without both parties' agreement) discovery by (i) witness deposition (testimony recorded and provided under oath prior to the hearing); (ii) interrogatories (written questions about the case submitted by either party to the other party or witness); or (iii) requests for admissions (written statements concerning the case submitted by one party to the other, who then admits or denies each statement).

The hearing officer may, however, issue an order for the production of documents or the appearance of witnesses at hearing. Orders should be issued in the name of the hearing officer and mailed by the hearing officer to the appropriate individual(s), with a copy to each party. The hearing officer can ask the agency to schedule requested employee witnesses to a shift compatible with the date, time, and location of the hearing. If this unduly burdens the business of the agency, the hearing can be continued to another day, witnesses can testify by phone, or the hearing may be moved to a location at the work site. The agency shall make available for hearing any employee ordered by the hearing officer to appear as a witness. Examples of the recommended format and content of orders are included in Appendix A. If a party believes that a hearing officer's order is out of compliance with the grievance procedure, the party may request a compliance ruling from the EDR Director in accordance with the *Grievance Procedure Manual*.

Production of Documents: In considering a party's request for an order for the production of documents, hearing officers should bear in mind that under the employment dispute resolution statutes, absent just cause, all documents, as defined in the Rules of the Supreme Court of Virginia,[2] relating to actions grieved "shall be made available" upon request from a party to the grievance, by the opposing party. EDR's interpretation of the mandatory language "shall be made available" is that absent just cause (e.g., legal privilege, undue burden, compelling security reasons), all relevant grievance-related information *must* be produced under the grievance statutes. Accordingly, an agency's discretion under the Freedom of Information Act or other statute to withhold certain documents from an employee does not necessarily extend to the grievance process.

Documents pertaining to non-parties that are relevant to the grievance must be produced in such a manner as to preserve the privacy of the individuals not personally involved in the grievance. Also, a party is not required to create and produce a document if the document does not exist.

IV. The Hearing

Grievances focus on personnel matters impacting the privacy of the individuals involved, as well as the agency's personnel practices. To protect the privacy of all concerned, grievance hearings are not public hearings.

A. Persons Present

At the hearing officer's discretion, a hearing may proceed in the absence of one of the parties; a hearing so conducted will be decided on the grievance record and the evidence presented at the

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[2] Writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form. Supreme Court of Virginia Rule 4:9(a).

hearing. The hearing officer shall maintain order, decorum and civility during the hearing and shall have the authority to eject disruptive individuals from the hearing room.

Parties: The parties to the grievance are the employee and the agency. The agency may select an individual to serve in its capacity as a party. The fact that the individual selected by the agency is directly involved in the grievance or may testify is of no import. Each party may be present during the entire hearing and may testify.

Representatives: Parties may be represented by legal counsel, another individual of choice, or themselves. The representative, or the party without representation, may examine or cross-examine witnesses and present evidence. If a party is represented by more than one individual, however, only one representative may examine an individual witness.

Witnesses: Each party may call witnesses to testify at the hearing. A non-party witness may be present in the hearing room only while testifying.

Aides/Interpreters: An impaired party, representative, or witness may use an aide or an interpreter throughout the time that the individual is in the hearing room. Likewise, anyone not fluent in English may use a language interpreter. It shall be the agency's responsibility to secure the services of any necessary aides/interpreters and to bear all associated costs.

Observers: The hearing officer has the authority to determine whether observers may be present during the hearing. Observers include anyone who is not a party, representative, testifying witness, or aide/interpreter (e.g., friends, acquaintances, co-workers, or the agency's personnel officer). In deciding whether observers may attend the hearing, the hearing officer should recognize that non-parties might inhibit the full disclosure of information. The confidentiality of the parties and others not directly involved in the grievance must be preserved. Accordingly, at the request of one or both of the parties, the hearing should be closed to all persons who are not direct participants in the hearing. Because EDR is charged with oversight of the grievance process, the EDR Director or his designee may observe any hearing without first seeking or receiving permission to do so from the hearing officer.

B. Recording the Hearing

The hearing must be tape recorded verbatim to create a record should there be an administrative or judicial review of the hearing decision. EDR's full-time hearing officers will provide their own recording equipment, with the agency providing the tapes. For hearings conducted by private sector part-time hearing officers, the agency has the responsibility to arrange for recording equipment. The equipment must be in proper working order and produce a clearly audible recording. It is the hearing officer's responsibility to record the hearing and to retain the tapes until a final decision is rendered. Parties may have a transcript produced at their own expense by ordering a duplicate copy of the hearing tapes from the Hearing Division's Administrative Assistant and engaging the services of a court reporter.

C. Conducting the Hearing

The hearing must be conducted in an orderly, fair, and equitable fashion, pursuant to the provisions of the *Grievance Procedure Manual*. Because the grievance process is intended for use by unrepresented parties and lay advocates, the hearing officer must establish an informal, non-judicial hearing environment that is conducive to a free exchange of information and the development of the facts. The hearing officer is responsible for marking the exhibits received into evidence and making them a part of the grievance record. In addition, during the course of the hearing, the hearing officer may question the witnesses and, if essential to the resolution of a material issue in the case, request a party to provide further documentation. Hearing officers should exercise this discretion sparingly, however. The tone of the inquiry, the construct of the question, or the frequency of questioning one party's witnesses can create an impression of bias, so care should be taken to avoid appearing as an advocate for either side.

Each party may make opening and closing statements. In disciplinary actions and dismissals for unsatisfactory performance, the agency must present its evidence first and must show by a preponderance of the evidence (in other words, that it is more likely than not) that the action was warranted and appropriate under the circumstances. In all other actions, the employee must present evidence first and must prove his or her claim by a preponderance of the evidence.

If procedural or compliance issues arise, the hearing officer may contact EDR's Director or the Hearing Officer Program Coordinator for general guidance.

D. Admitting Evidence

The grievance hearing is not intended to be a court proceeding. Therefore, the technical rules of evidence do not apply and most probative evidence (any evidence that tends to prove that a material fact is true or not true) is admitted. However, the liberal admission of evidence should not be construed as a retreat from the underlying principles and reasoning behind rules of evidence. The purpose of liberal admission is to allow the introduction of evidence that might not be admissible under evidentiary rules, not to encourage the substitution of less reliable evidence for more reliable evidence. For example, because documents are typically the best evidence of their contents, when a party seeks to establish the contents of an available document, the party should introduce the document as evidence rather than relying solely upon an inherently less reliable form of evidence such as recollected testimony as to the document's contents. Because of the liberal admission policy, the hearing officer must exercise great care when considering and weighing the reliability of the evidence received.

The hearing officer may exclude evidence that is irrelevant, immaterial, insubstantial, privileged, or repetitive. Unfounded objections to the admission of evidence by either party must be discouraged, however. An unrepresented party can become flustered when this occurs and may not know how to rehabilitate the testimony of the witness after such objections. If a representative or a party disrupts the hearing with repeated objections or is argumentative, the hearing officer may declare a recess to talk about the standard of professional conduct expected of representatives in the hearing.

Pursuant to § 8.01-418.2 of the Code of Virginia, the results of polygraph tests are not admissible as evidence in a grievance hearing over the objection of any party except as to disciplinary or other actions taken against a polygrapher. Pursuant to § 60.2-623.B of the Code of Virginia, determinations or decisions of the Virginia Employment Commission (VEC) are not admissible in grievance hearings. Information provided to the VEC is likewise not admissible at a grievance hearing unless the information was otherwise discoverable and could have been obtained through other means.

E. Witness Issues

The hearing officer is responsible for limiting the number of witnesses called by either party whenever the testimony would be merely cumulative. The purpose of this power is to ensure the speedy and efficient conduct of the hearing. However, when limiting the number of witnesses, the hearing officer should be careful not to exclude testimony that may be of greater weight or probative value than that already presented.

Sometimes a party may wish to present the testimony of an individual who is in the physical custody of the state. There is no law or policy that requires the agency to produce that individual to testify as a witness. Nevertheless, testimony from such a person may be important. If that is the case, the hearing officer should weigh the costs associated with transporting the witness to the hearing location, as well as any security or health risks that could arise as a result of such an order. If transporting the witness to the hearing is not feasible, testimony can be received via

conference call or by conducting all or part of the hearing at the institution or building where the witness is housed. Another alternative is to admit a recorded statement from the witness.

There are several concerns regarding the testimony of those who are mentally incapacitated. Because there is a strong interest in protecting such a witness from aggressive direct or cross-examination, the hearing officer may choose to personally examine such a witness, as is done by the courts in competency proceedings, instead of allowing the parties to do so. Although the competency of a witness may be called into question, mental incapacity does not automatically disqualify a witness.[3] A witness need only have personal knowledge of the event, and be able to perceive, remember, recognize the duty to tell the truth, and comprehend and respond to questions in an understandable manner.

The matter before the hearing officer may involve an individual who is not under the control of either party, such as a discharged patient or a customer of the agency. If the party has made a good faith effort to produce the witness, or if there are sound reasons for not requesting the presence of the witness, the hearing officer may admit any recorded statement or official report previously made by the unavailable witness.

F. Documents

The *Grievance Procedure Manual* does not require the use of affidavits or sworn statements at hearing. However, the formality of a recorded statement may affect the evidentiary weight that the hearing officer accords to the statement. If the hearing officer prefers a certain formality to recorded statements used in lieu of testimony, he or she should so inform the parties during the pre-hearing conference, and should explain to the parties how formality could affect the weight that will be given to such statements.

When a recorded statement is offered into evidence, the burden is on the party introducing the document to establish the truth of the facts contained in that statement. The truth of the facts can be established by direct or circumstantial evidence.

Personally identifiable information regarding individuals not party to the proceeding is often deleted from investigative notes or agency records. If a party objects to such deletions, or if the hearing officer deems that the deleted information is essential, the hearing officer should work with the parties to obtain the information in a format that does not violate the privacy rights of non-parties. If this is not feasible or fair, the hearing officer should exercise care in preserving confidentiality when non-party records, especially medical records, are exchanged or admitted into evidence.

V. The Decision

A. Deliberations

After the hearing, the hearing officer should deliberate on the evidence admitted at the hearing and arrive at a decision in an expeditious fashion. If additional information or clarification is required after the hearing, both parties must be present to hear the information, unless one of the parties elects not to be present.

B. Use of Adverse Inferences

Although a hearing officer does not have subpoena power, he has the authority to draw adverse factual inferences against a party, if that party, without just cause, has failed to produce relevant

[3] *See* U.S. v. Lightly, 677 F.2d 1027 (4th Cir. 1982).

documents or has failed to make available relevant witnesses as the hearing officer or the EDR Director had ordered. Under such circumstances, an adverse inference could be drawn with respect to any factual conflicts resolvable by the ordered documents or witnesses. For example, if the agency withholds documents without just cause, and those documents could resolve a disputed material fact pertaining to the grievance, the hearing officer could resolve that factual dispute in the grievant's favor.

C. Written Decision

A written decision should be issued no later than 35 calendar days after the date shown on the hearing officer's appointment letter, allowing for an additional three days from the date of appointment for mailing. The decision must resolve the grievance on the merits of the substantive issue(s) qualified and not on procedural issues. Issues that have not been qualified in the grievance assigned to the hearing officer are not before that hearing officer, and may not be resolved or remedied. Decisions should be brief but thorough, and written as soon as possible after the hearing when the testimony of the witnesses is fresh.

The decision must contain a statement of the issues qualified; findings of fact on material issues and the grounds in the record for those findings; any related conclusions of law or policy; any aggravating or mitigating circumstances that are pertinent to the decision; and clearly identified order(s) specifying whether the agency's action has been upheld, reversed, or modified, and clearly listing all required actions and any recommended actions. Finally, the decision must include, within its text, information regarding a party's right to appeal the decision.

EDR publishes all hearing decisions on its web site in a searchable format. In an effort to protect personal privacy, the decision itself must not reference any individual by name. The hearing officer must send his or her decision with a cover letter to the parties by certified mail, return receipt requested. In the alternative, the hearing officer may e-mail or fax the decision to the parties so long as proof of receipt is established. The decision must also be provided to the EDR Director by first class U.S. mail and in an electronic format, either "text only" or Microsoft® Word. The electronic version may be sent on a 3-½ floppy disk or as an e-mail attachment to administrator@edr.virginia.gov. See Appendix B for further information regarding EDR's policy on drafting and publishing hearing decisions.

VI. Scope of Relief

A. General

Under the employment dispute resolution statutes, management is reserved the exclusive right to manage the affairs and operations of state government. In addition, challenges to the content of state or agency human resource policies and procedures are not permitted to advance to a hearing. Thus, in fashioning relief, the reasonableness of an established policy or procedure itself is presumed, and the hearing officer has no authority to change the policy, no matter how unclear, imprudent or ineffective he believes it may be.[4] Further, a hearing officer is not a "super-personnel officer."[5] 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.

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[4] *Cf.* Pulliam v. Coastal Emergency Services, 257 Va. 1, 9, 509 S.E.2d 307, 311 (1999)(citing to the "well-established principle" that all statutes are presumed to be constitutional, and that unless "plainly repugnant" to the state or federal constitution, the wisdom or propriety of a statute is for the legislature, not the courts, to decide).

[5] *Cf.* DeJarnette v. Corning, 133 F.3d 293, 299 (4th Cir. 1998)("Title VII is not a vehicle for substituting the judgment of a court for that of the employer").

In general, the hearing officer is not limited to the specific relief requested by the employee on the Form A, as long as the relief granted is consistent with law and policy. 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; he may also order the reinstatement of a grievant terminated for disciplinary reasons with partial or full backpay for the period of termination. In matters not involving discipline, the scope of relief available through the grievance procedure is more limited. For example, an award of back pay may be permissible only if under the facts, established policy, and law an entitlement to compensation is found; further, in such a case, the amount of awarded back pay would be limited to the 30 calendar day statutory period preceding the initiation of the grievance.[6]

Hearing officers should be aware that as of 2000, a party may petition the circuit court for an order implementing a hearing officer's order or *recommendation.* Therefore, hearing officers should be cognizant that, as a practical matter, their recommendations may have the same force and effect as their orders. If a recommendation is made, the hearing decision should clearly identify it as such and distinguish it from an order. Absent a court order, an agency is not compelled to act upon any recommendation. All remedies provided by a hearing officer in his decision, whether ordered or recommended, must conform to law and policy.

B. Disciplinary Actions

Under the *Standards of Conduct,* offenses are grouped into three levels according to the severity of the behavior. Group I offenses include behavior that is the least severe in nature but requires correction to maintain a productive and well-managed work force. Group II offenses include behavior that is more severe in nature and may result in up to 10 days of suspension without pay. Group III offenses include behavior of such a serious nature that it normally warrants discharge. As the *Standards of Conduct* states, the listed offenses are not "all inclusive, but are intended to be illustrative of the minimum expectations for acceptable work performance and workplace behavior." Accordingly, agencies may issue a Written Notice for an offense not specifically listed in the *Standards of Conduct*. In all circumstances, however, the employee must receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge.[7]

Framework for Determining Whether Discipline was Warranted and Appropriate

The responsibility of 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.[8] To do this, the hearing officer reviews the facts de novo (afresh and independently, as if no determinations 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, (iii) whether the agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense) 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.

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[6] Compare Brinkley-Obu v. Hughes Training, Inc., 36 F.3d 336 (4th Cir. 1994)(in context of a Title VII or Equal Pay Act violation, relief is available only for the designated statutory time) with Va. Code §2.2-3003(C)(in context of on employee grievance, designated time to file is 30 calendar days).

[7] O'Keefe v. U.S.P.S., 318 F.3d 1310, 1315 (Fed. Cir. 2002).

[8] *Grievance Procedure Manual*, § 5.8.

In 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 operations.[9] 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.[10] (See Mitigating and Aggravating Circumstances below.)

Sometimes an employee may experience an "adverse employment action" (e.g., discharge, transfer, demotion, etc.)[11] that is not accompanied by a formal Written Notice as contemplated by the *Standards of Conduct*, but which may have been taken for essentially disciplinary reasons -- in other words, to correct or penalize behavior by enforcing applicable standards of conduct or performance. If the grievance is qualified, the grievant will have the burden of proving at hearing that the contested adverse employment action, though unaccompanied by a formal Written Notice, was nevertheless taken for disciplinary reasons. If the hearing officer finds that the contested action was disciplinary, the agency will have the burden of proving that the action, though disciplinary, was warranted. As with formal disciplinary actions, the hearing officer shall consider mitigating and aggravating circumstances, giving appropriate deference to the agency's right to manage its affairs.

1. Mitigating and Aggravating Circumstances: The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances," such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance." A hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation.

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[9] *See* LaChance v. M.S.P.B., 178 F.3d 1246; 1999 U.S. App. LEXIS 9711 (Fed. Cir. 1999) the court noted that "it is a well-established rule of civil service law that the penalty for employee misconduct is left to the sound discretion of the agency." La Chance 178 F.3d at 1251, citing Miguel v. Department of the Army, 727 F.2d 1081, 1083 (Fed. Cir. 1984). *See also* Beard v. General Serv. Admin., 801 F.2d 1318 (Fed. Cir. 1986) ("[T]he employing (and not the reviewing) agency is in the best position to judge the impact of employee misconduct upon the operations of the agency . . .") Beard, 801 F.2d at 1321; Hunt v. Department of Health and Human Servs., 758 F.2d 608, 611 (Fed. Cir. 1985) ("Determination of an appropriate penalty is a matter committed primarily to the sound discretion of the employing agency.").

[10] *Cf.* Davis v. Department of Treasury, 8 M.S.P.R. 317, 1981 MSPB LEXIS 305, at 5-6 (1981)(the Merit Systems Protection Board (MSPB) "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.'" Davis at 5-6. *See also* Mings v. Department of Justice, 813 F.2d 384, 390 (Fed. Cir. 1987)(The MSPB "will not disturb a choice of penalty within the agency's discretion unless the severity of the agency's action appears totally unwarranted in light of all factors.")

[11] *See* Boone v. Goldin, 178 F.3d 253 (4th Cir. 1999) (under Title VII, an "adverse employment action" typically requires discharge, demotion, or reduction in grade, salary, benefits, level of responsibility, title, or opportunities for future reassignments or promotions). *See also* Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir. 2001)(citing Munday v. Waste Mgmt. of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997)).

Examples of "mitigating circumstances" include:

- Lack of Notice: The employee did not have notice of the rule, how the agency interprets the rule, and/or the possible consequences of not complying with it. However, an employee may be presumed to have notice of written rules if those rules had been distributed or made available to the employee. Proper notice of the rule and/or its interpretation by the agency may also be found when the rule and/or interpretation have been communicated by word of mouth or by past practice. Notice may not be required when the misconduct is so severe, or is contrary to applicable professional standards, such that a reasonable employee should know that such behavior would not be acceptable.
- Inconsistent Application: The discipline is inconsistent with how other similarly situated employees have been treated.
- Improper Motive: The discipline was tainted by improper motive, such as retaliation or discrimination.

2. Accumulated Discipline: Under the *Standards of Conduct*, Written Notices remain "active" for a specified period of time and may be used, while "active," in conjunction with other disciplinary actions by the agency as the basis for suspending, transferring, demoting, or terminating an employee. Because the active life of a Written Notice is prescribed by policy, the hearing officer cannot change the length of the active life as a means of reducing the discipline.

If the grievance involves an agency action based on accumulated active Written Notices, the hearing officer must ascertain from the agency whether any of the other Written Notices supporting the action are being grieved. If so, final disposition of the grievance before the hearing officer must wait until the grievances on the other Written Notices have been decided. The hearing officer should determine immediately the appropriate level of discipline (Group I, II, or III) for the grievance before him or her, but must await the outcome of the other grievance(s) to determine whether there are sufficient cumulative active Written Notices to support the agency's disciplinary action.

3. Suspension and Termination: The *Standards of Conduct* provides maximum limits on the number of days of suspension associated with a disciplinary action. For example, in order to sustain a full 30-workday suspension, a Group III Written Notice or two active Group II Written Notices or four active Group I Written Notices are necessary. The hearing officer has authority to order a lesser, but not greater, number of days of suspension. [12]

An employee may be terminated for misconduct based on the receipt of a single Group III Written Notice or for the accumulation of active Group I, II, or III Written Notices. A hearing officer may order that the employee be reinstated while upholding the level of the Written Notice, however, the hearing officer must give deference to the agency's decision to discharge as opposed to suspend an employee. The hearing officer may mitigate discharge to a suspension only if the discharge exceeds the limits of reasonableness. If the hearing officer rescinds or reduces a Written Notice and the employee's total accumulated active Written Notices are insufficient to sustain a termination, the employee must be reinstated.

4. Back Pay: For grievances involving discipline, back pay may be awarded, and must be considered, if the Written Notice before the hearing officer resulted in a total or partial loss of pay, such as through a termination or suspension. Full, partial, or no back pay for the affected period

[12] The *Standards of Conduct* limits this discretion: if the employee is exempt from the FLSA (Fair Labor Standards Act), the suspension must be in multiples of a "workweek," which is generally five consecutive days. This limitation does not apply to safety rule violations. *See Standards of Conduct*, §VIII.7.

may be ordered. Other benefits (e.g., earned leave) are restored for the same period and in the same proportion as the back pay award. The hearing officer has no authority to award front pay, damages, or in non-discharge grievances, attorneys' fees.

If back pay is awarded, it must be offset by interim earnings. Interim earnings include unemployment compensation and other income earned or received to replace the loss of state employment. Thus, if an employee had previously engaged in gainful employment in addition to his or her state employment, the earnings from this ancillary employment would not count as interim earnings.

The authority of the hearing officer in determining the amount of back pay in a disciplinary matter is limited by the accumulated amount of discipline. For example:

- If a Written Notice is rescinded or reduced, and the total accumulated discipline is insufficient to support a suspension of any length, full back pay must be awarded.
- If there are insufficient active Written Notices remaining to support a termination, full or partial back pay must be ordered. The amount of back pay that may be withheld is limited to the period of suspension allowed by the accumulated Written Notices, as delineated in the *Standards of Conduct.* For example, if a Group III Written Notice is reduced to a Group II and there are no other active accumulated Written Notices, 10 days of back pay is the maximum that can be withheld.
- No back pay can be ordered if the termination or suspension without pay resulted from a Written Notice that is not before the hearing officer.

5. Reinstatement: Reinstatement means an order returning the employee to the position he or she formerly held prior to a termination, demotion, or transfer. In some circumstances, reinstatement to the exact same position may not occur. Where the position no longer exists, reinstatement means returning the employee to an objectively similar position, with all incumbent rights at the time of the removal.[13]

C. Non-disciplinary Actions

As with disciplinary actions, all remedies for non-disciplinary actions must conform to law and policy. (See above Section VI.A, regarding orders and recommendations.)

1. Misapplication or Unfair Application of Policy: If the issue of policy misapplication is qualified for hearing, and the hearing officer determines that a policy mandate has been misapplied or applied unfairly, the hearing officer may order the agency to reapply the policy from the point at which it became tainted, including, where written policy mandates a certain level or type of compensation, making an appropriate upward pay adjustment for the 30 calendar day statutory period preceding the initiation of the grievance. Further, where written policy places specific limitations on removing an employee from his or her position, a hearing officer may order reinstatement when those limitations had not been observed.

Remedies that conform to law and policy for misapplications or unfair applications of policy may include:

- A classification review of a position by the agency in accordance with policy (not the award of any particular classification).

[13] *See* Virginia Department of Taxation v. Daugherty, 250 Va. 542, 463 S.E.2d 847 (1995).

- A repeat of the selection process by the agency in accordance with policy (not the selection of any particular employee for the job).
- Compensation by the agency of a nonexempt employee for past unpaid overtime work (either at time-and-one-half if the employee has actually worked over 40 hours, or straight time if the hours actually worked do not exceed 40 hours because the employee was on scheduled leave).
- Compensation by the agency of a promoted employee in accordance with policy.
- Compensation by the agency of an employee whose position changed to a different role in a higher pay band, if mandated by policy (e.g. bringing salary up to the minimum of the new pay band).
- Having the agency advise the employee of the potential for further training and/or counseling services (not requiring the agency to provide a service or requiring the employee to participate).

2. Arbitrary or Capricious Performance Evaluation: The *Grievance Procedure Manual* defines "arbitrary or capricious" as "in disregard of the facts or without a reasoned basis."[14] If a contested performance evaluation is qualified for hearing, and a hearing officer finds that it is arbitrary or capricious, the only remedy is for the agency to repeat the evaluation process and provide a rating with a reasoned basis related to established expectations. The remedy cannot include an award of any particular rating.

3. Retaliation/Discrimination: If the issue of retaliation or discrimination is qualified for hearing and the hearing officer finds that it occurred, the hearing officer may order the agency to create an environment free from discrimination and/or retaliation, and to take appropriate corrective actions necessary to cure the violation and/or minimize its reoccurrence. The hearing officer should avoid providing specific remedies that would unduly interfere with management's prerogatives to manage the agency (e.g., ordering the discipline of the manager for discriminatory supervisory practices). Bear in mind that any relief designated as a "recommendation" may, as the result of a circuit court's implementation order, have the same force and effect as an order. See above Section VI.A, regarding orders and recommendations.)

D. Attorneys' Fees

In grievance filed on or after July 1, 2004, an employee who is represented by an attorney and substantially prevails on the merits of a grievance challenging his or her **discharge** is entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust. For such an employee to "substantially prevail" in a discharge grievance, the hearing officer's decision must contain an order that the agency reinstate the employee to his or her former (or an

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[14] *See also* Norman v. Dept. of Game and Inland Fisheries (Fifth Judicial Circuit of Virginia, July 28, 1999)(Delk, J.). The court's opinion in *Norman* indicates that an arbitrary or capricious performance evaluation is one that no reasonable person could make after considering all available evidence, and that if an evaluation is fairly debatable (meaning that reasonable persons could draw different conclusions), it is not arbitrary or capricious. Thus, mere disagreement with the evaluation or with the reasons assigned for the ratings is insufficient to sustain an arbitrary or capricious performance evaluation claim as long as there is adequate documentation in the record to support the conclusion that the evaluation had a reasoned basis related to established expectations.

objectively similar) position. Attorneys' fees are not otherwise available for employees who prevail at grievance hearings.

When the hearing officer issues the initial decision ordering reinstatement, the decision is considered an "original" decision as described in §7.2(a) of the *Grievance Procedure Manual* and §VII(A) of these *Rules for Conducting the Grievance Hearings (Rules)*. Thus, within 15 calendar days of the issuance of the original decision, either party may seek administrative review in accordance with §7.2(a) and §VII(A). In addition, counsel for the grievant shall ensure that the hearing officer *receives*, within 15 calendar days of the issuance of the original decision, counsel's petition for reasonable attorneys' fees. The hearing decision shall inform grievant's counsel of the obligation to timely submit the fees petition.

The fees petition shall include an affidavit itemizing services rendered, the time billed for each service, and the attorney's customary hourly rate not to exceed $120 per hour ($144 per hour if the attorney's practice is located in Northern Virginia.)[15] A copy of the fees petition must be provided to the opposing party at the time it is submitted to the hearing officer. The opposing party may contest the fees petition by providing a written rebuttal to the hearing officer.

If neither party requests an administrative review, the hearing officer must issue an addendum to the decision denying or awarding, in part or in full, the fees requested in the petition and should do so no later than 30 calendar days from the date of the initial decision.

If either party has timely requested an administrative review as described in §VII(A) of the *Rules*, all other administrative reviews must be issued (including any reconsidered decision by the hearing officer) before the hearing officer issues the fees addendum. The hearing officer should issue the addendum within 15 calendar days of the issuance of the last of the administrative review decisions.

Within 10 calendar days of the issuance of the fees addendum, either party may petition the EDR Director for a decision solely addressing whether the fees addendum complies with the *Grievance Procedure Manual* and these *Rules.* Once the EDR Director issues a ruling on the propriety of the fees addendum, and if ordered by EDR, the hearing officer has issued a revised fees addendum, the original decision becomes "final" as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

VII. Challenges to the Hearing Officer's Decision

A hearing decision must be consistent with law and policy. A 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 of Hearing Decisions

A hearing officer's original decision is subject to three types of administrative review. A party may make more than one type of request for review. However, all requests for review must be made in writing, and received by the administrative reviewer, within 15 calendar days of the date of the original hearing decision. A copy of the requests must be provided to the other party.

[15] Northern Virginia includes the counties of Fairfax, Arlington, Prince William, and Loudon, and the cities of Alexandria, Fairfax, Falls Church, Manassas, and Manassas Park. Beginning in July 2005, the EDR Director will review both hourly rates on an annual basis in light of any needed cost of living adjustments.

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

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

3. **A challenge that the hearing decision does not comply with the grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the hearing decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, Main Street Centre, 600 East Main Street, Suite 301, Richmond, VA 23219 or faxed to (804) 786-0111.

If multiple requests for administrative review are pending, a hearing officer's decision on reconsideration or reopening should be issued before any decisions are issued by the Director of Human Resources Management or the EDR Director.

The hearing officer should issue a written decision on a request for reconsideration or reopening within 15 calendar days of receiving the request.

The Director of Human Resources Management and the Director of EDR should issue a written decision on a request for administrative review within 30 calendar days of receiving the request or within 15 calendar days of receiving the hearing officer's decision on a request for reconsideration or reopening, whichever is longer. If the Director of Human Resources Management or the Director of EDR orders the hearing officer to revise his decision, he should issue a written decision within 15 calendar days of receiving the order.

B. Final Hearing Decisions[16]

A hearing officer's decision becomes a final hearing decision, with no further possibility of 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 the Department of Human Resources Management, the hearing officer has issued a revised decision.

Once the hearing decision becomes final, the hearing officer must forward the hearing record to the agency. The record consists of:

- The original Form A.
- Attachments to the Form A.

[16] *See* exception for discharge hearings where grievant is reinstated and awarded attorneys' fees at §VI(D) of these *Rules* and §7.2(e) of the *Grievance Procedure Manual*.

- Qualification determinations by the agency head, the EDR Director, or the Circuit Court.
- Tape recording of the hearing (verbatim).
- Exhibits either proffered or received in evidence.
- Hearing officer's decision(s), including any original, revised, or reconsidered decision and the attorneys' fees addendum, if applicable.
- Administrative challenges to the decision and fees addendum, and decisions on those challenges by the hearing officer, Director of the Department of Human Resource Management, or EDR Director.

C. Judicial Review of Final Hearing Decisions

Once a hearing decision becomes final (see above Section VII.B), either party may seek review by the circuit court hearing jurisdiction in the locality in which the grievance arose on the ground that the final hearing decision is contradictory to law. The court shall award reasonable attorneys' fees and costs to the employee if the employee substantially prevails on the merits of the appeal. Either party may appeal the final decision of the circuit court to the Court of Appeals pursuant to Virginia Code § 17.1-405.

D. Implementation of Final Hearing Decisions

Once a hearing decision becomes final (see above Section VII.B), either party may petition the circuit court having jurisdiction in the locality in which the grievance arose for an order requiring implementation of that decision. The court shall award reasonable attorneys' fees and costs to the employee if the employee substantially prevails on the merits of the implementation petition.

VIII. Billing by Part-Time Hearing Officers

All part-time, private sector hearing officers must send their bills for hearing services directly to the agency, with a copy to EDR. The bills are to adhere to the flat rate fee schedule established for full-time and part-time hearing officers. The fee amount covers all services and disbursements incurred in conducting an employee grievance hearing, including travel, trip, and office expenses. Grievances that are settled or concluded prior to the hearing are billed on a prorated basis-

- 10% after the appointment and opening of a file.
- 25% after the prehearing conference is scheduled.
- 50% after the prehearing conference is conducted.
- 100% after the hearing officer travels to the hearing site.

Appendix A

Effective date: August 30, 2004

State Employee Witnesses

Order

Pursuant to the Commonwealth of Virginia's *Grievance Procedure*, § 2.1-116.01 et seq. of the Code of Virginia, your presence is hereby ordered as a witness in the above-referenced grievance. Your testimony has been deemed necessary to determine the merits of the grievance. You should understand that you either must appear on [date, time and location] or must notify me at [telephone and address] that you will not be appearing and provide a reason. If your attendance is not possible on the date requested, alternative arrangements can be made.

Pursuant to the *Grievance Procedure Manual* § 5.3, the agency shall make available for hearing any employee ordered by the hearing officer to appear as a witness. As a state employee, the time spent at the grievance hearing will be considered work time and you will be on administrative leave and entitled to travel expenses.

Your participation in this hearing is an activity protected from retaliation.

_____
(Hearing Officer Name)

cc: Agency
Employee

Witnesses

Order

Pursuant to the Commonwealth of Virginia's *Grievance Procedure*, § 2.1-116.01 et seq. of the Code of Virginia, your presence is hereby ordered as a witness in the above-referenced grievance. Your testimony has been deemed necessary to determine the merits of the grievance. You should understand that you either must appear on [date, time and location] or must notify me at [telephone and address] that you will not be appearing and provide a reason. If your attendance is not possible on the date requested, alternative arrangements can be made.

_____
(Hearing Officer Name)

cc: Agency
Employee

Appendix B

Effective date: August 30, 2004

EDR Publication Policy

Policy Statement:

To promote a better understanding of the grievance procedure and a consistent application of its rules, as well as state and agency policy, the General Assembly has mandated that the Department of Employment Dispute Resolution ("EDR") publish its rulings and hearing officer decisions. To achieve an appropriate balance between a citizen's right to access records of governmental activities and the privacy concerns of individuals, EDR will publish all rulings and hearing officer decisions in a manner that seeks to preserve personal privacy. To accomplish this end, EDR will require hearing officers to draft their opinions in accordance with the guidelines set forth below. EDR rulings will also conform to the guidelines below.

Guidelines:

1. Individuals will not be referenced by name in the body of the ruling or decision. Instead, the person who initiated the grievance shall be referred to as the "grievant." Likewise, witnesses and agency representatives shall be referred to by job title (e.g., the first lieutenant or accountant senior) or simply by their relationship to the grievant or the agency (e.g, inmate, patient, immediate supervisor, grievant's spouse). The agency should be named but identification of particular facilities should be avoided.
2. When EDR rulings and hearing decisions are mailed to the parties, they will be accompanied with cover pages that identify, by name, the parties to the grievance. The cover page shall be the only portion of the decisions or ruling that contains individuals' names. To preserve privacy, ruling and decision cover pages will not be published.
3. EDR rulings and hearing decisions should be written in "plain English." The use of legal terminology should be avoided to the extent possible. (Example: the phrase "among other things" should be used instead of "inter alia").
4. Final drafts of hearing decisions must be provided to EDR in an electronic format, either "text only" or Microsoft® Word. The electronic version may be sent on a 3-½ floppy disk or as an e-mail attachment to administrator@edr.virginia.gov.
5. Hearing decisions should follow the format set forth at Sub-Appendix B-1.

SUB-APPENDIX B-1

[COVER PAGE FOR HEARING DECISION, NOT TO BE PUBLISHED]

In the matter of
Grievance of John Doe with [Agency Name]
Case Number 5220
Issued: July 3, 2001

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS
DECISION OF HEARING OFFICER

In the matter of: Case No: 5220

Hearing Date: July 2, 2001
Decision Issued: July 3, 2001

PROCEDURAL ISSUE

Grievant sought to present testimony about what he feels is improper behavior of his supervisor since he was employed in January 2000. The Hearing Officer declined to hear such testimony because the incidents complained of occurred more than 30 days prior to filing of the grievance.[1] Moreover, such testimony is not relevant to the issues grieved.[2]

APPEARANCES

Grievant
One witness for Grievant
Representative for Agency
One witness for Agency

ISSUES

Was the grievant's absence from March 20 through March 23, 2001 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? If there evidence of discrimination or a hostile work environment?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group II Written Notice issued on March 26, 2001 because he left work during his shift without permission and failed to report for work on the next three workdays. Following failure to resolve the matter at the third resolution step, the grievance was qualified for a hearing.

[1] A written grievance must be initiated within 30 calendar days of the date that the employee knew, or should have known, of the event that formed the basis of the dispute. *Grievance Procedure Manual,* § 2.4.
[2] Hearing Officers have the authority to exclude evidence. *Grievance Procedure Manual,* § 5.7.

The Virginia Community College System (hereinafter referred to as "agency") has employed the grievant as security officer senior since January 2000. Grievant's direct supervisor is the Compliance/Safety Officer, who in turn reports to the Director of Student Development Services. He has performed satisfactorily and has no prior disciplinary actions.

The agency utilizes the rules for annual leave found in Department of Human Resources Management (DHRM) policy 4.10, which states, in pertinent part:

> **Leave must be approved**. An employee who wants to use his or her annual leave must receive approval for the desired time. The request for leave should be made as far in advance as possible.[3]

Grievant was aware of this policy and had fully complied with the policy prior to March 20, 2001 by requesting permission, and obtaining permission from his supervisor, for any annual leave taken. The standard practice is to submit a leave slip to one's supervisor in advance of the requested leave and to obtain written approval prior to the leave date. In short-notice situations, the request and approval may be verbal.

On March 19, 2001, grievant had spoken with the Maintenance Supervisor regarding a lock located on an access gate. Grievant felt the lock was too small for the gate and was difficult to remove because it was old and rusted. The Maintenance Supervisor obtained a new lock and delivered it grievant on March 20, 2001. Grievant installed the new lock, returned to the security office and laid the keys on the desk. A fellow security officer noticed the keys and asked what they were for. Grievant explained what had transpired and nothing more was discussed. At approximately 1:30 p.m., grievant's supervisor telephoned him and told him that he had not used the proper procedure for obtaining a new lock. She directed grievant to reinstall the old lock. Grievant found his supervisor to be hostile and unprofessional during the telephone conversation, and he became extremely upset.[4]

After the call ended, grievant switched the locks as directed. He then told his fellow security officer that he would have to cover grievant's shift for the rest of the week because grievant was going to take off to look for a new job. Grievant then sent a very brief e-mail to his supervisor at 1:36 p.m. stating that he was taking "the rest of the week off for personal reasons." Grievant did not call his supervisor or anyone else to obtain permission to leave. He did not wait for a response to the e-mail and, instead, left his post and went home. Grievant did not call his supervisor or any other management person for the rest of the week. He did not report to work. As a result of grievant leaving without permission and his

[3] Exhibit 1. DHRM Policy No. 4.10, *Annual Leave.*
[4] Exhibit 13, page 4. Grievant's written description of March 20, 2001 incident.
on Wednesday through Friday, March 21-23, 2001.

absence from work for more than three days, other employees had to work additional hours and some overtime expense was incurred by the agency. When grievant returned to work on Monday, March 26, 2001, his supervisor gave him a Group II Written Notice.

During the past four years, there have been two other instances in which security officers have left their post without permission and were absent without good reason. Both security officers were discharged from employment.

APPLICABLE LAW AND OPINION

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

Code § 2.2-3000(A) 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.[5]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, 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

[5] *Grievance Procedure Manual,* § 5.8.

of misconduct and to provide appropriate corrective action. Section V.B.2 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group II offenses include acts and behavior which are more severe in nature
and are such that an accumulation of two Group II offenses normally should warrant removal from employment. One example of a Group II offense is leaving the work site during work hours without permission.

It must be noted that the Standards of Conduct includes Group III offenses, which include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment. An absence from work in excess of three days without proper authorization or a satisfactory reason is a Group III offense. In the instant case, grievant was absent from work in excess of three days. Under such circumstances, the agency could have given grievant a Group III Written Notice and discharged him from employment but Human Resources elected to utilize the lesser Group II disciplinary action because grievant had no prior Written Notices.

The basic facts in this case are undisputed. Grievant became extremely upset because of a telephone conversation with his supervisor on March 20, 2001. Within a few minutes thereafter, he left work without permission and failed to report to work for the following three scheduled workdays. He did not call or contact his supervisor or any other management person during his unauthorized absence. Leaving work without permission is a Group II offense.

Grievant believes that leaving work without permission was justified because he was extremely upset at the time. He reasoned that he was so upset that if he had called his supervisor to seek permission to leave, he might have said something unprofessional or out of line. While this is understandable, grievant had other alternatives available to him. He could have called the person to whom his supervisor reported and sought his permission to leave. Grievant could also have called his supervisor or her superior on the following day when he had had an opportunity to cool off. However, grievant failed to avail himself of these reasonable alternatives. Therefore, the fact that he was upset does not provide sufficient justification for his offense.

Significantly, grievant acknowledged during the hearing that, by the day following his unauthorized departure from work, he felt that he would probably be disciplined for his action. Thus, grievant had almost immediately realized that he should have sought permission before leaving work and should not have remained off work without giving notice to the agency.

Grievant contends that two employees had left work without permission in other incidents but that no disciplinary action was taken. However, the agency presented testimony that both employees had advised the supervisor or some other management person soon after leaving of the nature of the situation.

Grievant is not aware whether these two individuals were counseled for their actions.

Grievant maintains that his supervisor has over a period of time created an atmosphere of hostility. However, grievant indicated that, prior to this incident, the hostility had been directed primarily at other individuals and other departments. He could not point to any specific incidents in which his supervisor had been hostile to him until after he filed his grievance. Therefore, the hearing officer must conclude that the disciplinary action herein was not based on any discrimination or hostility. In fact, the agency administered a less severe disciplinary action than was warranted by the facts; as noted above, the agency could have issued a Group III Written Notice and terminated the grievant's employment.

Therefore, the agency has demonstrated, by a preponderance of the evidence, that grievant did leave work without permission on March 20, 2001 – a Group II offense. The Hearing Officer finds no circumstances that would warrant mitigation of this disciplinary action.

It is already apparent to the agency that an interpersonal conflict exists between grievant and his supervisor. The agency has reassigned grievant to another location and a different supervisor. Therefore, the Hearing Officer sees no need to address this issue because the agency has recognized the problem and has taken steps to separate the two individuals.

DECISION

The disciplinary action of the agency is affirmed. The Group II Written Notice issued to the grievant on March 26, 2001 is AFFIRMED. The disciplinary action shall remain active pursuant to the guidelines in Section VII.B.2 of the Standards of Conduct.

APPEAL RIGHTS

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

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

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

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

3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, Main Street Centre, 600 East Main, Suite 301, Richmond, VA 23219 or faxed to (804) 786-0111.

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

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

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

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

John Q. Smith, Esq.
Hearing Officer