Issue: Group II Written Notice (failure to follow supervisor's instructions); Hearing Date: August 13 and 14, 2001; Decision Date: August 20, 2001; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; AHO: David J. Latham, Esquire; Case Number: 5248; **Administrative Review: Hearing Officer Reconsideration Request received 08/30/01; Reconsideration Decision Date: 08/31/01; Outcome: No basis to amend or reverse decision; Administrative Review: EDR Ruling Request received 08/30/01; EDR Ruling Date: 11/27/01 (Ruling No. 2001-162); Outcome: HO did not abuse discretion or exceed authority; Administrative Review: DHRM Ruling Request received 08/30/01; DHRM Ruling Date: 01/18/02; Outcome: No policy violation – no basis to interfere with decision; Judicial Review: Appealed to the Circuit Court in the City of Staunton on 02/15/02; Outcome: HO decision found to be contradictory to law. Decision reversed; Judicial Review: Appealed to the Court of Appeals; full brief submitted 12/31/02; oral arguments heard 03/19/03; Outcome: Remanded to Circuit Court for decision consistent with Court of Appeals ruling of 04/22/03 [Record No. 2553-02-3]**

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of Department of Mental Health, Mental Retardation and Substance Abuse Services
Case Number 5348

Hearing Date: August 13 & 14, 2001
Decision Issued: August 20, 2001

PROCEDURAL ISSUE

Due to availability of the participants, the hearing could not be docketed until the 35th day following appointment of the hearing officer.[1]

APPEARANCES

Grievant
Attorney for Grievant
Four witnesses for Grievant
Facility Director
Attorney for Agency
Seven witnesses for Agency

ISSUES

Was the disciplinary action promptly issued pursuant to the requirements of the Commonwealth of Virginia Standards of Conduct? Did the agency violate any facility or agency policies? Was the grievant's conduct on March 1, March 8 and March 15, 2001 subject to disciplinary action under the Commonwealth of Virginia Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue? Was the disciplinary action retaliatory?

[1] § 5.1 of the *Grievance Procedure Manual* requires that a grievance hearing must be held and a written decision issued within 30 calendar days of the hearing officer's appointment unless just cause is shown to extend the time limit.

FINDINGS OF FACT

The grievant filed a timely appeal from a Group II Written Notice issued on May 15, 2001 because he failed to follow a supervisor's instructions. Specifically, grievant left the work site without arranging for coverage or notifying his supervisor. The grievant was discharged from his employment because of the cumulative effect of two other active Group II disciplinary actions. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.

The Department of Mental Health, Mental Retardation and Substance Abuse Services (Hereinafter referred to as "agency") has employed the grievant as a mental health physician (internist) for six years. During each of the four most recent performance cycles, the grievant's overall performance evaluation was "exceptional."[2] When this disciplinary action was issued, grievant had one other active Group II Written Notice that was pending resolution through the grievance process. A third Group II Written Notice was issued on May 15, 2001 for a different offense. All three disciplinary actions have been adjudicated consecutively during a continuous hearing session and separate decisions for each case are being issued on this date.

The facility at which grievant was employed has approximately 18 psychiatrists on staff but only two internists. The grievant's direct supervisor is the only other full-time internist on staff.[3] The employment arrangement for physicians includes an allowance for time to attend lectures, seminars and other functions at a medical teaching hospital located in a state university. For several years, grievant's supervisor had utilized half a day on Tuesday for this purpose while grievant had taken half a day each Thursday to go to the university. Each of the two internists would "cover" for the other on these occasions. It is the responsibility of each physician to arrange for another physician to cover his patients and responsibilities and, to notify the medical director's office, the treatment team and others of who will be the covering physician.

In June 2000, the medical director (to whom grievant's supervisor reports) became concerned that both internists had accumulated a significant amount of compensatory time. Both physicians have on-call requirements on certain nights and weekends and must work overtime when medical emergencies require their presence at the mental health facility. Therefore, the medical director asked both internists to begin drawing down their bank of compensatory time by taking a full day off each week. Half of the day was to attend lectures/seminars at the university and half the day was compensatory time to use as each physician saw fit. Each physician continued to cover for the other on Tuesdays and Thursdays. Occasionally however, one of the internists might be absent on a day when he was scheduled to cover for the other internist. To provide for this eventuality, the medical director told the internists to arrange for coverage by one of the hospital's psychiatrists.

Grievant believes that only another practicing internist is sufficiently qualified to provide full coverage for an internist. Grievant's supervisor shares this view, albeit to a lesser degree. In late November 2000, grievant's supervisor, anticipating a three-week vacation in December,

---

[2] Grievant's Exhibit 1. Grievant's evaluations for the performance cycles ending in 1997, 1998, 1999 and 2000.

[3] One of the staff psychiatrists is board-certified in internal medicine as well as psychiatry; however, as a practical matter, this physician's practice is primarily psychiatric.

arranged for triage coverage during his time off by the one psychiatrist who is also board-certified in internal medicine. At the same time, he asked if she would cover for both he and the grievant in the future if the occasion arose. The psychiatrist agreed to help out whenever she could. Grievant's supervisor advised him of the psychiatrist's willingness to cover for both of the internists. Grievant assumed from what his supervisor told him that this was a firm commitment and that he need take no further action.

On February 23, 2001, the medical director distributed to all physicians a memorandum that addresses, among other things, coverage guidelines. The policy requires physicians to notify a specific person if they are going to be "out for any reason."[4] It also requires the absent physician to identify the covering physician by posting their name in the ward and ensure that the nursing staff is notified of whom is covering.[5] The memorandum was distributed in the mailbox of each physician; grievant avers that he did not receive this memorandum.

During this same time frame, grievant and the medical director exchanged e-mail messages beginning on February 15; on that date, the medical director advised grievant that:

> My office received a call from MACS[6] today asking who was providing the medical coverage for MACS. I had instructed you in a previous e-mail that you must arrange for coverage when you are gone. As I have previously outlined I know a psychiatrist cannot provide the direct medical care -24 can serve to check in on the ward and make triage decisions as needed much as they do on weeknights and weekends. I also instructed you that you must inform both the ward and this office regarding your absence and who is covering.[7]

The e-mail exchange culminated on February 23, 2001 with the medical director's response to grievant, in which she stated, in pertinent part:

> …it is still your responsibility to see that you have someone providing your back-up coverage. Normally this is [name of grievant's supervisor] -24 he has been o24 more frequently leaving some days uncovered. I had previously requested that both you and [grievant's supervisor] seek alternate coverage by a psychiatrist when you know that neither of you will be there. This would include planned days off, schedule [sic] doctor appointments, academic time. Doctor [grievant's supervisor] has agreed to do this. I do not and will not ro24inely arrange coverage for any of the physicians for these types of things. It is the physician's obligation to do so. …
>
> I want to be perfectly clear that you must have arranged coverage and notified this office and your ward regarding that coverage if you are not going to be here and Doctor [grievant's supervisor] is not here. This is regardless of whether this is

[4] Agency Exhibit 15. *Physician Leave and Coverage Guidelines*, February 21, 2001.
[5] *Ibid.*
[6] MACS – Medical Acute Care Service
[7] Agency Exhibit 16. E-mail from medical director to grievant, February 15, 2001.

> your "routinely" scheduled time away from the hospital or not. Failure to do so is failure to follow supervisor's direction.[8]

Grievant's supervisor was absent during the first three weeks of March 2001. Grievant took his regularly scheduled Thursdays of March 1, 8 & 15, 2001 off to go to the university and attend to personal business. Grievant did not arrange with any other physician to cover for him on these three dates. The medical director's office received calls from the grievant's ward on these days asking who was covering for grievant. Grievant had surgery in March 2001 and was absent from work from March 23 until May 7, 2001.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.1-110 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 § 2.1-116.05(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 § 2.1-116.09.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.[9]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.1-114.5 of the Code of Virginia, the Department of Personnel and Training[10] promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. 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.

---

[8] Agency Exhibit 16. E-mail from medical director to grievant, February 23, 2001.
[9] § 5.8 Department of Employment Dispute Resolution, *Grievance Procedure Manual*, effective July 1, 2000.
[10] Now known as the Department of Human Resource Management (DHRM).

Section V.B.3 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].[11] One example of a Group II offense is failure to follow a supervisor's instructions.

Prompt Issuance of Disciplinary Actions

One of the basic tenets of the Standards of Conduct is the requirement to promptly issue disciplinary action when an offense is committed. As soon as a supervisor becomes aware of an employee's unsatisfactory behavior or performance, or commission of an offense, the supervisor and/or management should use corrective action to address such behavior.[12] Management should issue a written notice as soon as possible after an employee's commission of an offense.[13] One purpose in acting promptly is to bring the offense to the employee's attention while it is still fresh in memory. A second purpose in disciplining promptly is to prevent a recurrence of the offense. Unless a detailed investigation is required, most disciplinary actions are issued within a few weeks of an offense.

Here, the agency was notified of the alleged offense in March 2001 and effected the disciplinary action on May 15, 2001. However, the grievant underwent surgery in March 2001 and was absent from work from March 23 until May 7, 2001. It would have been inappropriate to issue disciplinary action during sick leave. The sick leave of six weeks' duration constitutes an extenuating circumstance that mitigates the delay in issuance of the disciplinary action. Therefore, it is concluded that the disciplinary action was issued in a reasonably prompt time following the grievant's return to work and that the agency did not violate the Standards of Conduct requirement for promptness in the issuance of disciplinary action.

Violation of Agency and/or Facility policies

The only written policy proffered by grievant addresses Attendance and Hours of Work.[14] A careful review of this policy and the evidence at the hearing reveals no agency violation of the policy. More significantly, this policy is not relevant to the issue in the instant case. Hospital Instruction 3050 provides guidance for the disciplinary action required when an employee's absences exceed specified parameters. The grievant's discipline is grounded not in excessive unplanned absenteeism, but rather in his failure to provide appropriate coverage and notification during approved time off from work.

Grievant also contends that the agency violated a hospital instruction regarding the processing of disciplinary actions. However, this policy was not proffered as an exhibit during the hearing. Nonetheless, in the interest of responding to all of grievant's concerns, the hearing officer will address this issue. The relevant portion of the policy cited by grievant states,

---

[11] DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.
[12] Section VI.A. *Ibid.*
[13] Section VII.B.1. *Ibid.*
[14] Grievant's Exhibit 8. Hospital Instruction Number 3050, *Attendance and Hours of Work*, June 22, 2000.

"Disciplinary actions will be taken only after careful review by the supervisor of the facts concerning the misconduct of an employee."[15] This general statement does not specify that grievant's direct supervisor must review the facts. Rather, it refers to the supervisor taking the disciplinary action; that supervisor may be the primary supervisor, or the second-line supervisor or higher. In any case, the intent of the cited sentence is to assure that whichever supervisor issues the discipline does so "*only after careful review* … of the facts concerning the misconduct." (Italics added)

Moreover, a prior ruling by the Director of the Department of Employment Dispute Resolution (EDR) has established that upper management has the discretion to review the immediate supervisor's decision and to make a determination to award the requested relief or uphold the disciplinary action.[16] Thus, even if grievant's immediate supervisor disagreed with the proposed disciplinary action, management may overrule the supervisor and take disciplinary action on its own initiative.

Failure to follow supervisor's instructions

Grievant contends that he relied upon his supervisor's representation that a specific staff psychiatrist had agreed to cover for both grievant and his supervisor when both were absent. The agency has offered no evidence that directly contradicts this contention. Grievant also asserts that he never received the coverage guideline policy disseminated on February 23, 2001. The agency was unable to rebut this assertion because they never obtained a signed receipt from grievant certifying that he had received the policy.

However, grievant did receive the medical director's February 23, 2001 e-mail response to his earlier e-mail message. The language in that e-mail is clear and unambiguous. The medical director's message requires grievant to 1) assure that he has arranged back-up coverage each Thursday, 2) notify the medical director's office of who is covering and, 3) notify the ward of the coverage arrangement. The grievant failed to comply with this instruction.

Even if grievant reasonably believed that his supervisor had made a prior arrangement that included coverage of grievant's day off, the medical director's e-mail placed grievant on notice that he bears the ultimate responsibility to assure that this coverage took place and that the proper parties were notified. Grievant testified during the hearing that the language in the medical director's e-mail confused him. Given the grievant's education and position, this testimony is not credible. However, even if one accepts grievant at his word on this point, this does not absolve him of responsibility. It is apparent from the exchange of e-mail that this was a topic of considerable concern to both grievant and the medical director. If grievant was truly confused by the medical director's language, he had an obligation to speak with the medical director to obtain clarification before he absented himself on three consecutive Thursdays without assuring back-up coverage.

[15] Hospital Instruction Number 3110, *Processing Disciplinary Actions*, June 23, 2000.
[16] Compliance Ruling of Director, In re: DMHMRSAS, March 23, 2001.

Moreover, even if grievant was totally oblivious to the importance placed on this matter by the medical director, he could not possibly have missed the red flag being waved when she said, **"Failure to do so is failure to follow supervisor's instructions."**(Emphasis added). Based on other testimony and documentation in this case, it is obvious that grievant is very familiar with the Standards of Conduct. This language signaled to grievant that the medical director had drawn a line in the sand on this issue and that grievant's failure to comply would be cause for disciplinary action. Grievant's response to the medical director's warning was, "Why should anyone be concerned about failing to follow a supervisor's direction per se? I am aware of at least one instance in our Hospital in which a supervisor instructed an employee to bear false witness. This instruction was ignored. Do you suggest that this was inappropriate?"[17] (Underscoring added). This cavalier response to a second-level supervisor suggests an obvious lack of respect for authority.

Especially revealing is grievant's e-mail message to his immediate supervisor on March 23, 2001, in which he states:

> I [have] taken every Thurs off while you've been out, as well as going to doctor appointments I had scheduled on days other than Thurs. *I did not request or obtain coverage from psych for any of this, despite warnings that failure to do so constituted failure to follow a supervisor's direction.*[18] (Italics added)

It appears that grievant believed so strongly that psychiatrists could not provide adequate coverage for an internist that he decided to test the medical director's resolve on this issue. Certainly, grievant has every right to express disagreement with the policy. However, the right to disagree does not infer a concomitant right to ignore specific supervisory instructions. Grievant argues that this is a medical care issue and that the rights of patients to adequate medical care are affected by having a non-internist provide coverage. The hearing officer concurs that if there were a demonstrated adverse effect on patient care, there might be justification for grievant's position. In this case, however, the triage care provided by staff psychiatrists is the same as is provided at night and on weekends. Moreover, if situations beyond the skill of a psychiatrist arise, the hospital's practice is to summon local EMS[19] crews and transport the patient to a hospital if necessary. Therefore, grievant has not demonstrated a basis for refusing to comply with the medical director's reasonable and clear instruction.

Retaliation

Grievant alleged in the attachment to his grievance that the disciplinary action was retaliatory because of purported disparate treatment. He states that he has reported several other physicians at the facility for what he considers patient abuse and substandard care. However, during the hearing, grievant proffered no documentation or testimony to support his assertions except with respect to one physician who is alleged to have committed a medication error associated with the death of a patient. This matter is currently in litigation and therefore the agency has delayed any possible disciplinary action. It is common practice for state agencies to

[17] Grievant's Exhibit 16. E-mail from grievant to medical director, February 26, 2001.
[18] Agency Exhibit 20. E-mail from grievant to his immediate supervisor, March 23, 2001.
[19] Emergency Medical Service.

delay taking disciplinary action during the pendency of a collateral lawsuit because discovery in a grievance hearing could jeopardize defense of the litigation. Therefore, delay in issuance of disciplinary action in the medication error case distinguishes that case from the instant case and will not support the allegation of disparate treatment.

All evidence presented in this hearing establishes that grievant is an exceptional performer, a well-respected clinician and, one whose paramount concern is the welfare of his patients. However, grievant disagrees with some of the hospital's policies and with the facility director. He has been an outspoken critic of hospital practices and management for at least three years. He has taken his complaints to the agency's top management, the Inspector General, the Governor, the federal Department of Justice and the news media. Grievant now contends that his discipline was retaliatory because the agency did not appreciate the adverse publicity generated by his activism.

Two of the complaints made by grievant have been addressed by the agency, and the changes effected are largely responsive to his suggestions. One suggestion has not yet been implemented to grievant's satisfaction. Nonetheless, given the grievant's persistence and high-profile manner of making complaints, it is not surprising that some people in the agency may have been irritated. However, the grievant has provided no testimony or evidence that would substantiate that this disciplinary action was retaliatory. There is more to proving retaliation than making a mere allegation.

Absent any concrete evidence of retaliation, the adjudicator must consider whether the disciplinary action, standing alone, is warranted by the facts. In this case, the agency has established, by a preponderance of the evidence, that grievant did fail to follow a clear and reasonable instruction from a supervisor.

Level of Discipline

Given the obvious lack of respect for authority demonstrated in this case, there are no mitigating circumstances sufficient to warrant reduction of the disciplinary action.

DECISION

The decision of the agency is hereby affirmed.

The Group II Written Notice issued on May 15, 2001 for failure to follow a supervisor's instructions and the discharge from employment are AFFIRMED. The disciplinary action shall remain active pursuant to the guidelines in Section VII.B.2 of the Standards of Conduct.

APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set 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 four 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.
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.
4. In grievances arising out of the Department of Mental Health, Mental Retardation and Substance Abuse Services which challenge allegations of patient abuse, **a challenge that a hearing decision is inconsistent with law** may be made to the Director of EDR. The party challenging the hearing decision must cite to the specific error of law in the hearing decision. The Director's authority is limited to ordering the hearing officer to revise the decision so that it is consistent with law.

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 **10 calendar** days of the **date of the original hearing decision.** (Note: the 10-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 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

Section 7/2(d) of the Grievance Procedure Manual provides that a hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 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. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

David J. Latham, Esq., Hearing Officer

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Grievance No: 5248

Hearing Dates: August 13 & 14, 2001
Decision Issued: August 20, 2001
Reconsideration Request Received: August 30, 2001
Response to Reconsideration: August 31, 2001

APPLICABLE LAW

A hearing officer's original decision is subject to administrative review. A request for review must be made in writing, and *received* by the administrative reviewer, within 10 calendar days of the date of the original hearing decision. A request to reconsider a decision is made to the hearing officer. A copy of the request must be provided to the other party. 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.[20]

The Grievance Procedure Manual further provides that a hearing officer's decision becomes final as follows:

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

1. The 10 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.[21]

[20] § 7.2 Department of Employment Dispute Resolution *Grievance Procedure Manual*, effective July 1, 2000.
[21] § 7.2(d) *Ibid.*

OPINION

The grievant failed to comply with the requirement to send a copy of his reconsideration request to the agency. Nonetheless, in the interest of responding to grievant's concerns, the following response is provided. For ease of reference, grievant's concerns are addressed in the same order as presented in his request for reconsideration.

Wording of Written Notice

Grievant argues, incorrectly, that the decision in this case changed the wording of the Group II Written Notice. The Written Notice was entered into the record as Agency Exhibit 14 and therefore was not, and cannot be, changed. The reference in the decision merely cites the specific Standards of Conduct offense listed in the Written Notice.

Alleged Errors

1. Grievant disagrees with the characterization of his response to questions regarding language in the medical director's e-mail dated February 23, 2001. The tape recording of the hearing verifies that the grievant did, in fact, respond affirmatively when asked if certain portions of the e-mail were confusing.

Grievant maintains that his e-mail to the medical director dated February 26, 2001 absolves him of culpability because his response expressed disagreement with the medical director's instructions. Unfortunately, grievant has missed the salient point. To wit, the medical director had given grievant specific instructions and grievant deliberately failed to comply with those instructions. Grievant's expression of disagreement with those instructions does not give him the right to disobey the instructions. Since the medical director had not responded to grievant's February 26th e-mail, grievant was obligated to comply with the instructions until such time as the medical director modified or rescinded those instructions.

Grievant's argument that it was inappropriate to ask a psychiatrist to provide coverage for an internist is without merit and was fully addressed in the decision. If a psychiatrist is qualified enough to provide triage care at night and on weekends, then she is also qualified enough to provide similar coverage during the occasional absence of an internist during the day. While such coverage affords less comprehensive care than would be provided by internist, the medical director and facility director had made the judgement call that such care was adequate to fulfill the facility's mission, given the alternative care available at local hospital facilities.

Grievant was, as he states, courteous, punctual, and patient during the hearing, however, virtually all grievants behave similarly during hearings. The "lack of respect for authority" exhibited by grievant does not refer to his demeanor in a face-to-face setting, but rather to his failure to deliberately follow instructions. His refusal to respect authority was exemplified in the e-mail to his supervisor in which he stated, "I did not request or obtain coverage … despite warnings that failure to do so constituted failure to follow a supervisor's direction."[22] Even after all that has transpired, grievant resolutely contends that it, "is not the grievant's responsibility"[23] to assure coverage during his absence.

---

[22] Agency Exhibit 20. E-mail from grievant to his supervisor, March 23, 2001.
[23] Page 5, Request for Reconsideration, August 30, 2001.

2. The determination of a "reasonable" time frame for the issuance of disciplinary action is based on the typical time that elapses between an offense and issuance of disciplinary action. That time may vary depending upon the circumstances of the individual case. Given the circumstances of this case, the elapsed time was reasonable and, moreover, is consistent with the time frames in other similar state employee grievance cases.

3. Grievant correctly observes that he was criticized for failing to resolve his disagreement with the medical director before absenting himself from work on three occasions. However, grievant fails to understand that the operative language in the decision said, "obtain clarification before he absented himself," (underscoring added). Grievant's offense of insubordination occurred when he deliberately decided not to resolve the coverage issue prior to leaving his position without coverage on the three Thursdays at issue herein.

4. With regard to the timeliness of the disciplinary action, grievant's reliance on Grievance No. 5247 is misplaced. He has quoted only a portion of the decision; the entire relevant passage states:

> Thus, the time between notice to the agency and issuance of discipline was nearly half a year. Such a significant delay does not meet the Standards of Conduct requirement for prompt issuance of disciplinary action.[24]

In the instant case, the elapsed time between notice to the agency and issuance of discipline (less intervening sick leave) was less than one month. Half a year's delay is not prompt; one month is reasonably promptly.

Alleged Exclusion of Evidence

Grievant fails to explain what conclusion he considers to be legally incorrect. Grievant testified that he did not receive the February 23, 2001 memorandum; the agency presented no evidence to rebut grievant's assertion. Therefore, the hearing officer accepted grievant's assertion as true.

Alleged Policy Violations

1. In effect, grievant argues that because his absences had been submitted and approved in advance, the decision's quotation of one portion of a policy constitutes misapplication of state policy. This is a red herring. The quotation is accurate as stated in the decision. Grievant infers from the fact that another portion was not quoted, that this somehow violates state policy but he fails to demonstrate this in his argument. There is no dispute that grievant had been preapproved to have every Thursday off from work. The issue in this case was not preapproval but whether grievant took action to assure coverage for this preapproved absence.

2. Grievant also alleges that Hospital Instruction 3110 was misapplied. Grievant correctly notes that the supervisor issuing the disciplinary action did not discuss details of the offense with grievant prior to issuing discipline. However, grievant has not pointed to any portion of the policy that would require such a discussion with him prior to issuance of discipline. The language cited by grievant only requires that the supervisor carefully review the facts before issuing discipline. The grievant provided no evidence to rebut the agency's contention that this

[24] Grievance No. 5247, issued August 20, 2001.

matter was carefully reviewed before the discipline was issued. Thus, grievant's allegation that HI 3110 was violated is without merit.

Alleged Violation of Va. Code § 2.1-116.05

This issue was addressed in the decision. The Director of the Department of Employment Dispute Resolution issued a Compliance Ruling that management may overrule a supervisor and take disciplinary action on its own initiative. This ruling is binding on the hearing officer. If the grievant's immediate supervisor were to have the final authority on the issuance of discipline, agency management would be powerless. Common sense dictates that in any hierarchical structure, authority is delegated from top management to those below. When authority can be delegated, it can also be revoked. In this case, agency management exercised its right to revoke the decision of grievant's immediate supervisor.

Postponement Request

Grievance hearings can be postponed beyond 30 days only upon a showing of just cause.[25] Just cause is defined as, "A reason sufficiently compelling to excuse not taking a required action in the grievance process."[26] During the prehearing conference on July 13th, grievant's attorney requested the hearing be delayed until mid-September. Because the witness' testimony was available by telephone, such a lengthy postponement was denied. However, partially at the request of grievant's attorney, this case was delayed to the 35th day to provide sufficient preparation time.

The witness testified by telephone for nearly one hour. Thus, grievant's attorney had ample opportunity to elicit testimony from this witness. Grievant had one full month between the prehearing conference and the hearing to send to the witness any documents considered essential for his testimony; the grievant did not take advantage of this opportunity. Because the credibility of this witness was not challenged, his demeanor was not a factor that would have changed the decision in this case. The decision explains the factors deemed most relevant to affirming the disciplinary action. Even if the witness had testified in person and had exemplary demeanor, the outcome of this hearing would be unchanged.

DECISION

After careful consideration of the grievant's request for reconsideration, it is concluded that there is no basis to amend or reverse the Decision issued on August 20, 2001.

Grievant has concurrently filed a challenge with the Director of the Department of Employment Dispute Resolution. A copy of this Reconsideration Decision is being sent to the Director who will then issue his Ruling.

APPEAL RIGHTS

[25] § 5.1, *Grievance Procedure Manual*, effective July 1, 2001.
[26] Definitions, *Ibid.*

A hearing officer's decision becomes a final hearing decision with no further possibility of administrative review when all timely requests for administrative review have been decided and, if ordered by EDR or HRM, the hearing officer has issued a revised decision.[27]

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 of the Department of Employment Dispute Resolution before filing a notice of appeal.

_____
David J. Latham, Esq.
Hearing Officer

[27] § 7.2(d). *Ibid.*

POLICY RULING OF DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the matter of the Department of Mental Health, Mental
Retardation and Substance Abuse Services
January 18, 2002

The grievant, through his representative and independently, has appealed the hearing officer's August 31, 2001, reconsideration decisions in Grievances Nos. 5248 and 5249, respectively. The grievant objects to the reconsideration decision in Grievance No. 5248 on the bases that the decision: (1) creates issues, misconstrues facts and arguments and fails to respond to issues raised in the grievant's request for reconsideration; (2) directly contradicts a precedent decision by this hearing officer regarding Grievance No. 5247* and violates State and Agency policy; (3) persists in violating VA Code 2.1-116.05. More specifically, the grievant contends that the hearing officer's reconsideration decision violates the grievance procedure and therefore should be reversed which would result in the removal of one Group II Written Notice.

In addition, the grievant objects to the reconsideration decision in Grievance No. 5249 on the bases that the decision: (1) directly contradicts a precedent decision by this hearing officer regarding Grievance No. 5247 and violates Standards of Conduct; (2) is based on misapplication of State and Agency; (3) persists in violating VA Code 2.1-116.05. More specifically, the grievant contends that the reconsideration decision violates State and Agency policy and the Code of VA. Based on his belief, he is requesting that the hearing officer decision in the reconsideration decision be reversed which would result in the removal of a second Group II Written Notice. The agency head, Ms. Sara Redding Wilson, has requested that I respond to this appeal.

FACTS

The Western State Hospital, a facility of the Department of Mental Health, Mental Retardation and Substance Abuse Services, employed the grievant before he was terminated. On May 15, 2001, the employing agency issued a Group II Written Notice to the grievant for failure to comply with written policy. On that same date, the employing agency issued to the grievant a second Group II Written Notice for committing an unrelated offense. These two Group II Written Notices, along with a third Group II Written Notice issued on an earlier date, resulted in his termination.

The grievant filed three grievances and the same hearing officer heard them consecutively. The grievant appealed to the hearing officer to reconsider his original decisions. The hearing officer accepted his appeals and issued his reconsideration decisions on August 31, 2001, on Grievances Nos. 5248 and 5249, respectively. After the hearing officer issued his reconsideration decisions, the grievant challenged the decisions in separate appeals to the

* The grievant did not request that the Department of Human Resource Management (DHRM) review the hearing officer's decision on Grievance No. 5247.

Department of Human Resource Management and to the Department of Employment Dispute Resolution.

The relevant policy, the DHRM's Policy 1.60, Standards of Conduct, states in part that, it is the Commonwealth's objective to promote the well-being of its employees in the workplace and to maintain high standards of professional conduct and work performance. This policy also sets forth (1) standards for professional conduct, (2) behavior that is unacceptable, and (3) corrective actions those agencies may impose to address behavior and employment problems. Similar to that policy, MHMR&SAS has a policy, and procedures, which address work behavior and corrective actions when necessary.

In addition, the DHRM'S Policy 6.05, Personnel Records Disclosure, establishes guidelines for access to and release of personnel information on employees, which is maintained by state agencies. In accordance with this policy, it is the Commonwealth's objective to ensure compliance with the Privacy Protection and the Freedom of Information Acts. The objectives of the DHRM's Policy, 6.10, Personnel Records Management, are to maintain complete and accurate records regarding each employee and position, to comply with legal requirements regarding retention and release of personnel records, and to preserve the confidentiality of personnel records.

DISCUSSION

A hearing officer is authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions of the grievant constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found but the hearing officer determines that the disciplinary action is too severe, he may reduce the discipline. By statute, the Department of Human Resource Management 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. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure. The Department of Employment Dispute Resolution is responsible for the administration of the grievance procedure and issues ruling on the propriety of the grievance proceedings, including the conduct of the hearing officer.

Grievance No. 5248

In the case of Grievance No. 5248, the hearing officer concluded in his original decision and upheld in his reconsideration decision that the grievant had committed the violation with which he was charged and upheld the agency's disciplinary action. By letter dated November 27, 2001, the Department of Employment Dispute Resolution (EDR) addressed all non-policy issues. Our review of the hearing officer's decision regarding the timeliness of issuance of the written revealed that the decision does not violate any written policy or procedure. While it is ideal that an agency always taken disciplinary action immediately after an alleged violation of a policy or procedure occurs, circumstances may exist which may delay such. Thus, we find no basis to interfere with the implementation of the decision.

Grievance No. 5249

In the case of Grievance No. 5249, the hearing officer concluded that the grievant violated DHRM Policy No. 6.05, Personnel Records Disclosure, and upheld the agency's disciplinary action. The grievant also requested that EDR review the hearing officer's decision to determine if his ruling violated, among other things, the grievance procedure and the Code of Virginia. In a ruling dated January 4, 2002, EDR addressed five of the eight issues raised by the grievant on appeal. Therefore, DHRM's ruling will address whether the hearing officer's decision violated (1) agency policy on reporting patient neglect and abuse; (2) state personnel records policy; and (3) policies on the timeliness and procedure for taking disciplinary action.

(1) Violation of the agency policy on reporting neglect and abuse

This Department has determined that the hearing officer's decision is not in violation of the agency's policy regarding reporting patient neglect and abuse. Department Instruction 201 of the agency's patient neglect and abuse policy clearly states that instances of alleged abuse and neglect may be reported to the Inspector General.

In the instant case, the hearing officer determined that the grievant initially did not suggest that the performance related information was intended to report an instance of alleged abuse or neglect. Rather, the hearing officer concluded that the sole purpose and intent of the February 27th e-mail was to focus attention on and to correct perceived deficiencies in the performance of a certain physician assistant. In addition, the hearing officer noted that the e-mail and attachments discuss the alleged deficiencies in the physician assistant's performance over a period of several months. Finally, he added, that if the performance of the physician's assistant could have been categorized as patient neglect and abuse, the grievant did not report those incidents "promptly" as directed by a requirement in DI 201. Thus, based on these events the hearing officer concluded that the grievant never viewed the incidents as abuse or neglect. To the hearing officer, raising the issue as neglect and abuse during the request for reconsideration was deemed to be spurious and without merit.

This Department has determined that the hearing officer's decision is not in violation of either state or agency policy. Rather, it appears that the grievant disagrees with the outcome of the grievance hearing. Thus, based on the authority granted this Agency under the Code, we have no authority to interfere with the implementation of this decision.

(2) Violation of state personnel records policy

This Department has determined that the hearing officer's decision is not in violation of DHRM's policies 6.05 and 6.10, Personnel Records Disclosure and Personnel Records Management, respectively. Policy 6.05 states, in part, that it is the Commonwealth's objective to ensure compliance with the Privacy Protection and Freedom of Information Acts. This policy establishes guidelines for access to and release of personal information on employees, which is maintained by state agencies. Policy 6.10 states, in part, that it is the Commonwealth's objective to maintain complete and accurate records regarding each employee and position, to comply with legal requirements regarding retention and release of personnel records, and to preserve the confidentiality of personnel records. Accordingly, this policy sets forth agency requirements for the retention and transfer of employees' records, the release of personnel information, and the reporting of employee and position changes within each agency.

Policy 6.05, though not all-inclusive, enumerates those documents that normally are considered personnel type information. In the instant case, the information submitted to the Inspector General was performance-related and normally is information that supervisors use to evaluate and rate their employees. Additionally, it was determined that the Inspector General is not in the chain of command in that she has no impact on the physician's assistant employment future and had no need to possess such information. Thus, the hearing officer deemed her a third party, being outside the chain of command. This Department concurs with this interpretation and has no reason to disturb that part of the hearing officer's decision.

Policy 6.10 enumerates steps for maintaining and releasing personnel records. Again, this policy is not all-inclusive. However, the hearing officer determined that the performance, data on the employee was personnel-type data and the Inspector General had no need to possess such information. Given that the grievant is familiar with the standard procedure for reporting alleged neglect and abuse of patients, the hearing officer concluded that there was no reason for the grievant to release the name of the physician's assistant to the Inspector General. This Department concurs with the decision and has no reason to interfere with that decision.

(3) Violation of the Policies on the Timeliness and Procedure for Taking Disciplinary Action

This agency has determined that the hearing officer's decision did not violate state and agency policy regarding the timeliness and procedure MHMR&SAS officials used when issuing him disciplinary actions. While it is the intent of the policy that agency officials take disciplinary action immediately after a violation of policy or procedure, circumstances may not permit that to occur in each instance. Thus, we find no reason to interfere with this decision.

Finally, the MHMR&SAS, through is representative, has asked that this Department reject the appeal concerning this issue because the grievant requested that this Department reverse the hearing officer's decisions rather than revise his decision. This Department has no authority to dismiss the appeal on that basis. To dismiss the appeal on this basis would be in violation of Section 7.2 (a) (2) of the Grievance Procedure Manual, in that this Department is obligated to respond to any alleged violation of policy as identified by the appealee.

In summary, this Department will not interfere with any part of the decisions, on Grievances 5248 and 5249. If you have any questions regarding this correspondence, please call me at (804) 225-2136.

Sincerely,

Ernest G. Spratley, Manager
Employment Equity