Issues: 1) Complaint of sexual harassment and objection to a revised EWP; 2) retaliation; 3) racial discrimination; 4) Group II Written Notice (failure to follow a supervisor's instructions and for leaving the work site during work hours without permission); 5) Group II Written Notice with termination (repeatedly making false statements, undermining the authority of management, disruptive behavior and abusive language); Hearing Date: 04/01/03; Decision Issued: 04/03/03; Agency: George Mason University; AHO: David J. Latham, Esq.; Case Nos. 5552/5553/5569/5570/5571; **Administrative Review: Hearing Officer Reconsideration request received 04/22/03; Reconsideration Decision Date: 04/22/03; Outcome: No basis to reopen hearing or change original decision; Administrative Review: DHRM Ruling Requested on 04/14/03; DHRM Ruling Date: 05/19/03; Outcome: No policy violation cited. No reason to interfere with decision.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Nos: 5552/5553/5569/5570/5571

Hearing Date: April 1, 2003
Decision Issued: April 3, 2003

PROCEDURAL ISSUES

Grievant requested a qualification ruling regarding three grievances he had filed. The Director of the Department of Employment Dispute Resolution (EDR) reviewed the request and subsequently issued a ruling qualifying the grievances for hearing and consolidating these grievances with two other grievances that had previously been qualified for hearing.[1]

This hearing was initially docketed for October 31, 2002. The grievant failed to appear for the hearing. After the hearing began, grievant called stating that he was in the emergency room of a hospital and that he had had a stroke. The hearing officer immediately postponed the hearing and directed grievant to contact the hearing officer as soon as he was released and well enough to proceed. During the next two months grievant failed to contact the hearing officer. The Hearing Division made repeated attempts to contact grievant by

[1] *Qualification and Compliance Ruling of Director*, Numbers 2002-141, 2002-142, 2002-178, issued October 18, 2002.

telephone and email; grievant failed to respond to messages. On January 23, 2003, EDR advised grievant by letter that his grievances had been closed but gave grievant leave to reopen them by submitting a written request to EDR. On February 21, 2003, grievant's attorney requested a reopening of his grievances. The first date on which all participants were available for a hearing was April 1, 2003, the 30th day following reappointment of the hearing officer.

Subsequently, the agency filed a Motion to Dismiss the grievances on the basis that grievant had not shown just cause to postpone and that he was dilatory in contacting EDR to reschedule the hearing. While the agency's Motion had some merit because of the inordinate delay, the hearing officer concluded that EDR's letter of January 23, 2003 had led grievant to believe that time was not a critical factor in his seeking to reschedule the hearing. Since grievant had implied permission to reopen his case without a specific time restriction, it would have been unfair to retroactively retract such permission.[2]

Grievant requested as part of the relief he seeks, that two other employees be disciplined. Hearing officers may provide certain types of relief including rescission of discipline, and payment of back wages and benefits.[3] However, hearing officers do not have authority to discipline other employees.[4]

APPEARANCES

Grievant
Attorney for Grievant
One witness for Grievant
Assistant Director of Personnel
Attorney for Agency
Eight witnesses for Agency

ISSUES

Did the grievant's actions warrant disciplinary action under the Standards of Performance policy? If so, what was the appropriate level of disciplinary action for the conduct at issue?

[2] NOTE: Future similar cases will be handled in a different and more expeditious manner.
[3] § 5.9(a) EDR *Grievance Procedure Manual*, effective July 1, 2001.
[4] § 5.9(b)5 *Ibid.*

FINDINGS OF FACT

The grievant timely filed five grievances. The first grievance alleged sexual harassment and objected to a revised Employee Work Profile.[5] The second grievance alleges retaliation by the Assistant Director of Personnel because grievant reported that he had stolen five state-owned computers.[6] The third grievance alleges racial discrimination because campus police were called when grievant was notified that he was being placed on administrative leave.[7] Grievant filed the fourth grievance after he received a Group II Written Notice for failure to follow a supervisor's instructions and for leaving the work site during work hours without permission.[8] Grievant's fifth grievance was filed when he received another Group II Written Notice for repeatedly making false statements, undermining the authority of management, disruptive behavior and abusive language.[9] Grievant was removed from state employment as part of the disciplinary actions.

George Mason University (hereinafter referred to as agency) has employed the grievant for 15 years. At the time of removal, grievant was the Buildings and Grounds Supervisor. Grievant had been promoted three times during the course of his employment. His work performance had been satisfactory or better. He was considered a hard worker.

In 1995, grievant filed a grievance alleging that the Assistant Director of Personnel (ADP) had retaliated and discriminated against him when he issued a Group I Written Notice for disruptive behavior. Grievant claimed the disciplinary action was retaliatory because grievant had earlier made a call to the State Employee Hotline for Fraud, Waste and Abuse alleging that the ADP had stolen four state computers.[10] A three-person panel conducted a grievance hearing that upheld the disciplinary action.[11] The Hotline complaint was separately investigated and found to be without merit.[12] On March 15, 2002, grievant filed another grievance alleging retaliation and citing the same rationale he had cited in his 1995 grievance, i.e., that the ADP continues to retaliate against him because of the Hotline complaint.[13] In the current version of the grievance, grievant complains that the ADP has wronged him over the years but fails to cite specific examples.

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[5] Exhibit 3. Grievance Form A, filed March 6, 2002.
[6] Exhibit 4. Grievance Form A, filed March 15, 2002.
[7] Exhibit 5. Grievance Form A, filed March 15, 2002.
[8] Exhibit 6. Grievance Form A, filed April 5, 2002. Written Notice, issued April 5, 2002.
[9] Exhibit 7. Grievance Form A, filed April 5, 2002. Written Notice, issued April 5, 2002.
[10] Exhibit 4. Grievance Form A, filed April 12, 1995.
[11] Exhibit 8. Grievance Panel Decision, February 15, 1995.
[12] Grievant filed a similar complaint against the Vice President of Facilities, alleging that he had stolen university computers. That charge was investigated and found to be without merit.
[13] Grievant has the dubious distinction of having filed the second highest number of grievances (45) of any employee in the history of the Commonwealth; none of the grievances have been upheld.

In January 2002, agency management made a business decision to utilize an outside contractor to perform the function of small office moves on campus. Grievant had been supervising two wage employees who performed these moving tasks. Because his position was being eliminated, grievant was given the opportunity either to take a similar position at a satellite campus, or to become a housekeeping labor crew supervisor in the main campus physical plant department. Grievant opted to remain at the main campus. His new position was in the same pay band, at the same rate of pay, and included supervision of the same two wage employees.

Although his Employee Work Profile (EWP) (position description) remained virtually the same, his title was changed and he was assigned to a different supervisor. These changes necessitated that a revised EWP be prepared and signed by grievant. The revised EWP was given to grievant on February 6, 2002.[14] When grievant's new supervisor explained that the scope of the job included the handling of various emergency situations on campus (removal of fallen trees, dead animals, snow removal, responding to flooded toilets), grievant became upset and refused to sign the EWP. He complained that he would not become a floor mopper and toilet cleaner. Grievant's supervisor and the Assistant Director of Personnel explained that grievant's primary job was the same as before but that all employees in the department are expected to respond when the occasional emergency situation arises. Grievant continued to refuse to sign the EWP maintaining that he considered the new position a demotion. The Human Resources Department has reviewed grievant's revised EWP and concluded that it is appropriate to his position, and that the role level is properly classified.[15] Grievant filed the first grievance alleging that he had been mislead about his new position because he had refused to have sex with his previous supervisor.

On February 8, 2002, grievant called in sick. The person who took grievant's call had been instructed by the supervisor to tell grievant to call him on his cell phone. The person taking the call gave that instruction to grievant. Grievant never called his supervisor that day. On February 11, 2002, grievant's supervisor directed grievant to review 60 work orders and provide a status report about which orders were completed and which were yet to be completed. He also directed grievant to call in periodically during the day. Grievant failed to call in during the morning. Several calls were made to grievant's state-owned cell phone and messages were left on the voice mail. Grievant failed to return any of the calls.[16] The supervisor then called a coworker who was with grievant, and

[14] Exhibit 13. Grievant's Employee Work Profile, February 6, 2002.
[15] Exhibit 3. Memorandum to supervisor from Human Resources analyst, March 12, 2002.
[16] Grievant avers that his cell phone was not working. However, grievant's cell phone and pager were both checked on February 13, 2002 and found to be in working order. *See* Exhibit 12, p. 11, Supervisor's notes.

through him, told grievant to call the supervisor immediately. Grievant refused to call the supervisor.

At about 7:45 a.m. on February 12, 2002, grievant came to work where his supervisor was waiting outside grievant's locked office door. The supervisor twice asked grievant to unlock his door so that they could go inside. Grievant refused, told the supervisor to open it himself, and left the area. The supervisor located another key and waited for grievant to return. He then asked grievant for the 60 work orders given to him the day before. Grievant instead handed the work orders to a subordinate and told him to go through them. The supervisor then called his immediate supervisor (ADP) to the scene. The ADP told grievant he would have to go over the work orders himself (rather than delegating to a wage employee) and that he must work with his new supervisor. Grievant started to walk away stating that he would not work with his supervisor. Both the ADP and the supervisor directed grievant to remain in his office. Grievant left the building, and drove away. He did not tell either the supervisor or the ADP where he was going. He failed to call in for the remainder of the day.

The ADP called grievant's state-provided cell phone and office phone, and left voice mail messages on both advising grievant that he was in violation of the Standards of Conduct for refusing to perform work assigned by his supervisor.[17] He further directed grievant to return his calls immediately or face disciplinary action. Grievant did not return the calls. He did not review the work orders as directed. As a result of this incident, the supervisor issued a Group II Written Notice to grievant on April 5, 2002, and grievant filed the fourth grievance.

On February 18, 2002, a decision was made to place grievant on paid administrative leave. At about 1:00 p.m. grievant's supervisor advised him that he was being placed on administrative leave, that he should take his truck back to the shop, turn in his keys and go home. Grievant refused to comply with the instructions. The supervisor called the campus police department and requested assistance. When the police arrived, grievant was again given the same instructions. Grievant then complied with the instructions. As a result of this incident, grievant filed the third grievance alleging racial discrimination (Grievant is African-American). Agency records during the five-year period prior to this incident reveal that campus police had been called to the Physical Plant Department on five other occasions. Three of the employees were Caucasian; two were African-American.[18]

After the above confrontation, grievant called several employees on campus alleging that his previous supervisor had retaliated against him because

[17] Exhibit 6. Written statement of ADP.
[18] Exhibit 5. Agency Equity Office memorandum to file, April 9, 2002.

grievant would not have sex with the supervisor.[19] Some of the messages were recorded on recipients' voice mail, a tape recording of which was played during the hearing and is part of the audio record. None of the employees who received the calls were in grievant's department or his supervisory chain of command. The recipients of these calls notified agency management and human resources. The previous supervisor learned of grievant's telephone calls and notified the campus police. The police department conducted an investigation, the results of which were corroborated by witness testimony during the hearing.[20] As a result of these calls, grievant was issued a Group II Written Notice on April 5, 2002. Because of the accumulated disciplinary actions, grievant was removed from employment on the same date.

After grievant was placed on administrative leave, the Employee Relations Manager requested that grievant have a psychiatric evaluation. The agency decided that such an evaluation was necessary because of grievant's current behavior, as well as an incident that had occurred in 1994 when grievant said he would kill a specific group of employees without remorse.[21] A psychiatrist interviewed grievant on February 25 & 28, 2002; he reported that grievant was not a danger to himself or coworkers.

Grievant was called back to work on April 2, 2002 and given three days to respond to the charges in the two Written Notices.

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 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

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[19] On May 29, 2001, grievant had made the same allegations against his supervisor. An extensive investigation failed to find any evidence of either sexual harassment or retaliation by the supervisor. *See* Exhibit 11. Investigation Report, June 20, 2001.

[20] Exhibit 10. Campus Police Department Incident Report, February 25, 2002.

[21] Exhibit 2. Group I Written Notice for disruptive behavior, issued August 22, 1994.

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

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.[22]

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 (DHRM) 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. 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. Examples of Group II offenses include failure to follow a supervisor's instructions, failure to perform assigned work, and leaving the work site during work hours without permission.[23] The policy also states:

> The offenses set forth below are not all-inclusive, but are intended as examples of unacceptable behavior for which specific disciplinary actions may be warranted. Accordingly, any offense which, in the judgment of agency heads, undermines the effectiveness of agencies' activities may be considered unacceptable and treated in a manner consistent with the provisions of this section.[24]

Grievant's testimony was at times internally inconsistent. The claimant's credibility was further tainted by his extensive past record of unsubstantiated accusations, and his failure to disclose his criminal record on state application forms.[25] Moreover, grievant continues to maintain that the ADP and the Vice

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[22] § 5.8, EDR *Grievance Procedure Manual*, effective July 1, 2001.
[23] Section V.B.2, DHRM Policy 1.60, Standards of Conduct, September 16, 1993.
[24] Section V.A. *Ibid*.
[25] Exhibits 18, 19, 20, and 21. Grievant's applications for state employment in 1989, 1985, 1988 and 1987, respectively. Grievant, by his own admission, is a convicted felon.

President are both lying about stealing computers, despite the fact that he failed to offer any evidence to support his allegations. Therefore, where there were differences between grievant's testimony and other witnesses, grievant's testimony was generally found to be less credible.

Sexual Harassment and revised EWP

To establish a sexual harassment claim under Title VII based on harassment by a supervisor, an employee must show:

(1) that he or she belongs to a protected group;
(2) that the employee has been subject to unwelcome sexual harassment, such as sexual advances, requests for sexual favors, and other conduct of a sexual nature;
(3) that the harassment must have been based on the sex of the employee;
(4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and,
(5) a basis for holding the employer liable.[26]

Grievant's former supervisor offered credible testimony denying that he had ever solicited sex or in any other manner sexually harassed grievant. A prior thorough investigation into the same charges revealed no evidence of any inappropriate conduct by the former supervisor. Moreover, under cross-examination during the hearing, grievant admitted that the former supervisor had never asked him for sex. Grievant contended that he made the accusations because he believed that the former supervisor "was working his way up to" asking for sex. Accordingly, grievant has utterly failed to prove his allegation of sexual harassment.

The agency has offered preponderant evidence that grievant's revised EWP was substantially similar to his prior EWP. Further grievant retained the same rate of pay, same pay band, and same scope of supervision he had under the prior EWP. The new EWP did require him to perform any tasks that were inappropriate for the position.

Retaliation

Retaliation is defined as actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority.[27] To prove a claim of retaliation, grievant must prove that: (i) he engaged in a protected activity; (ii) he suffered an adverse employment action; and (iii) a nexus or causal link exists between the

[26] Mendoza v. Borden, Inc., No. 97-5121, Ct. of Appeals (11th Cir.) November 16, 1999.
[27] EDR *Grievance Procedure Manual*, p.24

protected activity and the adverse employment action. Based on grievant's testimony and evidence, his basis to claim participation in a protected activity was his reporting of potential fraud or abuse on the State Employee Hotline. In order to establish retaliation, grievant must show a nexus between his Hotline report and what he claims were wrongs against him. Grievant has not specified in his grievance what the alleged wrongs were. However, even if one assumes that the new EWP and the events of February 6-18, 2002 constitute the alleged wrongs, grievant has not established any such connection between the two events. Moreover, even if such a nexus could be found, the agency has established nonretaliatory reasons for the EWP, the supervisory instructions, and the police presence on February 18, 2002. For the reasons stated previously, grievant has not shown that the agency's reasons for its actions were pretextual in nature.

Racial Discrimination

An employee may demonstrate racial discrimination by showing direct evidence of intentional discrimination (specific remarks or practices), circumstantial evidence (statistical evidence), or disparate impact resulting from the event of which he complains. Grievant contends that police were called on February 18, 2002 because he is African American. However, grievant has not presented any testimony or evidence of remarks or practices that would constitute racial discrimination. In contrast, the agency has presented testimony and evidence that the supervisor had good cause to be apprehensive about grievant's reaction to being placed on suspension. Moreover, the evidence reveals that police were called only *after* grievant had refused to comply with his supervisor's instructions to turn in his equipment and go home. Thus, it was grievant's refusal to comply, in conjunction with his known history (conviction for armed robbery, and statement about killing employees without remorse), that prompted a call for police backup. Therefore, it is concluded that grievant has failed to shoulder the burden of proving racial discrimination.

Failure to follow supervisor's instructions

The agency has demonstrated, by a preponderance of evidence, that grievant failed to follow supervisory instructions on at least five occasions during the period of February 6-18, 2002. First, he failed to unlock his office door despite repeated requests from his supervisor. Second, he failed to personally review the work orders as directed by the supervisor. Third, he was flagrantly insubordinate when he walked out on both his supervisor and the ADP after being twice told not to leave. Fourth, he was again insubordinate when he refused to return calls and messages from both his supervisor and the ADP. Finally, he was insubordinate when he refused to comply with instructions to turn in his equipment and go home, which necessitated that police be called to enforce the instructions. In each of the five cited instances, the supervisory instructions were reasonable and justified.

Grievant has offered no reason for failing to unlock his office door. He contends that he did not review the work orders because, in the past, he had been allowing his subordinate to review them. However, grievant's new supervisor explained that it was not appropriate for a wage employee to perform this task and that, henceforth, he expected grievant was to personally review the work orders. Once grievant was so instructed by his supervisor, it was incumbent on him to comply with the instruction regardless of his agreement or disagreement. Grievant has not offered any reason for failing to comply with this reasonable instruction from the supervisor.

Grievant contends that he walked out on his supervisor and the ADP on February 12, 2002 because he had a previously scheduled office move at 10:00 a.m. in one of the campus buildings. However, the grievant has not explained why he walked out before 8:00 a.m. when the move was not scheduled until 10:00 a.m. More importantly, any schedule that grievant had previously established for himself must always be secondary to the direct instructions of a supervisor. Grievant could have explained to his supervisors that he had a commitment, and then they could decide whether to allow him to leave. However, grievant unilaterally decided to leave and thereby flagrantly disobeyed the unambiguous instructions of two supervisors.

Grievant alleges that he did not return calls because his cell phone was not working. However, grievant's phone was tested the following day and found to be in working order. Moreover, even if it was not working, grievant could have used a co-worker's cell phone or he could have used any other telephone on campus. Grievant deliberately did not return the supervisor's calls because he did not like the supervisor, and because he was being obstinate and insubordinate.

Grievant's new supervisor has been employed by the agency for about five years. Soon after his arrival, grievant and the supervisor did not hit it off well. Each had different areas of responsibility and so did not have a need for daily work contacts. They had rarely spoken to each other over the past five years. It is therefore understandable that grievant might be unhappy about being assigned as the subordinate to this supervisor. However, even if an employee doesn't like the person who supervises him, the employee must comply with all reasonable instructions given by the supervisor. Grievant has not shown that any of the instructions he received were illegal, immoral or otherwise unreasonable. Without such evidence, grievant is obligated to comply with supervisory instructions. Accordingly, the Group II Written Notice was warranted.

<u>False statements & Undermining management authority</u>

It is undisputed that grievant made several telephone calls to various agency employees and stated that he was being reassigned because he refused

to have sex with his former supervisor. None of the people he called were in his department and none have any direct organizational relationship with grievant. Therefore, even if grievant had a bona fide complaint, there was no reason for him to publicize his complaint to the people he called. Under cross-examination during the hearing, grievant admitted that the former supervisor had never asked him for sex. Grievant contended that he made the accusations because he believed that the former supervisor "was working his way up to" asking for sex. Accordingly, the agency has demonstrated, by a preponderance of evidence, that grievant made statements about a management employee that were not only false but also slanderous.

Such an offense undermined the authority of a management employee because it created questions in the minds of many employees regarding whether the allegation might be true. The slanderous and titillating allegation made by grievant undoubtedly became a topic of conversation, thereby disrupting the work of employees. Grievant's spreading of this malicious charge among employees, knowing it to be false, was an offense that easily meets the definition of a Group II offense. Therefore, this disciplinary action must be affirmed.

DECISION

Grievant has not borne the burden of proof necessary to sustain his allegations of sexual harassment, retaliation or sexual discrimination. His requests for relief are hereby DENIED.

The disciplinary actions of the agency are affirmed.

The Group II Written Notice for failure to follow a supervisor's instructions is hereby UPHELD.

The Group II Written Notice for making false statements about a management employee, undermining management authority, and disruptive behavior, and the termination of grievant's employment are hereby UPHELD.

APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.[28] You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[29]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant]

_____
David J. Latham, Esq.
Hearing Officer

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

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

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Nos: 5552/5553/5569/5570/5571

Hearing Date:	April 1, 2003
Decision Issued:	April 3, 2003
Reconsideration Received:	April 14, 2003
Reconsideration Response:	April 22, 2003

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 all requests must be provided to the other party and to the EDR Director. 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.[30]

[30] § 7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

PROCEDURAL ISSUES

To be considered timely, a reconsideration request must be *received* not later than the 10th calendar day following the date of the original hearing decision. Grievant's request was received on the 11th calendar day following issuance of the decision. However, because the 10th day fell on a Sunday, the request will be accepted as timely filed since it was filed on the next business day.

The grievant's request failed to state that a copy of the request had been sent either to opposing counsel, or to the EDR Director. Despite this procedural deficiency, the hearing officer will respond to the request.

OPINION

Grievant proffered with his request for reconsideration or reopening of the hearing an email memorandum dated January 25, 2002, and a written statement, purportedly from an employee of the agency. The general rule regarding the reopening of a hearing for presentation of new evidence requires that the evidence be *newly discovered*. With the exercise of due diligence, grievant could have obtained these documents at any time prior to the hearing. He has offered no reason to show that such evidence could not have been obtained earlier and presented during the hearing. Accordingly, the evidence proffered by grievant is not *newly discovered* and, therefore, does not meet the criteria necessary to justify reopening the hearing. Moreover, the hearing officer may not consider this evidence when reconsidering the decision.

Grievant notes that one or more of his witnesses who appeared for the hearing left before they were called to testify. The hearing began at 10:00 a.m. and ended at 7:35 p.m. Grievant was represented by counsel who, presumably, was aware that a hearing is to last no more than one day, unless the hearing officer determines that the time is insufficient for a full and presentation of the evidence.[31] The hearing officer notified counsel for both parties during the prehearing conference that it was their responsibility to advise their own witnesses of the time, date and location of the hearing. Counsel were also advised that the agency would present its evidence first. Further, counsel were told that agency employees called as witnesses were entitled to administrative leave to attend the hearing. The parties exchanged documents and witness lists four working days or more prior to the hearing. It was therefore incumbent on grievant's counsel to advise grievant's witnesses that their testimony would come later in the day following presentation of the agency's case. The grievance procedure statute does not provide subpoena power for grievance hearings.

[31] § 5.4, EDR *Grievance Procedure Manual*, effective July 1, 2001.

As noted by grievant, he elected to testify before his witnesses. The order of testimony of grievant and his witnesses was decided solely by grievant and his counsel. Grievant knew that, as the key witness, his testimony would be lengthy. Grievant could have chosen to have his witnesses testify first and leave his testimony until later. Therefore, his decision to testify first was a major factor if some of his witnesses left early. Moreover, when grievant requested to allow one of his witnesses to testify before the agency had finished their case, he was allowed to do so. Even though the hearing officer offered to do the same with other witnesses for grievant, grievant did not make any further requests to take witnesses out of order. Moreover, no proffer was made that any missing witness' testimony would have been so crucial as to overcome the preponderance of evidence received.

Grievant contends that he was not allowed proper and adequate breaks during the hearing. The hearing officer took frequent breaks (approximately every 90 minutes to two hours) during the day. At lunchtime, the hearing officer asked the parties if they wanted to break for lunch. The consensus response was that a 15-minute break would be sufficient. Late in the afternoon, grievant's counsel raised the issue of grievant's diabetic condition and the hearing officer immediately suggested that we take a longer break (45 minutes) to enable grievant and everyone else to take a dinner break. Grievant's responses to questions during examination and cross-examination were no different after dinner than it had been before the break.

Grievant disagrees with the hearing officer's finding of fact that he was not demoted. The grievant's disagreement, when examined, simply contests the weight and credibility that the hearing officer accorded to the testimony of the various witnesses at the hearing, the resulting inferences that he drew, the characterizations that he made, or the facts he chose to include in his decision. Such determinations are entirely within the hearing officer's authority.

Grievant asserts that the written notices were written in February 2002 but were not given to him until April 2002. There is no evidence in the record to show when the written notices were actually prepared, and no testimony was taken on this issue. The written notices were for offenses that grievant *committed* in February 2002. However, the record is silent as to when the notices were actually written. In any case, grievant was on paid administrative leave from February 18, 2002 until April 2002 while the agency investigated this matter. Under these circumstances, it is not unusual that the agency carefully considered all of the evidence before issuing the discipline on April 5, 2002.

Grievant complains that the agency had required him to undergo a psychiatric evaluation. This issue was not qualified for hearing. Nonetheless, the agency presented a reasonable basis for its decision to require such an evaluation. While the psychiatrist concluded that grievant was not a threat to others, the agency could not afford to ignore grievant's current behavior, given

his previous threat against employees. In any case, this issue does not provide a basis either to reopen the hearing or to reconsider the decision.

DECISION

The hearing officer has carefully reconsidered grievant's arguments and concludes that there is no basis either to reopen the hearing, or to change the Decision issued on April 3, 2003.

APPEAL RIGHTS

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.[32]

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David J. Latham, Esq.
Hearing Officer

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

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the matter of George Mason University
May 19, 2003

The grievant, through his representative, is challenging the hearing officer's April 3, 2003, decision in Case Nos. 5552,5553,5569,5570,5571. The grievant has requested an administrative review of the hearing officer's decision because he disagrees with the decision. The grievant raised several concerns regarding the outcome of the hearing officer's decision and the hearing proceedings. Summarily, the grievant's concerns are as follows: the admission of witnesses and testimony, evidence utilized at the hearing, how the hearing officer conducted the hearing, and the outcome of the hearing. The agency head, Ms. Sara Redding Wilson, has requested that I conduct this review.

FACTS

The George Mason University (GMU) employed the grievant as a Buildings and Grounds Supervisor. The GMU issued to the grievant a Group II Written Notice for failure to follow his supervisor's instructions and for leaving the work site during work hours without permission. The GMU issued to him a second Group II Written Notice for repeatedly making false statements, undermining the authority of management, disruptive behavior and use of abusive language. The disciplinary actions included removal from state employment. The grievant filed two grievances related to these disciplinary actions and three others on non-disciplinary matters. The Department of Employment Dispute Resolution had qualified the non-disciplinary related grievances to be heard by a hearing officer and consolidated them so they could be heard at the same time. The hearing officer issued his decision on April 3, 2003. In his decision, he upheld GMU's disciplinary action. Also, in his did not grant any relief on the non-disciplinary issues. The grievant challenged the decision by appealing to the Department of Human Resource Management (DHRM) for an administrative review.

To support his contention that the hearing officer's decision should be modified, the grievant contends that several procedural matters at the hearing and personnel management actions before the hearing were not appropriate. More specifically, he contends that only one of his witnesses was given an opportunity to testify; he was not allowed adequate breaks to accommodate his medical condition; the decision mistakenly

states that he was not demoted; the Group II Written Notices were written in February 2002 but were not presented to him until April 2002; and, he was forced to participate in a psychiatric evaluation.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case, to determine whether witnesses will testify based on the relevancy of their testimony, and to determine the grievance based on the evidence. The Department of Employment Dispute Resolution administers the grievance procedure and rules on procedural matters. 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.

In the present case, the issues the grievant raised are procedural and evidentiary matters and are outside the statutory authority of the DHRM to review. In summary, the grievant has not raised an issue that this Office is authorized to review because he has not identified either a DHRM or GMU policy that the hearing officer violated when making his decision. It appears to this Office that the grievant is disagreeing with the hearing officer's decision rather than demonstrating that a particular policy has been violated. Thus, we have no basis to interfere with this decision. Because the issues are outside the purview of this Office, we suggest that the grievant pursue his appeal through the Department of Employment Dispute Resolution.

If you have any questions regarding this determination, please call me at (804) 225-2136.

Ernest G. Spratley
Manager, Employment
Equity Services