Issue: Three Group II Written Notices with terminiation (failure to report for duty in a timely manner, failure to respond to a telephone page while on call, and failure to follow established written policy) Hearing Date: 01/09/03; Decision Date: 01/21/03; Agency: Mary Washington College; AHO: David J. Latham, Esquire; Case No. 5579; **Administrative Review: Hearing Officer Reconsideration Request received 01/31/03; Reconsideration Decision Date: 02/03/03; Outcome: No newly discovered evidence or incorrect legal conclusion – request denied; Administrative Review: DHRM Ruling Request received 01/31/03; DHRM Ruling Date: 02/28/03; Outcome: HO's decision is consistent with state and agency policy; Judicial Review: Appealed to the Circuit Court in the City of Fredericksburg on 02/20/03; Outcome: Court cannot find any matters contradictory to law. HO's decision is affirmed [Case No. CL03-26]; ruling dated 05/09/03**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5579

Hearing Date: January 9, 2003
Decision Issued: January 21, 2003

PROCEDURAL ISSUE

Although this case was initially docketed for hearing within 30 days of appointment of the hearing officer, grievant's attorney requested a postponement due to an unavoidable personal reason. A postponement was granted and the hearing was subsequently conducted on the 52nd day following appointment.[1]

APPEARANCES

Grievant
Attorney for Grievant
One witness for Grievant
Attorney for Agency
Intern for Attorney

[1] § 5.1 of the Department of Employment Dispute Resolution (EDR) *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.

Senior Locksmith
Three witnesses for Agency

ISSUES

Were the grievant's actions 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?

FINDINGS OF FACT

Grievant filed a timely appeal from three Group II Written Notices issued for failure to report for duty in a timely manner, failure to respond to a telephone page while on call, and failure to follow established written policy.[2] The grievant was removed from state employment as a result of the disciplinary actions. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[3]

Mary Washington College (Hereinafter referred to as "agency") has employed grievant as a locksmith for two years. When the disciplinary actions herein were issued, grievant had one other active Group II Written Notice.[4] Grievant filed a grievance and a hearing was conducted, however, the hearing officer's affirmation of the disciplinary action became final when grievant failed to file an appeal within the time limit.

Offense of May 12, 2002

During the school year, the Director of Residence Life and Housing had informed the senior locksmith that dormitories should be locked two hours after the posted closing time on graduation day.[5] During the week prior to graduation, grievant's immediate supervisor (senior locksmith) assigned grievant to work on Sunday, May 12, 2002 (graduation day). Dormitories officially closed at 10:00 a.m. on graduation day. Resident assistants are responsible to assure that students move their belongings out of the dormitories.[6] He instructed grievant to come to work at 11:00 a.m. and begin locking dormitories "after 12:00 noon."[7] Grievant drove to the campus at about 4:00 p.m. and observed a number of

[2] Exhibits 1, 7 & 13. Three Written Notices, issued June 24, 2002.
[3] Exhibit 17. Grievance Form A, filed June 30, 2002.
[4] Exhibit 18. *Decision of Hearing Officer*, Case Number 5405, issued May 16, 2002.
[5] Exhibit 5. Email from Director of Residence Life and Housing to senior locksmith, June 11, 2002.
[6] Those few students who remain in the dormitories for the summer or for special reasons must obtain a special pass that admits them into their dormitory. Others desiring admission must contact the campus police for permission and escort to the dormitories.
[7] Exhibit 12. Grievant's attachment III to grievance.

students still moving their belongings out of dormitories. Grievant did not radio in to the police department that he was reporting to work at 4:00 p.m. He left the campus and returned at 9:09 p.m.; this time he radioed in his reporting time.[8] Although grievant said the situation was still about the same (students still moving out), he locked dormitories until 10:52 p.m.

On June 10, 2002, grievant told his supervisor that two witnesses had overheard the conversation in which grievant was instructed by the supervisor to lock the dormitories on graduation day. When asked for the names of the witnesses, grievant refused to provide them.[9] Grievant's supervisor has been employed by the agency since August 2001. Grievant contends that his previous supervisor had always told him to "play it by ear" when locking dormitories on graduation day.

Offense of May 18, 2002

Grievant had been assigned as the "standby" or on-call locksmith during the period of May 6 –19, 2002.[10] When a locksmith is on call, he must remain close to a telephone and advise his supervisor of the telephone number, or carry a pager so that he can respond promptly to locksmith problems on campus.[11] On May 18, 2002, the campus police paged grievant at 6:36 p.m.[12] When there was no response, the police department called grievant's home telephone number at 6:56 p.m. The police department again paged grievant, and called his home telephone number, at 11:31 p.m.; grievant did not respond to any of the pages or calls.

On May 19, 2002, the police department called grievant at home but again he failed to answer. At 4:30 p.m., grievant returned home and found messages on his home telephone and he reported to the facility. After grievant reported for work a police officer tested the pager and determined that the batteries were functional when he pressed the manual beeper on the pager. Prior to this incident, grievant had twice told the police chief that his pager was not working properly.

Offense of May 20, 2002

Grievant's supervisor went to lunch at noon on May 20, 2002. At sometime between noon and 1:00 p.m., grievant filled out a leave request asking

[8] Exhibit 2. Police department radio communications log, May 12, 2002.
[9] Exhibits 3 & 4. Memorandum from senior locksmith, and statement prepared for grievant, June 10, 2002.
[10] Exhibit 11. Memorandum of on-call schedule from senior locksmith, April 23, 2002.
[11] Exhibit 12. Police department policy 1.11, *Standby Status*, effective December 1, 1997. NOTE: Subsequent to issuance of the policy, pagers were issued to locksmiths so that they need not always be near a telephone.
[12] The locksmith unit is part of the campus police department. The senior locksmith reports to the chief of police.

for family/personal leave from 3:30 p.m. to 4:30 p.m. that afternoon, and left the request on the supervisor's desk. The leave request stated that the purpose was to take his mother to an appointment with her physician.[13] The supervisor determined that grievant had not provided sufficient advance notice and that there was too much work to be done. He called grievant on the radio and advised him that the request for leave was denied. At 3:27 p.m., grievant walked past the supervisor's office, said, "I am going home ill," and left the building.[14] Grievant has never signed a leave request form stating that he was taking personal sick leave on May 20, 2002. He admitted during the hearing that he was not ill when he left work on May 20, 2002.

Grievant took his mother to the physician's office after which he took her home. She was not taken to a hospital emergency room or admitted to a hospital. Neither the physician nor grievant's mother testified at the hearing, and no affidavits or written statements from either person were proffered by the grievant.

On June 3, 2002, the senior locksmith gave grievant written advance notice that he was considering disciplinary action for the above three offenses.[15] Grievant submitted a brief one-page response. The supervisor issued Group II Written Notices for each of the three offenses and discharged grievant on June 24, 2002.

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:

> 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

[13] Exhibit 14. Leave request, May 20, 2002.
[14] Memorandum from supervisor, May 20, 2002.
[15] Exhibit 17. Memorandum from senior locksmith to grievant, June 3, 2002.

> 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.[16]

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 Personnel and Training[17] 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 I offenses are the least severe. Examples of Group I offenses include: inadequate or unsatisfactory work performance; and abuse of state time, including unauthorized time away from the work area and abuse of sick leave. 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.[18] Examples of Group II offenses include: failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy; leaving the work site during work hours without permission; and failure to report to work as scheduled without proper notice to supervision.

Offense of May 12, 2002

Grievant contends that he told his supervisor in the week prior to graduation that, on previous graduation days, he had locked the dormitories during the afternoon or early evening because students were frequently still moving out of the dorms at noon. The supervisor denies that grievant ever raised this objection. Grievant contends that two witnesses heard the supervisor tell him to lock the dormitories "in the afternoon." Grievant brought only one witness to the hearing and that witness said that the supervisor had told grievant to lock the dormitories "after noon." Grievant believes that the supervisor's statement to lock the dormitories "after 12:00 noon" meant anytime after noon, including late into the evening.

[16] § 5.8 Department of Employment Dispute Resolution, *Grievance Procedure Manual*, effective July 1, 2001.
[17] Now known as the Department of Human Resource Management (DHRM).
[18] Exhibit 23. DHRM Policy 1.60*, Standards of Conduct*, effective September 16, 1993.

Grievant's arguments on the "after noon" issue are not logically consistent. On one hand grievant argues that the supervisor's instruction meant *any time* after noon and that it could mean late at night. However, grievant also steadfastly maintains that he had objected to the supervisor's instruction to begin locking the dormitories after noon, saying that usually they are locked later in the afternoon or early evening. If grievant had truly interpreted the instruction to mean *any time,* there was no reason for him to object to the instruction. On the other hand, if grievant did raise an objection to his supervisor, it demonstrates that grievant did understand the instruction.

Based on the preponderance of the testimony, including that of grievant's own witness, it appears more likely than not that grievant did understand the supervisor's instructions to begin locking the dormitories after noon. If grievant had felt that his supervisor's instructions were inappropriate, he had ample opportunity in the week prior to graduation to bring this issue to the senior locksmith's supervisor – the chief of police. However, grievant did not do so; rather, he chose not to follow his supervisor's instructions – a Group II offense.

Offense of May 18, 2002

Grievant contends that his pager was not working correctly. A police officer tested the pager and found that the beeper was also beeping properly. A new pager was ordered for grievant in mid-June 2002. Even after the service provider deactivated the pager and sent a new one to the college, the old pager was tested and found to beep. Grievant further alleges that the agency gave him a defective pager on purpose, however, grievant presented no testimony or evidence to corroborate his allegation.

In this instance, grievant has established that he had notified the police chief well before this incident that his pager was not always working properly. Further, the agency has not proven that grievant's pager did not fail to receive messages on May 18, 2002. Grievant did respond to the campus on May 19, 2002 when he found the earlier messages on his home telephone. During the hearing the senior locksmith acknowledged that employees are not required to remain near a telephone if they have a pager. Since the agency has not proven that the grievant was deliberately failing to respond to pages, it has not shown that grievant committed any offense on May 18, 2002.

Offense of May 20, 2002

Grievant contends that he received a call from his 82-year-old mother at 3:00 p.m. saying that she was having chest pains and that the physician had told her to come to his office as soon as possible.[19] Grievant's mother lives alone and grievant is the only child in this area able to care for his mother's needs. Grievant admitted during the hearing that his mother did not have a scheduled

[19] Exhibit 21. Attachment V to the grievance.

physician's appointment on May 20, 2002. Grievant's testimony was inconsistent. He testified at one point that he called his mother at about 3:00 p.m. to check on her. Later in his testimony, grievant claimed that his mother had called him at 3:00 p.m. on his cell phone.

Grievant's overall testimony with regard to this incident was less than credible. He submitted a request to take his mother to an appointment, but admitted under oath that there was no appointment. His testimony about who called whom at 3:00 p.m. was inconsistent. He further admitted under oath that his statement to the supervisor that he was ill was untruthful. It appears far more likely than not that grievant had decided, for whatever reason, to leave work at 3:30 p.m. on May 20, 2002. He told the supervisor whatever he thought the supervisor might believe in order to justify leaving early. When that was not successful, he claimed he was ill and left work even though he was not ill. This was unquestionably an abuse of sick leave. However, more significantly, grievant left the work site during work hours without the permission of his supervisor – a Group II offense.

It must be noted that, prior to the instant grievance, grievant already had one active Group II Written Notice. One additional Group II Written Notice normally results in termination of employment. Thus, even if this decision had upheld only one of the three written notices, grievant would nonetheless be removed from state employment.

DECISION

The decision of the agency is hereby modified.

The Group II Written Notice issued on June 24, 2002 for failing to report to work in a timely manner on May 12, 2002 is hereby UPHELD.

The Group II Written Notice issued on June 24, 2002 for failure to respond to a phone page on May 18, 2002 is hereby RESCINDED.

The Group II Written Notice issued on June 24, 2002 for failure to follow established departmental policy on May 20, 2002 is hereby UPHELD.

Grievant's removal from employment effective June 24, 2002 is hereby UPHELD.

The disciplinary actions shall remain active pursuant to the guidelines in the Standards of Conduct.

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.[20] 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.[21]

[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

[20] 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, Record No. 2853-01-4, Va. Ct. of Appeals, (December 17, 2002).

[21] 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 No: 5579

Hearing Date:	January 9, 2003
Decision Issued:	January 21, 2003
Reconsideration Received:	January 31, 2003
Reconsideration Response:	February 3, 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. 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.[22]

OPINION

Grievant proffered with his request for reconsideration a written statement from his mother's physician. 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 this physician statement at any time during the past seven months. He has offered no reason to show that such statement could not have been obtained and presented during the hearing. Accordingly, this written physician statement is not *newly discovered* and, therefore, does not meet the criteria necessary to justify reopening the hearing. Even if such a statement were

[22] § 7.2 Department of Employment Dispute Resolution *Grievance Procedure Manual*, effective July 1, 2001.

deemed to meet the criteria, it would not change the decision for the reasons discussed therein.

Grievant also submitted a statement from his own physician contending that he went to the physician on the same day – May 20, 2002 – for a back sprain. Grievant would have the hearing office believe that he worked until 3:00 p.m., went to his mother's residence, took her to her physician and then, somehow managed to visit his own physician in the metropolitan Washington, D.C. area. – some 50 miles from his workplace. Given the afternoon traffic in that area, this contention is less than credible. Even less credible is grievant's contention that he had such a back sprain on May 20, 2002. Grievant never advised his employer of this condition before leaving work on May 20, 2002 and never mentioned it during the hearing.

Grievant contends that the agency violated his due process rights by not giving him advance notice that discipline was being considered. Not only did the agency give grievant a written advance notice of possible disciplinary action three weeks before discipline was issued, but grievant wrote a response to the charges.[23]

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 January 21, 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.[24]

[23] See *Decision of Hearing Officer*, page 4, second full paragraph.

[24] An appeal to circuit court may be made only on the basis that the decision was *contradictory to law,* and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, Record No. 2853-01-4, Va. Ct. of Appeals, (December 17, 2002).

_____
David J. Latham, Esq.
Hearing Officer

POLICY RULING OF DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the matter of the Mary Washington College
February 28, 2003

The grievant, through his representative, is challenging the hearing officer's January 21, 2003, decision in Grievance No. 5579. The grievant has requested an administrative review of his case because he believes that the hearing officer's decision is inconsistent with state or agency policy. Summarily, his concerns are that the three disciplinary actions that terminated him were issued within one to two months after the offense. He also requested that the hearing officer reconsider his decision based what he identified as new evidence. The agency head, Ms. Sara Redding Wilson, has requested that I conduct this review.

FACTS

Mary Washington College (MWC) employed the grievant as a Locksmith before he was terminated. MWC issued to him the following disciplinary actions: (1) a Group II Written Notice for "Fail to report for duty in a timely manner…"; (2) a Group II Written Notice for "Failure to respond to phone page while on duty recall assignment as the on call locksmith; and (3) a Group II Written Notice for "Failure to follow established Departmental policy." The three written notices were sufficient to cause his termination. He filed a grievance and the hearing officer issued his decision on January 21, 2003. In his decision, the hearing officer upheld two of the three Group II Written Notices and the termination remained. The grievant had one other active Group II Written Notice on record. In his reconsideration response of February 3, 2003, the hearing officer concluded that there was no basis either to reopen the hearing or to change the decision he issued on January 21, 2003. The grievant challenged the hearing officer's January 21, 2003, 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 is inconsistent with state or agency policy, the grievant opines that the agency violated Section VII.B of the DHRM Policy Number 1.60, Standards of Conduct, which states that "[m] anagement should issue a Written Notice as soon as possible after an employee's commission of an offense." The grievant surmises that an unreasonable amount of time elapsed between the alleged violation and the issuance of the disciplinary action. This is based on the fact that the agency issued the three Group II Written Notices on June 24, 2002, for violations that occurred on May 12, 2002, May 18, 2002, and May 20, 2002, respectively. The grievant provided, as an example of the inconsistency, a ruling that the same hearing officer had made in which timeliness was a consideration (In the Matter of Department of Mental Health, Mental Retardation and Substance Abuse Services, Case No. 5166). In Case No. 5166, the hearing officer stated, "The purpose of issuing disciplinary action as soon as possible is to promptly make the offender aware of both the specific offense and the consequences that flow from the offense." Thus, the

grievant concluded that the hearing officer's decision was inconsistent with agency and state policy.

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, this Agency maintains that the time intervals involved in this matter are reasonable and consistent with DHRM Policy Number 1.60. In the present case, the hearing officer noted that while the violations occurred on May 12, 2002, May 18, 2002, and May 20, respectively, the grievant had been put on notice of the pending disciplinary action as early as June 3, 2002. Concerning the grievance referred to in Case No. 5166, noteworthy is the fact that the time intervals involved are distinctly different. In Case No. 5166, the hearing officer commented on a protracted time interval of two to four months. In the case at hand, the time interval between the earliest violation and notification of pending disciplinary action was three weeks. Disciplinary action was taken approximately two and one-half weeks after notification. Moreover, DHRM Policy Number 1.60 does not identify a specific time period as to how soon disciplinary action should occur after a violation. Rather, the policy inherently recognizes that agency investigations and reviews may have a reasonable impact on timeliness. While it is preferable that agencies expedite disciplinary action, such a delay as in the present case is not unusual or unreasonable, especially since an employee's job was at stake. Disciplinary action is based on the nature and severity of the violation, not the time interval between the violation and the issuance of the disciplinary action. This Department has determined that the hearing officer's decision is consistent with state and agency policy.

Thus, we have no basis to interfere with this decision. If you have any questions regarding this determination, please call me at (804) 225-2136.

Ernest G. Spratley

Manager, Employment
Equity Services