Issues: Group II Written Notice (failure to follow supervisor's instructions) and Group III Written Notice with termination (falsification of records); Hearing Date: 03/18/03; Decision Issued: 03/20/03; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 5660; **Reconsideration Request received 03/31/03; Reconsideration Decision date: 04/10/03; Outcome: No basis to reopen hearing or change original decision; Administrative Review: DHRM Ruling Request received 03/31/03; DHRM Ruling date: 05/13/03; Outcome: No violation of application of provisions of DHRM or agency policy; Judicial Review: Appealed to Chesterfield County Circuit Court on 06/12/03; Court ruling issued 08/01/03; Outcome: HO's decision found not to be contradictory to law [CL03-431]**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5660

Hearing Date: March 18, 2003
Decision Issued: March 20, 2003

PROCEDURAL ISSUE

Grievant requested as part of her relief the option of resigning in lieu of removal from employment. Hearing officers may provide certain types of relief including rescission of discipline, and payment of back wages and benefits.[1] However, hearing officers do not have authority to alter the nature of the employee's separation from employment.[2] Such a decision is an internal management decision made by each agency, pursuant to Section 2.2-3004.B of the Code of Virginia, which states in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government."

APPEARANCES

Grievant
Attorney for Grievant

[1] § 5.9(a) EDR *Grievance Procedure Manual*, Ibid.
[2] § 5.9(b)6 & 7 *Ibid.*

Superintendent
Advocate for Agency
One witness for Agency

ISSUES

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

FINDINGS OF FACT

The grievant filed a timely grievance from two Written Notices. She received a Group II Written Notice issued for failure to follow a supervisor's instructions.[3] She also received a Group III Written Notice for falsification of records.[4] Grievant's employment was terminated as part of the two disciplinary actions. Following failure to resolve the grievance, the agency head qualified the grievance for a hearing.[5] The Department of Corrections (DOC) (hereinafter referred to as agency) has employed grievant for five years; she was a corrections officer senior.

The agency has promulgated a policy that addresses outside activity, which states, in pertinent part:

> Employees may not accept payment for services from any person(s) or organization other than the Department of Corrections without written approval of the organizational unit head. Failure to obtain permission for outside employment may result in disciplinary action under the Standards of Conduct.[6]

After working for four years at another corrections facility, grievant transferred to her most recent corrections facility on June 25, 2001. On June 27, 2001, an orientation session was conducted for all newly hired employees. During that session, the Chief of Security advised all employees that anyone working in other jobs must complete and sign a form requesting permission to secure employment outside regular working hours. In November 2001, grievant attended a meeting of all staff during which the Chief of Security repeated the requirement for all employees who worked other jobs to complete a request for outside employment form. Forms were available during the meeting and several other employees completed the forms and turned them in. On September 16, 2002, grievant attended a third meeting at which the Chief of Security discussed

[3] Exhibit 1. Written Notice, issued December 11, 2002.
[4] Exhibit 1. Written Notice, issued December 11, 2002.
[5] Exhibit 2. Grievance Form A, filed December 13, 2002.
[6] Exhibit 10. Section 5-4.17B & D, DOC Procedure Number 5-4, *Standards of Ethics and Conflicts of Interest*, June 1, 2002.

the same topic and again directed all employees to complete the request form if they were working outside employment.[7] Grievant did not fill out a request form during any of the above meetings or at any other time.

When grievant was hired, she had been working as a wage employee in a part-time capacity for another state agency since October 1998. She listed that employment on her Application for Employment.[8] She did not attempt to conceal this employment and discussed it from time to time with coworkers and supervisors. Because she assumed that most people knew about her part-time job, she felt that there was no need to complete the request form. An audit conducted by the American Correctional Association during November 2002 revealed that grievant had not filled out the required form.

The Commonwealth's policy regarding leave for community service provides that leave under this policy may be used only for providing community service or school assistance. The policy further provides that employees with children may be granted paid leave for school assistance under this policy to:

- meet with a teacher or administrator of a public or private preschool, elementary school, middle school, or high school concerning their children, step-children, or children for whom the employee has legal custody, or
- attend a school function in which such children are participating.[9]

The policy also states that if the leave is used for school assistance, supervisors may require written verification from a school administrator or teacher.

Grievant requested, and was granted permission for, 16 hours of school assistance leave on June 10 and June 11, 2002.[10] Grievant would have been scheduled to work from 6:00 a.m. to 6:00 p.m. on each of these two days, but for her leave request. On June 10, 2002, grievant went to her child's school to meet with his teacher for five hours. She did not report to work before or after the parent-teacher meeting. On June 11, 2002, grievant worked at her part-time job for another state agency from 6:00 a.m. to 6:30 p.m. The time sheet from her part-time job reflects that she worked for 12 hours and took one half-hour break.[11] On June 11, 2002, grievant received full pay from the agency for school

[7] Exhibit 9. Attendance Roster, September 16, 2002.
[8] Exhibit 1. Application for Employment, May 10, 2001.
[9] DHRM Policy No. 4.40, *Leave to Provide Community Service*, July 1, 2001.
[10] Exhibit 4. Leave Activity Reporting Form, signed May 6, 2002.
[11] Exhibit 5. Running Time Sheet, pay period June 1 – June 15, 2002. NOTE: Grievant avers that met with her son's teacher for two hours on June 11, 2002. However, the time sheet from grievant's outside employment indicates that she worked for the entire day from 6:00 a.m. to 6:30 p.m. and therefore could not have gone to school on that date. Grievant did not offer testimony or a written statement from her supervisor to rebut the time sheet.

assistance leave, and also received pay from her part-time employer for the 12 hours worked there.

Grievant was absent from work on sick leave during the week of July 22-28, 2002.[12] Grievant was asked to work part-time by her other state employer beginning at 10:00 p.m. on the evening of July 28, 2002. Grievant avers that she felt better that evening. She reported to work for the part-time employer and worked until 6:45 a.m. the following morning.[13]

Grievant was absent on approved leave under the Family and Medical Leave Act (FMLA) from October 7, 2002 through December 2, 2002. The initial physician's excuse ran from October 7 through November 10, 2002. Grievant's first scheduled workday after November 10 was November 18, 2002. On November 18, 2002, grievant called in stating that she was *still* sick and unable to return to work. To support her absence on this date, grievant faxed to the agency a note from her physician stating, "Pt continues under care for work-related stress, continue L.O.A. for medical reason 11/11 – 11/24/02 return work 11/25/02."[14]

During this week of continued leave under FMLA, grievant worked a 12.5–hour shift at her part-time employment on November 13, 2002.[15] On November 13, 2002, grievant received full pay from the agency for FMLA leave, and she received pay from her part-time employer.

Grievant was given the Written Notices and removed from employment on December 13, 2002. Following her removal from state employment, grievant obtained a note from her physician on which he states that his November 18th note contained an error in the dates; the revised note lists the dates of 11/18 - 11/24/02.[16]

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

[12] Exhibit 4. Leave Activity Reporting Form, signed August 5, 2002.
[13] Exhibit 5. Running Time Sheet, pay period July 16 to July 31, 2002.
[14] Exhibit 7. Note from physician, November 18, 2002.
[15] Exhibit 7. Running Time Sheet, pay period November 1 to November 15, 2002.
[16] Exhibit 11. Note from physician, December 16, 2002.

and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

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

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

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.[17]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards 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. Section V.B.3 defines Group III offenses to include acts and behavior of such a serious nature that a first occurrence should normally warrant removal from employment.

The Department of Corrections, pursuant to Va. Code § 53.1-10, has promulgated its own Standards of Conduct and Performance, which is modeled very closely on the DHRM Standards of Conduct. Group II offenses include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal from employment; an example of a Group II offense is failure to follow a supervisor's instructions. Group III offenses include falsification of any records or other official state documents.[18] The policy also states:

> The offenses listed in this procedure are intended to be illustrative, not all-inclusive. Accordingly, an offense that in the judgment of the agency head, although not listed in the procedure, undermines the

[17] § 5.8, Grievance Procedure Manual, *Rules for the Hearing*, Effective July 1, 2001.

[18] Exhibit 8. Section 5-10.17A & B.2, Department of Corrections Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

effectiveness of the agency's activities or the employee's performance, should be treated consistent with the provisions of the procedure.[19]

Failure to follow a supervisor's instructions

The preponderance of evidence reflects that on multiple occasions, the Chief of Security instructed all employees to complete and sign a request form in order to obtain written permission to engage in outside employment. Grievant was present on at least three occasions (June 27, 2001 orientation, November 2001, and September 16, 2002) when this instruction was given to her. Although grievant does not recall being at the first two meetings, the credible testimony of the Chief of Security establishes that she was present. Moreover, grievant admits attending the September 16, 2002 meeting, and her signature on the attendance roster corroborates her attendance. Therefore, the agency has borne the burden of proof necessary to demonstrate that grievant failed to follow her supervisor's instructions. The burden of persuasion now shifts to grievant to demonstrate any mitigating circumstances.

Grievant argues that some of her coworkers and supervisors knew that she was working in outside employment, that she made no attempt to hide such employment, and therefore, she saw no need to complete the form. Grievant's argument is not persuasive. First, the grievant has not shown that the superintendent was aware of her outside employment. Even though grievant testified that she had mentioned her outside employment during a group discussion at which the superintendent was present, the superintendent credibly denied that grievant ever mentioned her outside employment. Grievant claims that at least four other employees were involved in the group discussion but she did not ask any of those employees to testify or provide written statements.

Second, grievant contends that some of her supervisors knew of her outside employment. Assuming that to be true, such knowledge by some supervisors did not negate the Chief of Security's direct instruction to complete a request form in order to obtain written approval for outside employment. Before any employee is allowed to work in outside employment, agency management must review the nature of the employment and then give its written approval. Grievant never requested permission and therefore, never received written approval to secure outside employment. Grievant argues that she had not received written approval for outside employment at the previous facility to which she was assigned and therefore felt it wasn't necessary at her current facility. If the Chief of Security had never directed grievant to submit a request for permission form, grievant's argument might have some merit. However, once grievant was transferred to the current facility, under totally different management, she had a duty and obligation to follow all instructions from supervision.

[19] Section 5-10.7C *Ibid*.

Grievant also argues that disclosure of her outside employment on the application form was sufficient notice to management. This argument also fails. The application form does not indicate that grievant intended to continue in the job once she was transferred to her current facility. It indicates only that she was working at the job at the time she completed the application form in May 2001. There is no evidence to show that grievant advised the Chief of Security during her interview that she intended to continue in her part-time employment. Moreover, even if grievant had so advised the Chief, his subsequent instruction to complete a request for permission form superceded any such alleged statement. Finally, during her testimony grievant admitted that she had never been given permission, either written or verbal, to work in outside employment. Accordingly, grievant has not borne the burden of persuasion. The discipline of a Group II Written Notice is affirmed.

Falsification of records

Black's Law Dictionary defines "falsify" as, "To counterfeit or forge; to make something false; to give a false appearance to anything. … The word "falsify" may be used to convey two distinct meanings – either that of being intentionally or knowingly untrue, made with intent to defraud, or mistakenly and accidentally untrue. Washer v. Bank of American Nat. Trust & Savings Ass'n, 21 Cal2d 822, 136 P.2d 297, 301."

The Commonwealth provides a wide variety of leave for state employees including administrative leave, annual leave, educational leave, family and medical leave, leave to provide community service, military leave, and sick leave. Employees requesting leave for any of these purposes must complete a leave activity reporting form certifying that the hours of leave requested are being used for the purpose requested.[20] Most of these policies provide that supervisors may request written verification to document that the time was used as requested. If, for example, an employee requests leave to attend a court proceeding, one may take administrative leave only for the amount of time necessary to attend court. An employee may not go to court for two hours, and then use the rest of the day for shopping or other personal business. If an employee wished to take the entire day off, she may use two hours of administrative leave for court, and then use annual leave for the remaining six hours.

Grievant certified that she was utilizing 16 hours of leave for school assistance on June 10 and 11, 2002. However, by her own testimony, she claims to have gone to school for only five hours on June 10, 2002, and for only two hours on June 11, 2002. For the remaining nine hours, grievant was actually working her part-time job on June 11, 2002. Therefore, grievant should have taken seven hours of school assistance leave and nine hours of annual leave.

[20] Exhibit 4. Certification language is found below the signatures of employee and supervisor.

Finally, grievant admitted during the hearing that, from the beginning, she had not planned to use the full 16 hours of leave for school assistance purposes. Accordingly, grievant's certification of the entire 16 hours as school assistance leave was intentionally and knowingly untrue.

The situation that occurred on July 28, 2002 is less clear-cut. Grievant's sick leave ended on July 28, 2002, and she would not have been scheduled to work after 6:00 p.m. Grievant avers that she felt better that evening and was able to work at her part-time job from 10:00 p.m. to 6:45 a.m. on the morning of July 29, 2002. Thus, there was no direct overlap between the time grievant was scheduled to work for the agency and the hours she worked at her part-time job. Accordingly, while this sudden recovery may appear suspicious to the agency, it does not appear that grievant's use of sick leave on July 28, 2002 constituted a falsification of state documents.

Grievant was absent and received her regular salary for nearly two full months from October 7, 2002 through December 2, 2002. During this period, grievant was paid under the aegis of FMLA. On November 13, 2002, she worked at her part-time job and was also paid for 12.5 hours of work. This constitutes a knowing and intentional falsification. Grievant argues that she would not have been scheduled to work for the agency during the week of November 10-16, 2002, and that this should not be held against her. This argument does not persuade for the following reasons. Grievant's work schedule is not relevant. While grievant was on FMLA leave, the agency could not recall her in the event of a sudden need for staff.[21] Grievant also contends that her FMLA leave ended on November 10, 2002 because her physician had initially recommended medical leave from October 7 through November 10, 2002.[22] If this were so, grievant should not have been paid under FMLA leave for the week of November 10-16, 2002. In fact, however, according to agency records, grievant was paid under FMLA for the entire period from October 7 through December 2, 2002.

The preponderance of evidence indicates that grievant was, in fact, under a physician's care during the entire two-month period. First, the physician wrote a note on November 18, 2002 certifying that grievant was absent due to medical reasons for the period from November 11-24, 2002. On the same date, grievant called the agency and stated that she was *still* sick and unable to return to work, thus corroborating the physician's statement. Subsequent to her removal from employment in December 2002, grievant obtained a second note from the physician in which he amended the leave of absence dates in his earlier note. However, the physician also stated that grievant was seen on November 18, 2002 for "continued" care for "increased" stress. The plain inference from this statement is that grievant's stress had not only been *continuous*, but that it had *increased* prior to November 18, 2002. Thus, the weight of the evidence

[21] In the event of emergencies such as illness of other staff, or disturbances among detainees, DOC security staff are subject to recall to work even though they may be on scheduled rest days.
[22] Exhibit 6. Letter from physician, October 4, 2002.

suggests that grievant was continuously ill before, *during*, and after the week of November 10-16, 2002. Grievant did not proffer the testimony of the physician to rebut this reasonable inference.

Therefore, the totality of the evidence in this case substantiates a finding that grievant was ill and was, in fact, utilizing FMLA leave from October 7, 2002 through December 2, 2002. While drawing FMLA leave pay, grievant worked at outside employment. Claiming that she was ill in order to draw leave pay, while working at outside employment, is a falsification of state documents. Moreover, grievant's post-dismissal attempt to have her physician retroactively alter the dates of her excuse note is not sufficient to overcome the facts in this case.

DECISION

The disciplinary actions of the agency are affirmed.

The Group II Written Notice issued on December 11, 2002 for failure to follow a supervisor's instructions is hereby UPHELD.

The Group III Written Notice issued on December 11, 2002 for falsifying official state records, and the removal from employment are hereby UPHELD.

The disciplinary actions shall remain active pursuant to the guidelines in Section VII.B.2 of 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.[23] 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.[24]

[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

[23] 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).

[24] 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: 5660

Hearing Date:	March 18, 2003
Decision Issued:	March 20, 2003
Reconsideration Received:	March 31, 2003
Reconsideration Response:	April 10, 2003

PROCEDURAL ISSUES

Grievant was represented by counsel during the hearing. She submitted a request for reconsideration on a *pro se* basis. It is therefore assumed that an attorney no longer represents her.

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.

Grievant stated in the first paragraph of her request that she wanted the Director of the Department of Human Resource Management (DHRM) to review the hearing officer's decision but she did not indicate that she sent a copy to the DHRM Director. If grievant desires such a review, she should make her request directly to the DHRM Director.

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.[25]

OPINION

Grievant proffered with her request for reconsideration a written statement from a psychologist dated March 27, 2002, a letter from an agency personnel analyst dated March 27, 2002, four incident reports from December 2002 and, what appear to be pages from a logbook. 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 all of these documents at any time prior to her hearing. She 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 contends that the agency did not comply with Section 5-10.13.B of the Standards of Conduct procedure. The referenced section of the agency's procedure gives the agency the discretion to *consider* mitigating circumstances and to reduce corrective action if warranted. However, this section does not *require* an agency to reduce the corrective action. In this case, the agency made a decision that the circumstances did not warrant a reduction in corrective action. Grievant presented no evidence to demonstrate that the agency's decision was incorrect.

Grievant argues that Sections 5-10.6 (Definitions), 5-10.11, and 5-10.12 were not followed but fails to explain her argument. It is impossible to respond to grievant's concern because she failed to amplify her argument.

Grievant next offers several excerpts (pages 2 & 3), purportedly taken from an agency policy regarding hours of work and leaves of absence (Procedure 5-12). However, this policy was not entered into evidence during the hearing. Grievant did not provide a copy of the policy with her request for reconsideration, and therefore the hearing officer is unable to review the policy. Moreover, grievant had ample opportunity to proffer this policy at the hearing but

[25] § 7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

failed to do so. Since grievant could have presented this policy during the hearing through the exercise of due diligence, it does not constitute newly discovered evidence.

Grievant suggests (by including definitions of the terms) that this case involved harassment or retaliation. However, grievant did not raise these issues on her grievance form. Moreover, no evidence was presented during the hearing to demonstrate that the disciplinary actions were taken to harass or retaliate against grievant.

Grievant argues that the Chief of Security's statement in September 2002 led her to believe that she did not have to complete a request form at that time. However, even if this were true, grievant had been told in June 2001 and again in November 2001 that she must complete a request form. She failed to do so on both occasions.

Grievant alleges that several other employees violated various and totally unrelated rules but were not disciplined. She also alleges that the agency failed to properly investigate matters. In both instances, it appears that grievant is attempting to put up a smokescreen to divert attention away from her own offenses. If she has concerns about these issues, they should be brought to the attention of the superintendent or the Human Resources department.

Grievant contends that she has a right to be represented by an attorney during a meeting with agency management. First, grievant did not raise this issue during the hearing. Second, grievant has provided no citation or agency policy that would give her such a right. Agency Procedure 5-10 does not provide any such right to employees.

The superintendent, when questioned about her "not objective" statement, testified that she readily admits that she is "not objective when it comes to employee abuse of state time." She did not say that she did not evaluate this matter objectively.

Grievant seeks to be transferred to a different facility. Hearing officers do not have authority to transfer an employee.[26] Such a decision is an internal management decision made by each agency, pursuant to Section 2.2-3004.B of the Code of Virginia, which states in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government."

[26] § 5.9(b)2. EDR Grievance Procedure Manual, *Ibid*.

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 March 20, 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.[27]

_____
David J. Latham, Esq.
Hearing Officer

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

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the matter of the Virginia Department of Corrections
Grievance No. 5660
May 13, 2003

The grievant is challenging the hearing officer's March 20, 2003, decision in Grievance No. 5660. The grievant has requested that this Agency conduct an administrative review of the hearing officer's decision made on the above grievance. The basis for the appeal is the grievant believes that the agency did not follow the provisions of Policy No. 5 -10.13.B, 5 –10.14 and 5 -10.6 of the agency's Standards of Conduct Policy and the hearing officer did not force officials to adhere to those provisions by reversing the termination. The grievant also requested that the hearing officer reconsider his decision. The agency head, Ms. Sara Redding Wilson, has requested that I conduct this review.

FACTS

The Virginia Department of Corrections (DOC) employed the grievant as a Corrections Officer at the Chesterfield Women's Detention Diversion Center. She also worked for the Department of Juvenile Justice on a part time basis. The DOC issued to her a Group II Written Notice for "Failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy," when she did not complete the written request to obtain approval for outside employment. The DOC issued to her a Group III Written Notice for "Falsifying any records, including but not limited to, vouchers, reports, insurance claims, time records, leave records, or other official state documents and theft of state time" when she worked her part time job while being on FMLA leave from her position at DOC. She was terminated from her employment at the Department of Corrections. She filed a grievance and the hearing officer upheld the disciplinary action. The grievant challenged the decision by appealing to the Department of Human Resource Management (DHRM) and asked that the hearing officer reconsider his decision. The hearing officer did not modify his decision in his reconsideration decision.

To support her contention that the hearing officer's decision is inconsistent with DOC's Standards of Conduct Policy No. 5 -10.13.B, 5 -10.14 and 5 -10.6, the grievant

contends that the following actions could have been taken rather than terminate her: (1) The agency could have taken other measures such as have her repay any funds to which it felt she was not entitled. (2) The agency could have placed her on suspension. (3) The agency could have taken corrective action such as give a verbal warning or written counseling statement, or considered mitigating circumstances. She also states that other employees have committed more egregious infractions but the punishments were less severe.

In reference to his decision to uphold the Group II Written Notice, the hearing officer concluded that while the grievant attempted to prove that her superiors knew that she was employed outside the DOC, she "admitted that she had never been given permission, either written or verbal, to work outside. Accordingly, grievant has not borne the burden of persuasion." Concerning his decision to uphold the Group III Written Notice, the hearing officer stated that the grievant knowingly used leave time for a purpose for which it was not designated. He also determined that the grievant, while on FMLA leave, worked on her part time job. She also

worked on her part time job while she was on school leave at DOC. Thus, he found no reason to reverse the agency's disciplinary actions.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. By statute, 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. In order to challenge a hearing officer's decision, the challenge must cite a particular mandate or provision in policy. The Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

The relevant policies are the Department of Human Resource Management's Policy No. 1.60, Standards of Conduct, and the DOC's Procedure No. 5-10, DOC's own Standards of Conduct. The Standards provide a set of rules governing the professional and personal conduct or work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance and to distinguish between the less serious and more serious actions of misconduct and to provide appropriate corrective action. The offenses as listed in the Standards are intended to be illustrative, not all-inclusive. An example of a Group II offense is failure to follow a supervisor's instructions. An example of a Group III offense is falsification of any records or other official state documents.

In the present case, the hearing officer determined that the grievant's efforts to disprove that she failed to follow her supervisor's instructions failed. She failed to complete the form to request permission for outside employment as directed. In addition, he stated that the evidence supports that the grievant was paid simultaneously for time when she was on sick leave at the DOC and for some of those same hours while she was working on her part time job. In addition, he stated that the evidence supports that she used a number of hours as school leave while at the same time she worked some of those same hours on her part time job. Thus, he upheld the agency's disciplinary actions of issuing a Group II Written Notice and a Group III Written Notice and terminating the grievant.

While the grievant may not agree with the hearing officer's assessment of the evidence and his decision, this Agency has found no violation concerning the hearing officer's application of the provisions of DHRM or 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