Issue: Group II Written Notice (failure to follow supervisor's instructions/ established workplace violence policy); Hearing Date: 02/05/04; Decision Issued: 02/10/04; Agency: VDOT; AHO: David J. Latham, Esq.; Case No. 537; **Administrative Review: HO Reconsideration Request received 02/18/04; Reconsideration Decision issued 02/23/04; Outcome: No basis to reopen hearing or change original decision.**

# *COMMONWEALTH of VIRGINIA*

***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

## DECISION OF HEARING OFFICER

In re:

Case No: 537

Hearing Date: February 5, 2004
Decision Issued: February 10, 2004

## PROCEDURAL ISSUES

1. Grievant requested as part of the relief she seeks, that she be transferred to a different location. Hearing officers may provide certain types of relief including reduction or rescission of the disciplinary action.[1] However, hearing officers do not have authority to transfer employees from one location to another location.[2] Such decisions are internal management decisions made by each agency, pursuant to Va. Code § 2.2-3004.B, which states in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government."

2. Prior to the hearing, the acting Human Resource Manager told a witness whom grievant had requested to attend the hearing that his name no longer appeared on the witness list. The witness advised grievant that he had been told he did not have to attend the hearing. After grievant notified the hearing officer, the hearing officer called the witness who twice stated

[1] § 5.9(a)2. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.
[2] § 5.9(b)2. *Ibid.*

that the acting Human Resource Manager told him he did not have to attend the hearing. The hearing officer advised the witness that he was still on the witness list and that he should attend the hearing. At the hearing, the witness testified under oath that the acting Human Resource Manager had told him that his name was not on the witness list. He was less certain about whether she told him he did not have to attend, but stated that she gave him the "clear impression" that he did not have to attend the hearing.

Grievant had requested 17 witnesses to attend the hearing on her behalf. She also submitted to the hearing officer a separate list requesting that Orders be issued for the appearance of six of the 17 witnesses. It is not known how the acting Human Resource Manager obtained a copy of the witness Order list. However, upon receipt of the list she avers that she assumed those not on the list did not have to attend the hearing. Parenthetically, it should be noted that all witnesses named by either party are expected to appear at the hearing, regardless of whether an Order has been issued for their appearance.

The agency had appointed an assistant resident engineer from another location to be the *designated agency representative* in this case. It is troubling that anyone else would become involved in the process. Moreover, it is of particular concern that anyone else would advise a witness that he did not have to attend the hearing. Only two persons have authority to excuse a witness from the hearing – the party who initially requested the witness, and the hearing officer. Anyone who has a question regarding witness attendance should direct their inquiry to one of these two persons.

In this case, the evidence is insufficient to conclude that there was a knowing interference with the administration of the grievance process.[3] However, the Commonwealth has mandated that "the grievance procedure shall afford an immediate and **fair** method for the administration of employment disputes…"[4](Emphasis added). If a grievant *believes* that management is suggesting to or otherwise influencing grievant's witnesses not to attend a hearing, employees will conclude that the grievance process is not fair. Even unintentional management action, as apparently occurred here, can create an *appearance of impropriety* that is

[3] *Compare* Va. Code § 18.2-460.A Interference with the Administration of Justice, which provides that: "If any person without just cause knowingly obstructs a judge, magistrate, justice, juror, attorney for the Commonwealth, **witness** or any law-enforcement officer in the performance of his duties as such or fails or refuses without just cause to cease such obstruction when requested to do so by such judge, magistrate, justice, juror, attorney for the Commonwealth, witness, or law-enforcement officer, he shall be guilty of a Class 2 misdemeanor." (Emphasis added)

[4] Va. Code § 2.2-3000.

just as damaging as if it had been a knowing interference with the process.[5]

## APPEARANCES

Grievant
Nine witnesses for Grievant
Human Resource Representative
Representative for Agency
Seven witnesses for Agency

## ISSUES

Was the grievant's conduct such as to warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

## FINDINGS OF FACT

The grievant filed a timely appeal from a Group II Written Notice issued for failure to follow a supervisor's instructions/established workplace violence policy.[6] Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[7]

The Virginia Department of Transportation (VDOT) (Hereinafter referred to as "agency") has employed grievant as an Engineering Technician for 25 years.

The Department of Human Resource Management (DHRM) has published a policy on workplace violence. It defines workplace violence to include verbal abuse and charges each state agency to develop a policy that implements the state policy.[8] VDOT has promulgated its own written policy designed to prevent violence in the workplace. The policy defines Workplace Violence to include, *inter alia*, derogatory comments or slurs, verbal intimidation, exaggerated criticism, or name calling.[9] Grievant received this policy.[10] She also received

[5] Agency management is also referred to Decision of Hearing Officer Case No. 5625, issued February 3, 2003, for a situation in which the same human relations representative failed to give potential witnesses positive reassurance that they would not be retaliated against for testifying in a grievance hearing.
[6] Exhibit 2. Written Notice, issued August 21, 2003.
[7] Exhibit 1. Grievance Form A, filed September 18, 2003.
[8] DHRM Policy 1.80, *Workplace Violence*, effective May 1, 2002.
[9] Exhibit 4. Section III, VDOT *Preventing Violence in the Workplace Policy*, effective May 1, 2002, states: "Workplace Violence is any act of violence, harassment, intimidation, or other threatening behavior that occurs in the workplace." Section III.B.1 states: "Threatening behavior includes, but is not limited to verbal threats of violence towards persons or property; the use of vulgar or profane language towards others; derogatory comments or slurs; verbal intimidation, exaggerated criticism or name calling."

formal training on the policy.[11] Soon after receiving this policy grievant's supervisor verbally counseled her not to make derogatory comments about other people.[12]

On August 6, 2003, a citizen came to the facility to ask questions about sidewalk repair on the property adjacent to hers. An assistant permit manager initially attempted to assist the citizen but realized her questions were not in his area of specialty. He went through the office to locate others with more specialized knowledge but all were unavailable. He then asked grievant to accompany him to the conference room to determine whether she might be able to help the citizen. The assistant permit engineer knew that the agency was working on a maintenance project within a few blocks of the citizen's property. He was then called away to answer a telephone call for two or three minutes. When he returned, he asked the citizen whether she knew if the maintenance project was going to extend as far down the street as her property. Grievant then asked the assistant permit engineer a question to the effect of, "What kind of question is that? Were you sleeping in the meetings?"[13]

As the meeting with the citizen ended, grievant went to a vacant cubicle next to the receptionist's cubicle to work on permits.[14] After the assistant permit manager saw the citizen out, he went to the entrance of the cubicle in which grievant was working. He felt humiliated by what grievant had said in the meeting and asked her why she had said what she did. Grievant responded in a loud, angry voice that she would ask whatever she wanted to ask, and that his question to the citizen was stupid, stupid, stupid. She also said that he made twice as much money as she did and he should be able to answer the citizen's concerns. She repeated that his question had been stupid. The assistant permit manager felt verbally intimidated by grievant's loud, angry responses. At the time of this encounter, there were three other employees working in the area.[15] All three agree that the manager's voice was calm and quiet but that grievant was very loud and upset; one characterized grievant as hysterical.[16]

On the following day, the assistant permit engineer went to the citizen's property to assess the situation firsthand. During his visit with her, the citizen told him that she had felt very uncomfortable the previous day when grievant asked him whether he had been sleeping in the meeting. The citizen also stated

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[10] Exhibit 2. Employee Receipt for *Preventing Violence in the Workplace Policy*, signed by grievant April 29, 2002.

[11] Exhibit 6. Grievant's training transcript, April 15, 2002.

[12] Exhibit 2. Supervisor's memorandum regarding counseling with grievant, May 24, 2002.

[13] The meetings referred to were monthly coordination meetings between agency staff and staff from the county in which the citizen resides. The purpose of the meetings was to coordinate the progress of various construction and maintenance projects in the county.

[14] Exhibit 7. Diagram identifying locations of conference room, receptionist (employee T.H.), adjacent vacant cubicle, and cubicles of two other employees (B.L. and M.M.) who heard grievant.

[15] Exhibits 10 & 11. Reports of incident from receptionist and administrative assistant, August 7, 2003.

[16] Exhibit 13. Email from administrative specialist to supervisor, August 8, 2003.

that grievant had implied that she was lying about the true purpose of her visit to the agency during the time the permit manager was out of the room answering a telephone call.[17]

Grievant's supervisor was not in the office on August 6, 2003. When he returned on August 7, 2003, he spoke with grievant, the assistant permit manager, the three employees who heard the incident, and the citizen. The citizen verified that grievant had made the sleeping comment during the meeting and, that grievant had implied the citizen was lying about the purpose of her visit by asking her, "Why are you *really* here?" The citizen stated that she had felt humiliated having to listen to grievant's questions to the assistant permit manager.

The matter was referred to a committee that assesses potential violence in the workplace incidents. The committee concluded that grievant's behavior constituted a violation of the Violence in the Workplace Policy and recommended issuance of discipline. The recommendation was discussed among human resource representatives, grievant's supervisor, and his superiors. Following that, grievant was given five days to respond to the charges, and was then disciplined on August 21, 2003.[18]

In mid-October 2003, grievant hand wrote a letter of apology to the citizen who had been in the August 6, 2003 meeting.[19] She gave a copy of the letter to the second resolution step respondent during the grievance process.

## 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 . . .

[17] Exhibit 8. Assistant Permit Manager's report of incident, August 7, 2003.
[18] Exhibit 2. Due process notification letter to grievant from supervisor, August 15, 2003.
[19] Exhibit 14. Grievant's letter to citizen, undated but written in mid-October 2003.

> 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, such as claims of retaliation and discrimination, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.[20]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management 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. Section V.B.2 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group II offenses include acts and behavior which are more severe in nature than Group I offenses, and are such that an accumulation of two Group II offenses normally should warrant removal from employment. Failure to follow a supervisor's instructions or to otherwise comply with established written policy is a Group II offense.[21] The policy also provides that the offenses listed in the Standards of Conduct are only *examples* of unacceptable behavior; the list is not all-inclusive.[22]

The agency has demonstrated by a preponderance of evidence that grievant humiliated a supervisor during a meeting with a citizen, that she subsequently verbally intimidated him by loudly and angrily making derogatory comments in the presence of coworkers, and that she made the citizen feel uncomfortable. Although grievant denies these actions, the sworn first-hand testimony of the supervisor and three coworkers in the area substantially

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[20] § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective July 1, 2001.

[21] Exhibit 3. Section V.B.2.a, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

[22] Exhibit 3. Section V.A., *Ibid*. 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 that, 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."

outweighs her denial.[23] The burden of persuasion now shifts to grievant to demonstrate any mitigating circumstances.

Retaliation

Grievant suggests that the disciplinary action was retaliatory. 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.[24] To prove a claim of retaliation, grievant must prove that: (i) she engaged in a protected activity; (ii) she suffered an adverse employment action; and (iii) a nexus or causal link exists between the protected activity and the adverse employment action. Grievant had been a witness cooperating with 1998 agency investigations involving, among others, her supervisor. In 1995, grievant had filed a grievance. Both of these activities are protected. Accordingly, based on grievant's testimony and evidence, she meets the first two prongs of the test. In order to establish retaliation, grievant must show a nexus between her protected activities and the disciplinary action. Grievant has not established any such connection between the two events.

Moreover, grievant's testimony suggested a curious inconsistency regarding her allegation of supervisory retaliation. Grievant stated that when she is in her supervisor's office, she sometimes puts her feet up on his desk. It is difficult to conceive of a working relationship that was so comfortable that a supervisor would regularly allow a subordinate to put her feet on his desk, and would then retaliate against her by participating in an alleged widespread conspiracy. However, even if a nexus could be found between grievant's protected activities and the disciplinary action, the agency has established nonretaliatory reasons for issuing discipline. For the reasons stated previously, grievant has not shown that the agency's reasons for issuing the disciplinary action were pretextual in nature.

Discrimination

Grievant alleges gender discrimination. To sustain a claim of gender discrimination, grievant must show that: (i) she is a member of a protected group; (ii) she suffered an adverse job action; (iii) she was performing at a level that met her employer's legitimate expectations; and (iv) there was adequate evidence to create an inference that the adverse action was based on the employee's gender.[25] Grievant has satisfied the first three prongs of this test because she is female, received a disciplinary action, and has been performing her work at a

[23] Grievant appears confused about what constitutes first-hand testimony. The supervisor and three coworkers each testified as to what they *personally* heard; this is first-hand testimony. When a witness testifies about what other people told him they had heard, that would constitute second-hand or hearsay testimony. (Hearsay testimony is nonetheless admissible in an administrative law hearing but such testimony is accorded less evidentiary weight than first-hand testimony.)

[24] EDR *Grievance Procedure Manual*, p.24

[25] *Cramer v. Intelidata Technologies Corp*., 1998 U.S. App Lexis 32676, p6 (4th Cir.1998) (unpub).

satisfactory or better level. However, for two reasons, the evidence is insufficient to conclude that the grievant's discipline was based on her gender. First, the agency has presented legitimate, non-discriminatory reasons for the disciplinary action. Second, grievant has presented no testimony, statistics, or other evidence to show that her supervisor is issuing discipline disproportionately to females. Grievant's sole argument is that she *believes* she is treated differently due to her gender. Such conjecture without objective corroborative evidence is insufficient to support grievant's speculation.

Grievant's other defenses

Grievant asserts that the disciplinary action is improperly based on the Violence in the Workplace policy. This assertion is not persuasive. The language of the policy is sufficiently broad to include grievant's actions during this incident. Her question to the assistant resident engineer during the meeting was derogatory; her loud responses to him after the meeting were derogatory, exaggerated criticism, and intimidating. These factors bring her actions within the ambit of the policy. Grievant also contends that the agency failed to follow the investigative requirement of the policy, which specifies that a Workplace Violence Initial Report is to be completed within 24 hours of the incident.[26] The initial report was completed on the second day following the incident, in part because grievant's supervisor was not in the office on the day of the incident.[27] However, while the report was completed within 48 hours instead of 24, grievant has not demonstrated that this one-day delay adversely affected her in any way.

Grievant takes issue with the Written Notice's statement that her offense was failure to follow supervisor's instructions/established workplace violence policy. In preparing written notices, it is not unusual that agencies sometimes believe that the offense committed must be described only as one of the specific offenses listed in the Standards of Conduct. This is, of course, untrue. The Standards of Conduct plainly states that the offenses listed under each Group of offenses are only *examples*. Any offense that undermines agency effectiveness may be considered unacceptable and subject to disciplinary action. What is important in issuing disciplinary action is that the employee receives a clear explanation of why she is being disciplined. In the instant case, grievant received a detailed two-page explanation of the offense she committed before discipline was issued,[28] and also a one-page memorandum with the written notice.[29]

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[26] Exhibit 4. Section V.A.2.b, *Preventing Violence in the Workplace Policy*, Ibid.

[27] Exhibit 13. *Workplace Violence Incident Initial Report*, August 8, 2003.

[28] Exhibit 2. Memorandum to grievant from supervisor, August 15, 2003. NOTE: In this case, the supervisor elected to give grievant a due process notice even though it was not required for this disciplinary action. *See* Section VII.E.2, *Standards of Conduct*, which requires advance notice to an employee only in the event of suspension, demotion, transfer or removal from employment.

[29] Exhibit 2. Attachment to Written Notice, memorandum to grievant from supervisor, August 21, 2003.

Grievant alleges that those who heard the incident, reported it, and testified about the incident conspired against her. Grievant offered only one witness who said he thought there was a conspiracy against grievant. Under cross-examination, however, that witness said that he had heard two coworkers saying they: do not like the grievant, think she does poor work and, wanted to isolate grievant. The sum total of the evidence established only that grievant is not popular with certain coworkers. It did not establish that there had been any actual conspiracy to fabricate the incident of August 6, 2003. Moreover, one of grievant's other witnesses denied any knowledge of a conspiracy. A third witness called by grievant corroborated the testimony of the agency's witnesses about what occurred on August 6, 2003.

Grievant was counseled in May 2002 about not making derogatory comments about other people. Grievant disputes that she was counseled on that occasion because she had neither seen nor signed the supervisor's memorandum. The Standards of Conduct provides that counseling is merely an informal discussion between an employee and her supervisor.[30] The counseling discussion may *or may not* be documented in a written memorandum. If a supervisor elects to document the discussion, there is no requirement that the employee either view or sign the documentation. Most supervisors document such counseling sessions in order to memorialize the exact nature of the counseling in the event that it is needed at a later time for disciplinary or performance evaluation purposes.

Grievant attempted to raise other issues that were outside the scope of this hearing.[31] She wanted to discuss several past concerns not directly related to the grievance, none of which had occurred within the 30 days prior to the filing of her grievance.[32] She also sought to address a matter that occurred after the date the grievance occurred.[33] Grievances are limited to the issues raised in the grievance form at the time of filing; employees may not add other issues to the grievance after filing.

Grievant avers that her supervisor has not completed an annual performance evaluation on her during either the 2002 or the 2003 performance cycles. This issue is outside the scope of the grievance and was therefore not explored during the hearing. This is a matter that agency management should investigate and thereafter take whatever action is deemed appropriate.

Summary

The agency has demonstrated that grievant committed offenses subject to discipline under the Standards of Conduct. Grievant has not proven her

[30] Exhibit 3. Section II.B.1, *Standards of Conduct*, Ibid.
[31] Exhibit 2. Letter to supervisor from grievant, August 20, 2003.
[32] § 2.2, EDR *Grievance Procedure Manual*, effective July 1, 2001, provides that written grievances must be initiated within 30 calendar days of the date that the employee knew, or should have known, of the event that formed the basis of the dispute.
[33] Exhibit 2. Memorandum to grievant from supervisor, September 3, 2003.

allegations of retaliation and discrimination, and has not shown any circumstances that would mitigate her misconduct. Grievant's statements to the supervisor during the meeting, and her loud, angry, derogatory, intimidating statements to him after the meeting were both violations of the Violence in the Workplace Policy. Her offense is one that, if repeated, would normally warrant removal from employment – the definition of a Group II offense. Moreover, grievant's statements to the citizen were offensive and undermined the effectiveness of the agency. This separate offense also meets the definition of a Group II offense.

## DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice issued on August 21, 2003 for failure to follow supervisory instructions/established workplace violence policy is hereby UPHELD.

The disciplinary action 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. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 400
Richmond, VA 23219

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.[34] 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.[35]

[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]

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David J. Latham, Esq.
Hearing Officer

[34] 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).

[35] 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: 537

Hearing Date: February 5, 2004
Decision Issued: February 10, 2004
Reconsideration Received: February 20, 2004
Reconsideration Response: February 23, 2004

### 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. The 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.[36]

### OPINION

Grievant renewed her request for a transfer to a different location within the agency; however, the hearing decision has already addressed this request.[37] Grievant is

[36] § 7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.
[37] *See* Procedural Issue 1, p.1, Decision *of Hearing Officer*, February 10, 2004.

certainly free to pursue her request for a transfer through the Human Resources Department. If agency management determines that a transfer would be in the best interest of the agency, it has the authority to take such action.

Grievant asserts that none of her witnesses were allowed to present testimony regarding alleged retaliation and conspiracy. The hearing record indicates otherwise. Grievant's witness V testified that one person does not like grievant. Grievant's witness R testified that she was unaware of any conspiracy. Grievant's witness B testified that she had not seen grievant's supervisor create any problems for grievant. Grievant's witness J testified that some female coworkers resented grievant but he had no knowledge of retaliatory acts or a conspiracy. Grievant's witness H was the only witness who alleged a conspiracy, however, under cross-examination he could identify only two women who wanted to isolate grievant and thought that her work performance was poor.

Grievant objects to some of the testimony of agency witnesses because it was hearsay, even though her own witnesses also offered hearsay testimony. "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[38] Hearsay is admissible in all administrative hearings providing it is otherwise reliable.[39] When hearsay evidence is admitted into the hearing, it is incumbent upon the hearing officer making a decision in the case to assign the appropriate evidentiary weight to such evidence. In making such an assignment of evidentiary weight, the hearing officer must consider many factors including the declarant's credibility, the existence or non-existence of corroboration, whether the hearsay statement is contradicted by other evidence and, the bias or lack of bias of the declarant.[40]

Grievant questions the credibility of agency witnesses because they did not *view* the interactions between grievant and the assistant permit manager. In fact, there was little to be seen by witnesses because the interactions were verbal. Agency witnesses testified as to what they *heard* grievant and the permit manager say. Their recollection of the words spoken is just as credible as if they had been watching the two.

Grievant was bothered by the fact that witness K.J. did not testify. The agency elected not to call this witness. Grievant did not choose to call this witness although she had ample opportunity to do so.

Grievant reiterates her argument that the Workplace Violence Initial Report was completed one day beyond the 24-hour requirement but in the same paragraph she argues that the disciplinary action was improperly based on the Preventing Violence in the Workplace policy. If, as grievant argues, the workplace violence policy was not applicable, then the untimely completion of the report required by the policy is a moot issue. However, in point of fact, the basis for grievant's discipline were her actions on August 6, 2003. The fact that related paperwork was filled out one day late is simply a red herring.

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[38] *Federal Rules of Evidence*, Rule 801 (c) definition.

[39] "The only limit to the admissibility of hearsay evidence is that it bears satisfactory indicia of reliability. We have stated that the test of admissibility as requiring that the hearsay be probative and its use fundamentally fair." *Calhoun v. Bailar*, 626 F.2d 145, 148 (9th Cir. 1980). Cert. denied 452 U.S. 906 (1981).

[40] For a more detailed test for the assignment of evidentiary weight, see *Industrial Claims Appeals Officer v. Flower Shop*, 782 P.2d 13 (Colo. 1990).

Grievant objects to the rejection of certain documents as exhibits. For the reasons stated during the hearing, the rejected documents were deemed irrelevant to the issue being adjudicated. However, those documents remain a part of the hearing file and are available for appellate review.

Grievant suggests that a policy prohibiting employees from tape recording conversations in the office (implemented in September 2003 - one month after the date of the offense) somehow inhibited her ability to present evidence in this case. Grievant was able to have her witnesses testify to anything they may have earlier said. Grievant has not explained how tape recorded conversations would have been more probative than in-person witness testimony.

Grievant objected to a question as to whether she was experiencing PMS on August 6, 2003. The evidence during the hearing strongly suggested that grievant's actions on that date were atypical. She had no previous history of loud outbursts or verbal abuse of management employees. If an effort to ascertain if there was some other underlying cause for her actions, the hearing officer first asked whether grievant had been experiencing any unusual problems at the time, either personal, home, family, or physical problems. Given grievant's gender it was a natural follow-up question to ask about the possibility that she might have been experiencing PMS at the time. The question was not sexist. In fact, had grievant answered the question affirmatively, it might have constituted a mitigating circumstance to partially explain her actions. Any objection to this question should more logically have been made by the agency since it could assert that the question was leading.

## DECISION

Grievant has not proffered any newly discovered evidence, or any evidence of incorrect legal conclusions. The hearing officer has carefully considered grievant's arguments and concludes that there is no basis to change the Decision issued on February 10, 2004.

## 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.[41]

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David J. Latham, Esq.
Hearing Officer

[41] 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).