Issue: Group II Written Notice (failure to follow supervisor's instructions); Hearing Date: 04/20/04; Decision Issued: 04/22/04; Agency: DJJ; AHO: David J. Latham, Esq.; Case No. 643; **Administrative Review: HO Reconsideration Request received 04/30/04; Reconsideration Decision issued 05/03/04; Outcome: No basis to change original decision.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 643

Hearing Date: April 20, 2004
Decision Issued: April 22, 2004

PROCEDURAL ISSUE

Grievant requested as part of the relief he seeks: that another employee be removed from his supervision; that a facility policy comply with Department of Human Resource Management (DHRM) policy; that procedural changes be communicated to staff immediately; and, that employee handbooks and the Standards of Conduct be distributed to staff. 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 direct an agency to reassign employees, change agency policy, or direct the means by which work activities are carried out.[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."

[1] § 5.9(a)2. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.
[2] § 5.9(b)2, 4, 5, 6 & 7. *Ibid.*

At the hearing, the grievant, through his attorney, stated that the only relief he now seeks is rescission of the disciplinary action and restoration of his duties as Chief of Security. Therefore, this decision will not address the other five items of relief requested in the written grievance.

APPEARANCES

Grievant
Attorney for Grievant
Superintendent
Representative for Agency

ISSUES

Did grievant's conduct 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.[3] Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[4]

The Department of Juvenile Justice (Hereinafter referred to as "agency") has employed grievant for 14 years. He is a Corrections Captain and Chief of Security, a position he has held for three years.[5]

On September 8, 2003 at 4:30 p.m., two wards in a housing unit became involved in a physical altercation that resulted in several corrections officers, including grievant, coming to the scene to separate the wards.[6] At about 4:50 p.m., a group disturbance erupted just outside the same housing unit among several wards, resulting in injury to one ward.[7] The superintendent received notification of both incidents at 4:50 p.m. Later that afternoon, the superintendent met with grievant and one or two assistant superintendents in her office.[8] She told grievant that she wanted to know, with regard to the first fracas,

[3] Exhibit 4. Written Notice, issued December 8, 2003.
[4] Exhibit 3. Grievance Form A, filed December 26, 2003.
[5] Exhibit 7.1. Grievant's Employee Work Profile, November 12, 2002.
[6] Exhibit 4.2. Serious Incident Report BE-03-09-178, September 8, 2003.
[7] Exhibit 4.1. Serious Incident Report BE-03-09-177, September 8, 2003.
[8] The superintendent states that the meeting occurred at about 6:00 p.m. on September 9, 2003; grievant believes the meeting took place the following day. Grievant and the superintendent also disagree as to whether both assistant superintendents were in the meetings.

who was responsible for allowing more wards to enter the hallway, why that occurred and, who left the housing unit unattended during the disturbance. Grievant told the superintendent that he and a lieutenant would talk with the corrections officers. The superintendent responded that she wanted more than just talk.

On September 18, 2003, the superintendent called grievant to her office and advised him that she still had not received answers to the questions she had asked him to investigate. Grievant excused himself from the meeting for a few minutes and then returned with his lieutenant and a copy of a counseling memorandum they had given to a corrections officer on September 17, 2003.[9] Grievant told the superintendent that the counseled officer had failed to follow proper procedure and allowed wards into the hallway during the September 8th incident. He also told her that a second corrections officer would be counseled for leaving his assigned post, thereby leaving the housing unit unattended.[10] The superintendent excused the lieutenant from the meeting and asked grievant who had authorized the issuance of counseling memoranda; grievant did not respond.

Grievant was on family medical leave from September 29 through November 17, 2003. On November 18, 2003, the superintendent met with grievant again and told him she was still waiting for the information she had requested. She also advised him that she was considering disciplinary action because of his failure to comply with her request for information. Grievant asked to be excused saying he had to pick up his son from school. The superintendent told grievant to return to her office after he had picked up his son and returned to the facility. Grievant returned to the facility but did not meet with the superintendent. Grievant was absent from work from November 19 through December 7, 2003 utilizing a combination of annual leave and sick leave.

Sometime in October 2003, during grievant's extended family medical leave, the superintendent named a lieutenant to be interim Chief of Security. When grievant returned to work on December 8, 2003, the superintendent issued the Group II disciplinary action. On the same day, she advised grievant that he was going to be given special assignments and that the interim Chief of Security would continue to perform chief of security functions for the time being.[11]

The superintendent's first day of work at this facility was August 26, 2003. Soon thereafter, she issued a memorandum directing that all disciplinary actions require prior approval by the superintendent.[12] Although the memorandum addresses only disciplinary actions, the superintendent states that she verbally

[9] Exhibit 11.1. Counseling memorandum, September 17, 2003.
[10] The second corrections officer was counseled on September 22, 2003. *See* Exhibit 11.2.
[11] Exhibit 6. Memorandum from superintendent to grievant, December 8, 2003. As of the date of this hearing, the lieutenant continues to function as Chief of Security, however, that issue is outside the purview of this hearing.
[12] Exhibit 11. Memorandum from superintendent to assistant superintendents, September 3, 2003.

told her subordinates on September 3, 2003 that counseling memoranda also require her approval prior to issuance; grievant did not rebut this testimony.

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 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.[13]

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 (DHRM) promulgated Standards of Conduct Policy No. 1.60. 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.

[13] § 5.8 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

Section V.B.2 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Policy No. 1.60 provides that Group II offenses include acts and behavior which are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal from employment.[14] Among the examples of Group II offenses is failing to follow a supervisor's instructions.

Written Notice

At first blush, this case appears to involve a failure of communication between the superintendent and grievant. Both parties believed that the initial directive had been clear enough – the superintendent wanted grievant to ascertain: how additional inmates entered the hallway during the physical altercation; whether the cause was mechanical or human; if human, who was responsible; and, who was responsible for leaving the pod unattended. On September 18, 2003, grievant believed he had provided the required information by telling the superintendent that a specific corrections officer had mistakenly allowed inmates into the hallway and, that a different officer had left the pod unattended.

At this point, communications appear to have become muddied. The superintendent became dismayed that grievant had directed issuance of a counseling memorandum to both corrections officers (one had already been issued and the other was issued four days later). The meeting ended with grievant believing he had provided the necessary information. The matter languished for two months until November 17, 2003 when the superintendent again asked grievant for the information she had requested on September 8, 2003. When she further advised grievant that she was considering disciplinary action, grievant left the meeting and did not return despite clear instructions to do so. Instead, grievant utilized annual leave and sick leave for the next three weeks and did not return to work until December 7, 2003.

It should have been apparent to grievant on November 17, 2003 that the superintendent was very concerned that he had not provided the information she requested. Even though grievant believed he had answered her questions, the superintendent told him she was considering discipline. Normally, one who is being threatened with discipline for something he believes himself innocent of would rise to his own defense and get the matter clarified immediately. Grievant, however, essentially walked away and went on leave for three weeks. Even more surprisingly, he clearly failed to comply with his supervisor's instructions to return to her office later that day. Grievant claims that he returned to her office but that she was busy and he never went back. Even if the superintendent was busy at that moment, that is merely an excuse – not a valid reason for failing to comply with the instruction. Grievant knew that the superintendent was taking

[14] Exhibit 4.3. Department of Human Resource Management (DHRM) Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

this matter very seriously because she warned him he could be disciplined. He could have waited for the superintendent to become available, or at the very least, he could have left a message to arrange a meeting the next morning. Grievant deliberately and willfully ignored the superintendent's instruction.

Apparently, the superintendent did not fully understand or recall what grievant had told her on September 17, 2003. It appears to this observer that, on that date, grievant did provide answers to the three questions the superintendent had raised. One may speculate as to why communication failed at that point, but speculation would serve no purpose in resolving this case. Regardless of who was responsible for the miscommunication, grievant understood, or reasonably should have understood, that there was a *problem*. As the subordinate, and the one who would be on the receiving end of discipline, grievant had the onus to attempt to straighten the matter out. He had ample opportunity to do so since the superintendent directed him to return to his office after taking care of his personal matter. Grievant did not do so; he walked away from the matter. Most importantly, he disobeyed an unambiguous instruction from his supervisor to return to her office – a Group II offense. Such an action is unacceptable in any employment situation; however, in a paramilitary organization such as this agency, instructions must be obeyed.[15]

Reassignment of Duties

Because the reassignment of grievant's duties occurred on the same day that he was disciplined, grievant believes that the reassignment was de facto part of the discipline. When two such actions occur in very close proximity to each other (or, as in this case, simultaneously), it is reasonable to question whether the reassignment was disciplinary. However, mere proximity alone is insufficient to prove that the action was disciplinary. The superintendent maintains that grievant was reassigned to different duties for several reasons unrelated to the disciplinary action.

The Chief of Security position is the pivotal security position at the facility; the superintendent expects the Chief to be actively involved in security matters. However, the superintendent had observed that grievant's participation in meetings is minimal. The amount of overtime worked by security staff is higher than appears necessary and, at the same time, large numbers of corrections officers have been exempted from the draft. The superintendent had instructed grievant to end the draft exemptions but grievant failed to do so. During rounds conducted by the superintendent and grievant, grievant appeared detached and there was little communication between grievant and his subordinates. Grievant appears to have little interaction with either the security staff or the wards.

[15] Obviously, instructions do not have to be followed if they are illegal or immoral, but such was not the case in this situation.

Grievant has not been enforcing security procedures such as the requirements to have people entering the facility provide identification, to use the x-ray equipment to scan packages. Grievant advised the superintendent that parts were needed for the x-ray equipment. When the x-ray equipment was still not being used some months later, it was determined that the machine was simply unplugged. Serious incidents were occurring almost daily and State Police have been called to the facility on the average of once per week. Prior to Hurricane Isabel, grievant had not assured that staff were briefed on all appropriate contingency plans. Some of the deficiencies observed by the superintendent are noted in grievant's 2003 performance evaluation.[16]

For all of the above reasons, the superintendent concluded that grievant was not sufficiently proactive or assertive enough in performing the responsibilities of the Chief of Security. Accordingly, it was not unreasonable that she decided to temporarily assign those functions to someone else, or that she gave grievant other assignments to perform.[17] The agency avers that the reassignment was not part of the disciplinary action. However, even if discipline was a factor in the reassignment, the agency has shown that it had ample non-disciplinary reasons to justify the change in duties. Grievant has not shown that these reasons are pretextual. Therefore, it is concluded that the reassignment of duties was justified for reasons shown to be not disciplinary in nature.

Grievant suggests that the revision of his work responsibilities was either a demotion or a transfer. The DHRM Policies and Procedures Manual Glossary defines demotion as, "An employee's reassignment to a position in a lower salary grade (renamed pay band in September 2000)."[18] Grievant has remained in the same position and pay band as he was prior to revision of his responsibilities. Accordingly, he was not demoted. The Glossary defines transfer as, "An employee's reassignment from one position to another position in the same salary grade." Grievant was not moved to a different position and therefore was not transferred.[19] He has the same role title, work title, salary, pay band, and position number as before the revision of responsibilities.

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[16] Exhibit 7.1A. Grievant's 2003 performance evaluation. NOTE: Grievant did not sign the evaluation. The superintendent asserts that grievant refused to sign the evaluation, however, there is no witnessing statement on the evaluation to show that grievant was given the evaluation or that he refused to sign it; grievant avers that he has never seen the evaluation. However, this evaluation (and the issue of its validity) is not within the purview of this grievance.

[17] Although not directly related to this grievance, the superintendent has observed a number of problems since her arrival at the facility and has found it necessary to revise the job assignments of certain other employees in addition to grievant.

[18] Exhibit 6.1. DHRM Policy 3.05, Compensation, revised March 1, 2001. *See* Definitions.

[19] Exhibit 8. Grievant's Employee Work Profile reflects that he still occupies the same position number. NOTE: *See* Exhibit 6.1. DHRM Policy 3.05, *Compensation*, revised March 1, 2001. The Commonwealth's Compensation Reform Program, which became effective on September 25, 2000, completely revised the state's compensation policy and included new terminology to define every facet of the program. The term "Reassignment within the Pay Band" is an "Action of agency management to move an employee from one *position* to a different *position* in the same

Grievant argues that he was not counseled prior to receiving the written notice. The Standards of Conduct does not require counseling prior to disciplinary action. The Standards provides that management *may*, when appropriate, counsel an employee before disciplining. However, if the offense is sufficiently serious, the agency may remove an employee from employment without any prior counseling or, it may elect to take other disciplinary actions without prior counseling as described in the Standards.

DECISION

The decision of the agency is affirmed.

The Group II Written Notice issued on December 8, 2003 for failure to follow a supervisor's instructions is hereby UPHELD. The disciplinary action shall remain active for the period specified in Section VII.B.2 of the Standards of Conduct.

Grievant's request to have his previous duties reassigned to him is hereby DENIED.

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

Role or Pay Band." Each state employee is assigned to a specific position designated by a position number.

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.[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*, 39 Va. App. 439, 573 S.E.2d 319 (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:

Grievance No: 643

Hearing Date:	April 20, 2004
Decision Issued:	April 24, 2004
Reconsideration Request Received:	April 30, 2004
Response to Reconsideration:	May 3, 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. 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 argues that the hearing officer's decision includes an incorrect legal conclusion because the Written Notice did not make a specific reference to grievant's meeting with the superintendent in November 2003. Grievant suggests that the

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

November meeting cannot be considered part of the offense because the meeting date is not mentioned in the Written Notice, and is therefore not a material issue.

The Procedures for implementing disciplinary action are found in the Standards of Conduct and state, in pertinent part: "A Written Notice form confirming the *cause and nature* of the disciplinary action, and stating the employee's right to grieve the disciplinary action, shall be provided to any employee who subsequently is disciplined."[23] Section II of the Written Notice form directs, in specifying the nature of offense and evidence, that one should, "***Briefly*** describe the offense and give an explanation of the offense."[24] It is not necessary that the offense description include every detail of an offense. It is sufficient that the description identifies the cause and nature of the offense so that there is no confusion about what offense is being disciplined. Likewise, where an offense continues over a period of time, it is not necessary that the description include every component date involved in the offense.

In this case, the Written Notice's description of the offense makes abundantly clear that grievant's offense was his *continuing* failure to provide the superintendent with all the information concerning the incidents that occurred on September 8, 2003. The description states, "On at least two other subsequent occasions, I inquired as to the status of the report I had requested and instructed you to provide the information to me." It was grievant's *ongoing* failure between September 8 and November 18, 2003 to provide all information requested by the superintendent that constituted the offense of failing to follow instructions. The fact that grievant again failed to satisfy the superintendent's request on November 18, 2003 was not a separate offense but merely a continuation of the ongoing offense. Accordingly, grievant's continued failure to provide all information requested was not only material but also an integral part of the ongoing offense.

Grievant notes that the hearing officer observed that it appeared to the hearing officer that grievant had answered the three questions asked by the superintendent. The hearing officer's observation is based solely on the hearing officer's own perspective. Obviously, the hearing officer cannot place himself in the shoes of the superintendent because he does not know what specific, detailed information is important to the superintendent. Thus, while the hearing officer may have felt the grievant's response provided minimal answers, it was clear that the superintendent was not satisfied with grievant's response. Rather than provide the superintendent with the information she wanted, grievant excused himself from the meeting and went on annual leave. While grievant may have thought he was responding adequately, it was plain that he was not doing so because the superintendent told him to return to her office later that afternoon for further discussion. Grievant's failure to communicate was part of the ongoing offense.

Grievant's offense, as stated in the Written Notice, was his failure to follow supervisory instructions, viz., to give the superintendent a complete report on the events of September 8, 2003. His behavior on November 18, 2003 was merely another manifestation of that failure. His failure to give a complete report that answered all of the superintendent's concerns, his sudden recollection of a personal matter and leaving in the middle of the meeting, his failure to meet with the superintendent later that afternoon

[23] Section VII.E.5, DHRM Policy 1.60, *Standards of Conduct*, effective September 16, 1993.
[24] Attachment I, *Ibid*.

(despite an order to do so), and his deliberate absence from work for several days thereafter without contacting the superintendent to resolve the matter, are part of grievant's perceived pattern of noncompliance with the new superintendent's instructions (which was the primary reason she assigned new responsibilities to grievant).

Grievant was not separately disciplined for his insubordinate failure to meet with the superintendent later on November 18, 2003, even though the agency could have issued a second disciplinary action for that offense. Grievant's excuse for not meeting with the superintendent was that she was busy at the time he came to her office. However, grievant could have waited for a short time until she was free. Alternatively, he could have asked the secretary to notify the superintendent that he was ready to meet, thereby giving the superintendent the opportunity to meet with him then, ask him to wait for a minute, or come back at a later time. Grievant did not wait and did not notify the superintendent that he was there; instead, he left the facility at 3:30 p.m.

Grievant argues that he did not address the events of November 18, 2003 as completely as he would have had he known this was part of the offense. The hearing record indicates that the November 18, 2003 discussion between grievant and the superintendent was thoroughly explored not only on direct examination and cross-examination but also during questioning by the hearing officer. The hearing officer is satisfied that all relevant testimony about that discussion was elicited during the hearing.

Grievant takes issue with the finding of fact that he did not rebut the superintendent's statement that she told subordinates that counseling memoranda require her approval prior to issuance. Grievant did not deny that the superintendent made that statement; he only said he could not *recall* her making the statement. Further, grievant did not offer any witnesses to rebut the superintendent's testimony. Grievant acknowledges that there were other executive team members in the meeting during which the superintendent made the statement. Grievant had the opportunity to call these witnesses to rebut the superintendent's statement but did not do so. When a party has the opportunity to call a witness who could rebut testimony, but chooses not to call the witness, it is presumed that the witness's testimony would not have been favorable to that party. Moreover, grievant stated only that he did not *recall* the superintendent's statement. Grievant's inability to remember the statement is not a denial that the statement was made. Thus, while grievant *attempted* to rebut the superintendent's testimony, her sworn testimony that she made the statement is preponderant. Therefore, the finding of fact was correct.

Grievant correctly observes that this finding was not subsequently mentioned in the decision. The decision included no further mention of this fact because grievant's failure to comply with this particular instruction was not part of the offense with which he was charged. However, the hearing officer deemed mention of this finding to be relevant because it supports the superintendent's contention of a pattern of behavior of not following instructions.[25]

Grievant observes that the Notice of Hearing did not set forth the issues to be resolved. Neither the grievance procedure nor the rules for conducting grievance

[25] See *Decision of Hearing Officer*, discussion of Reassignment of Duties, pp 6-7.

hearings requires a Notice of Hearing.[26] Therefore, there is no requirement that the issues be set forth in the Notice of Hearing. The issues in a grievance hearing are defined by the Grievance Form and the Written Notice. Here, the issue is grievant's failure to report all information requested by the superintendent. In any case, grievant raises this issue only to support his argument that the November 18, 2003 discussion constituted a separate event that should not be included in this offense. That issue has been already addressed, *supra*. Grievant also claims that there was not a pre-hearing conference. Between March 18 and March 22, 2004, the hearing officer contacted both grievant and the agency's representative to set the time, date and location of the hearing. The pre-hearing conference could not be held jointly because of difficulty in establishing contact with grievant. Therefore, the hearing officer spoke separately with both parties.[27]

Grievant alleges that EDR "acted as the Agency's surrogate and issued a Group II notice." EDR did not act as an agency surrogate, and clearly did not issue a disciplinary action. The hearing officer rejects the allegation that he caused this agency to take any such action. While grievant may disagree with the decision or the reasoning in the decision, his allegation is not supported by the evidence.

DECISION

Grievant has not proffered any newly discovered evidence that would affect the Decision in this case, 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 April 24, 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

[26] See EDR *Grievance Procedure Manual,* effective July 1, 2001, and, *Rules for Conducting Grievance Hearings,* effective July 1, 2001. NOTE: This hearing officer chooses to utilize a written Notice of Hearing to assure that all parties are clear about the dates for document and witness list exchange, as well as the time, date and location of the hearing.

[27] Grievant did not notify EDR at that time that he had retained an attorney; the attorney's letter of representation was received four work days prior to the hearing.

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.[28]

_____
David J. Latham, Esq.
Hearing Officer

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