Issue: Group II Written Notice with termination (due to accumulation) (failure to follow supervisor's instructions); Hearing Date: 02/09/05; Decision Issued: 02/14/05; Agency: VPI&SU; AHO: David J. Latham, Esq.; Case No. 7964; **Administrative Review: HO Reconsideration Request received 03/11/05; Reconsideration Decision issued 04/05/05; Outcome: No newly discovered evidence or incorrect legal conclusions. Request denied; Administrative Review: EDR Ruling Request received 02/23/05; Outcome pending; Administrative Review: DHRM Ruling Request received 02/23/05; Outcome pending**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 7964

Hearing Date: February 9, 2005
Decision Issued: February 14, 2005

APPEARANCES

Grievant
Three witnesses for Grievant
Director of Engineering Operations
Attorney for Agency
Three 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 grievance from a Group II Written Notice for failure to follow a supervisor's instructions.[1] Because a second Group II Written Notice for a different offense was issued on the same date, grievant was removed from state employment effective October 5, 2004.[2] Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[3] Virginia Polytechnic Institute and State University (Hereinafter referred to as "agency") has employed grievant for 16 years. He was a video technician at the time of the disciplinary action.

In March 2004, the agency's Engineering and Network Operations division was reorganized. Grievant worked in the Video Network Operations Center (VNOC) with two other technicians and one supervisor. VNOC was placed under the supervision of the Video Broadcast Services (VBS) Director. Prior to March 2004, the policy had been that overtime work had to be approved in advance by the supervisor.[4] However, this policy had not been strictly enforced and, on occasion, grievant had worked overtime without advance approval. Of course, once the overtime was worked, the agency was required by federal law to pay for the work, whether pre-approved or not. With the reorganization in March 2004, the new division director and the VBS Director both required that all overtime be approved in advance. Grievant was aware of the enforcement of this policy. Grievant's coworker testified that all schedulers were told of this policy during a staff meeting in April 2004.

Grievant did not get along well with the VBS Director and did not agree with his management style. On August 17, 2004, when his supervisor was absent, grievant sent an email requesting approval for overtime directly to the division director – bypassing his second-level supervisor (the VBS Director).[5] The division director responded that overtime could be approved *if required* but told grievant to work directly with the VBS Director to submit his request for overtime. Grievant did not comply with this instruction. Instead he worked 12 hours of overtime during the week of August 14-20 without scheduling the overtime and without obtaining authorization from the VBS Director.

On August 19, 2004, the VBS Director and grievant's immediate supervisor both met with grievant to discuss his lack of progress on completing his scheduling assignments for the week. The information necessary to perform the scheduling had been provided to grievant on August 13, 2004.[6] They estimated that about two hours of work remained and directed grievant to

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[1] Agency Exhibit C. Group II Written Notice, issued October 4, 2004.
[2] The other Group II Written Notice was separately grieved and adjudicated as Case # 7965.
[3] Agency Exhibit B. Grievance Form A, filed November 4, 2004.
[4] Agency Exhibit J. E-mail from grievant's prior supervisor to grievant, June 14, 2002, in which the supervisor states that overtime must be approved in advance, and that overtime not pre-approved will not be submitted or paid.
[5] Agency Exhibit C. Email from grievant to division director, August 17, 2004.
[6] Agency Exhibit H. E-mail to grievant, August 13, 2004.

complete the scheduling by the end of the shift, and that overtime would not be approved.[7] Grievant's supervisor told him that if any overtime was needed, he (the supervisor) would come in on the weekend to finish the work. At the time of this meeting, grievant had eight hours remaining on his shift for that day. Despite the instruction not to work overtime, grievant worked overtime that night (.5 hours) and the following day (8 hours).

On August 25, 2004, grievant was scheduled to attend a meeting upon his arrival at work at his scheduled start time of 2:00 p.m. Grievant notified his supervisor by email at 1:49 p.m. that he would not be arriving until 3:00 p.m. When grievant arrived, he spent 25 minutes making multiple trips to his car to bring personal items into the office.[8]

At about 6:25 p.m. on the evening of August 26, 2004, the VBS Director learned from grievant that he had already worked overtime hours during the week of August 23-26, 2004.[9] Grievant had not previously requested overtime authorization from the Director. When the Director asked grievant why he had worked unauthorized overtime, grievant had no response. In order to avoid incurring additional overtime expense, the Director sent grievant home early that evening.

During the above discussion on August 26, 2004, the VBS Director told grievant that voice mail and e-mail were unacceptable means of notification to management of absences or the need for unplanned leave. He specifically advised grievant that he must speak personally with either his direct supervisor or the VBS Director regarding any unscheduled leave. The Director had previously provided grievant and the other video technicians with his office phone number, home phone number, and pager number.[10] This same information, as well as the contact information for grievant's immediate supervisor, was also available on the agency intranet directory.[11]

On August 30, 2004, grievant failed to contact his supervisors directly and instead left a voice mail for the Director and an e-mail for his supervisor.[12] Grievant advised that he expected to be absent for "several more days" and that his physician would fax an excuse. The physician did not fax an excuse. Grievant had previously stated that he had an unlisted home telephone number and refused to give the number to anyone in VBS, including the Director.[13] He said he could be reached via an e-mail page. Accordingly, the VBS Director e-mailed grievant and directed him to contact him or grievant's supervisor to discuss his absence status.[14] Grievant again failed to follow instructions and did

[7] Grievant is scheduled to work four ten-hour shifts Monday through Thursday.
[8] Agency Exhibit C. Email from supervisor to grievant, August 26, 2004.
[9] Agency Exhibit C. *Classified Employee Time Report*, August 10, 2004 to September 9, 2004.
[10] Agency Exhibit C. E-mail from VBS Director to VNOC staff, July 9, 2004.
[11] Agency Exhibit I. CNS Intranet Directory.
[12] Agency Exhibit C. E-mail from grievant to supervisor, August 30, 2004.
[13] Agency Exhibit C. E-mail from grievant to supervisor, August 25, 2004.
[14] Agency Exhibit C. E-mail from VBS Director to grievant, September 1, 2004.

not call either his supervisor or the Director. He submitted a physician's excuse to his supervisor on September 7, 2004.

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. In all other actions, the employee must present his evidence first and must prove his claim by a preponderance of the evidence.[15]

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. 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 that are more severe in nature and are such that an

[15] § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective July 1, 2001.

accumulation of two Group II offenses normally should warrant removal from employment. Failure to follow a supervisor's instructions is a Group II offense.[16]

The agency has demonstrated, by a preponderance of evidence that grievant failed to follow supervisory instructions on multiple occasions – a Group II offense.

Grievant claims that overtime had been handled in a more relaxed manner prior to March 2004. The evidence on this point pits grievant's testimony against the memorandum of a prior supervisor which appears to be unambiguous in stating that overtime not approved in advance will not be paid for. Nonetheless, it is clear that beginning in March 2004, the new management of VBS made it very clear that overtime must be approved in advance. Certainly, there could be no doubt from the meeting on August 19, 2004 that grievant was instructed not to work overtime. By working overtime after this, grievant knowingly, deliberately, and insubordinately failed to follow supervisory instructions.

Grievant argues that completing scheduling requires far more time than his supervisors had allowed him. However, grievant's less-experienced coworker credibly testified that he completed the entire task in two days for the most recent school semester. (Grievant had nearly two weeks available in which to complete the scheduling).

Grievant's attitude with regard to the agency appears to be that he thinks he can dictate the conditions of his employment. At the time of the reorganization in March 2004, grievant stated in an e-mail to the then Director of Engineering and Network Support, "I will not work for VBS."[17] He went on to dictate the specific shift he wanted to work and said, "I know this job better and what needs to be done to do it better than anyone in CNS, including anyone in VBS."[18] The arrogance of grievant's e-mail to a third-level management employee is symptomatic of his continuing view of his employment situation. Grievant had to continue working in VBS but has chafed under this arrangement ever since. The VBS Director testified credibly that grievant seemed to deliberately leave him out of the loop in routine communications. Grievant's position is that he continued to operate as he had before new management took over VNOC. Because he did not like the new management, he did not comply with supervisory instructions when those instructions varied from previous practice or when grievant disagreed with them.

Hearsay evidence was offered that grievant had told a coworker that he could cheat the system to get overtime whenever he wanted to. Although grievant denied this allegation, he hedged by testifying that he had not made such a statement "as far as he can remember." Grievant's conditional denial is

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[16] Section V.B.2.a, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.
[17] Grievant Exhibit 3H. E-mail from grievant to Director of Engineering and Network Support, March 28, 2004.
[18] Grievant Exhibit 3H. *Ibid.*

not a complete denial and suggests that he may very well have made this or a similar statement to the coworker.

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice for failing to follow a supervisor's instructions issued on October, 4 2004 and grievant's removal from employment effective October 5, 2004 are hereby UPHELD.

APPEAL RIGHTS

You may file an administrative review request within **15 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 15 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 15-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.[19] 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.[20]

[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

[19] 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).

[20] 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: 7964

Hearing Date:	February 9, 2005
Decision Issued:	February 14, 2005
Reconsideration Request Received:	March 11, 2005
Response to Reconsideration:	April 5, 2005[21]

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 15 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 failed to follow instructions in submitting his request for reconsideration. The appeal rights section of the hearing officer's decision specifies that a request for reconsideration is to be made to the hearing officer; grievant instead sent his request to the EDR Director and to the Department of Human Resource Management (DHRM). Grievant avers that the agency's personnel department gave him incorrect information

[21] Pursuant to Section VII.A of the Department of Employment Dispute Resolution (EDR) *Rules for Conducting Grievance Hearings,* decisions on requests for reconsideration or reopening are usually issued within 15 days from receipt. In this instance, the decision was delayed slightly because during March 2005 the EDR Hearing Division relocated to different office space.

[22] § 7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

upon which he relied. Grievant also failed to follow the instruction to send a copy of his request to the other party (agency). Finally, grievant failed to submit separate requests for each grievance; instead his request includes the issues of two grievances and two decisions.[23] Despite grievant's noncompliance with the appeal rights instructions, the hearing officer will respond to grievant's request.

Grievant proffers with his request two tape recordings and asks that the hearing officer listen to them. Evidence submitted to a hearing officer cannot be considered by the hearing officer in the absence of the parties. All evidence reviewed by a hearing officer must be offered during the hearing so that both parties have the opportunity to consider that evidence, and to object to it if they have concerns about it. Therefore, grievant's request is taken as a request to reopen the hearing. Grievant asserts that the first tape records a meeting with his supervisor and manager on June 10, 2004. Grievant did not proffer this tape during either hearing even though he could have done so. He asserts that he did not have time during the hearings to use the tape; as the two hearings lasted for 16 hours, this assertion is rejected. Moreover, grievant did not request that the tape be considered as evidence during the hearing. At the hearing, grievant was free to use whatever evidence he felt was most probative. His decision after the hearing to use evidence that he chose not to use at the hearing comes too late.

The second tape purportedly records a staff meeting on August 19, 2004. Grievant indicates that he had been looking for the tape but was unable to find it until after the hearing. However, at the hearing, grievant did not make a proffer that he had such a tape, and he did not request a continuance of the hearing to locate the tape. Grievant was removed from employment more than four months prior to the hearing and, therefore, had ample time to locate evidence prior to the hearing. Since the tape was in grievant's possession, it does not constitute evidence that could not have been discovered before the hearing. He knew of the tape, and had the tape, but simply could not locate it. Finally, grievant makes no proffer in his request as to specifically what the tapes would reveal. A hearing is not reopened merely because a grievant makes a bald assertion that there *might* be something on the tapes to support his position. In any case, for the reasons stated above, the tapes are not newly discovered evidence and, therefore, do not constitute a basis to reopen the hearing. Because the hearing will not be reopened, the hearing officer has not listened to the tape recordings in making this reconsideration decision.

First offense in written notice

Grievant asserts that his supervisor was aware that work demands might require some overtime work. While this may have been correct, grievant was disciplined because *he failed to obtain advance approval* for overtime hours. Had he made a request to his supervisor prior to working overtime hours, the supervisor could have approved or disapproved the request, or could have decided to do the work himself so as to avoid an overtime salary expense.

Second offense in written notice

[23] Grievant filed two grievances and had two separate hearings. Separate decisions were issued for each grievance. This decision addresses only the issues in Case # 7964; a separate decision is being issued to address the issues in Case # 7965.

Grievant's contention was addressed on pages 2 & 5 of the Decision. In essence, grievant disagrees with the weight assigned by the hearing officer to the testimony of agency witnesses.

Third offense in written notice

Grievant attributes his working overtime to an alleged misunderstanding about what the VBS Director meant. However, grievant also acknowledges that he made an assumption that the Director would have copied the manager on an e-mail[24] the Director sent to grievant. In fact, it appears from this document that the Director did send a copy to the manager on August 17, 2004 at 8:09 a.m. In any case, grievant misses the point of the Director's instruction to him. The Director told grievant in the e-mail to "coordinate with Mark." This clearly put the onus on grievant to contact the manager and inform him of what overtime the grievant believed might be required. Grievant failed to do so and that resulted in grievant working overtime without specific advance approval from his supervisor.

Fourth offense in written notice

Grievant disagrees with the finding of the hearing officer regarding the incident of August 25, 2004. This single incident, standing alone, would probably not have warranted disciplinary action, although counseling would have been an appropriate corrective action. While the hearing officer mentioned this incident in the Findings of Fact, the incident was given relatively little weight in making the decision in this case.

Fifth offense in written notice

Grievant acknowledges that the manager talked to him on August 25, 2004 about the need in case of his absence to notify both the manager and grievant's immediate supervisor. However, grievant states that he does not remember hearing the manager tell him that he should make contact *directly* rather than leaving voice mail or e-mail messages. The manager said he would e-mail grievant a copy of the written instruction, and avers that he did so a few minutes after their meeting ended. Grievant contends that he received the e-mail only when he returned to work two weeks later. Grievant asserts that he had mentioned to "people" in March 2004 that urgent e-mail should be sent to him under a different e-mail system (POP) from the one used on campus. However, grievant did not say that "people" included the manager so there is no evidence that the manager knew grievant had made such a request.

In any case, grievant knew that the manager was going to send him an e-mail message in a matter of minutes after the meeting ended. Rather than wait a few minutes for the message to arrive in his computer, grievant left and went home. When grievant did not receive the message in the POP e-mail system, he did not contact the manager to request that a copy be sent through that system. Knowing that he had just been given corrective action in the form of a counseling session with his manager, grievant should have followed up with the manger to inquire about the e-mail message.

Grievant had stated to the agency that he would have a physician's excuse faxed to the agency on August 31, 2004. Grievant explains at length what occurred after he went to his physician's office. However, grievant fails to explain why he did not have the

[24] Agency Exhibit C. E-mail from VBS Director to grievant, August 17, 2004.

physician's excuse faxed directly from the doctor's office to his supervisor. Instead, grievant took the excuse and did not turn it in until a week later.

Grievant expresses puzzlement about the supervisor's expressed concern about arranging coverage for grievant during his absence. The supervisor wanted a physician's excuse in order to determine the estimated length of grievant's absence. Arranging coverage on a temporary basis for a day or two is often quite different from arranging coverage on a longer-term basis when an employee is expected to be off for weeks at a time. For a day or two's coverage, supervisors often draft someone on a temporary ad hoc basis. However, when one is expected to be absent for a prolonged period, it is not unusual that a different arrangement will be made so as to spread the workload more equitably among those who must cover the grievant's absence. Grievant states, "I see no logic to [the supervisor's] reasoning on this." While grievant may not understand the logic, it was nevertheless incumbent on him to comply with the supervisor's request to have a physician's excuse provided promptly. It was grievant's failure to comply with this request that caused this offense to be made part of the disciplinary action.

DECISION

Grievant has not proffered either 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 either to reopen the hearing or to change the Decision.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 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.[25]

David J. Latham, Esq.
Hearing Officer

[25] 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).