Issue: Group II Written Notice with termination (due to accumulation) (failure to perform assigned work); Hearing Date: 02/10/05; Decision Issued: 02/14/05; Agency: VPI&SU; AHO: David J. Latham, Esq.; Case No. 7965; **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: 7965

Hearing Date: February 9 & 10, 2005
Decision Issued: February 14, 2005

APPEARANCES

Grievant
Two witnesses for Grievant
Director of Engineering Operations
Attorney for Agency
Two 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 perform assigned work.[1] Because a second Group II Written Notice for a different offense was issued on the same date, grievant was removed from state employment due to an accumulation of disciplinary actions 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. Grievant did not get along well with the VBS Director and did not agree with his management style.

During a staff meeting on July 14, 2004, grievant's supervisor assigned grievant a task of preparing multimedia training materials for the VNOC operation. Grievant was to have the outline of the project completed by July 29, 2004 so that recording and production of training materials could begin on August 16, 2004 when grievant returned from two weeks of leave. The supervisor confirmed this assignment by sending grievant an e-mail on the day of the staff meeting.[4] On July 19, 2004, the supervisor sent grievant an e-mail clarifying the details of the training project.[5] Grievant was reminded that he was to submit his outline for the project to the VBS Director not later than July 29, 2004. The supervisor sent grievant another reminder e-mail on July 20, 2004.[6] Grievant failed to make any effort to perform the assigned work during the last two weeks of July. Instead, just before the end of his last shift before leaving for two weeks vacation, grievant sent an e-mail to his supervisor and the VBS Director in which he listed his objections and complaints about the project.[7]

On August 20, 2004, the VBS Director advised grievant that he had rescheduled the entire project to give grievant additional time.[8] He told grievant to submit his outline and planning documents for review not later than September 7, 2004 so that recording sessions could begin on September 14, 2004. The Director also advised grievant that he and grievant's supervisor would both be

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[1] Agency Exhibit B. Group II Written Notice, issued October 4, 2004.
[2] The other Group II Written Notice was separately grieved and adjudicated as Case # 7964.
[3] Agency Exhibit A. Grievance Form A, filed November 4, 2004.
[4] Agency Exhibit B. E-mail from supervisor to grievant and other video technicians, July 14, 2004.
[5] Agency Exhibit B. E-mail from supervisor to grievant, July 19, 2004.
[6] Agency Exhibit B. E-mail from supervisor to grievant, July 20, 2004.
[7] Agency Exhibit B. E-mail from grievant to VBS Director and supervisor, July 30, 2004.
[8] Agency Exhibit B. E-mail from VBS Director to grievant, August 20, 2004.

available for questions. Grievant did not respond to the e-mail and did not complete any work on the project. The VBS Director sent another e-mail to grievant on August 26, 2004 and grievant again failed to respond. The Director confronted grievant in person later that day about his failure to respond; grievant said he had been too busy to read e-mails. Grievant failed to perform any work on the project, did not submit an outline for review on September 7th, and did not report for recording sessions on September 14th. The VBS Director asked grievant when he was going to submit material for review; grievant said "several days or maybe weeks."

Grievant's supervisor performed a detailed analysis of grievant's work between July 14 and September 16, 2004.[9] The analysis revealed that after completion of his other duties, grievant had almost 84 hours of available time to work on the training project.

One of grievant's routine scheduling duties was to provide encoder assignments and ISDN assignments to clients prior to the start of semester classes. The fall 2004 semester classes began on Monday, August 23, 2004. Grievant delayed completing this duty until 9:00 p.m. on Sunday, August 22, 2004. This late notification prevented clients from using the information before classes started on Monday. In addition, grievant's e-mail message was difficult to understand and poorly prepared.[10]

On Monday August 23, 2004, grievant failed to correctly schedule ISDN tests. The VBS Director notified grievant about the problems that ensued from the incorrectly scheduled tests.[11] Grievant did not read the e-mail, failed to correct the problem, and it occurred again on August 24, 2004. Grievant failed on both August 23 & 24, 2004 to complete routine end-of-shift duties such as archiving ACC files and editing/archiving afternoon and evening classes.[12] Again, the VBS Director e-mailed grievant and the other schedulers about these problems; grievant chose not to read the e-mail.[13] The same problem recurred on both August 25 and August 26, 2004. On both days, the VBS Director e-mailed grievant; on both days, grievant elected not to read the e-mail messages.[14]

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

[9] Agency Exhibit F. Analysis of grievant's available time.
[10] Agency Exhibit B. E-mail from grievant, August 22, 2004, 9:01 p.m.
[11] Agency Exhibit B. E-mail from VBS Director to schedulers, August 23, 2004.
[12] Agency Exhibit B. E-mail from grievant to schedulers, August 24, 2004.
[13] Agency Exhibit B. E-mail from VBS Director to schedulers, August 24, 2004.
[14] Agency Exhibit B. E-mails from VBS Director to schedulers, August 25 & 26, 2004.

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 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 perform assigned work on multiple occasions – a Group II offense.

Grievant's lengthy written explanation for failing to perform any work on the training project amounts primarily to arguments against the project and

[15] § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective July 1, 2001.
[16] Section V.B.2.a, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

against his involvement in the project. Grievant asserts that various issues about the project puzzled him. However, he fails to demonstrate that he sought to meet with his supervisor, or the VBS Director, to obtain clarification on such issues. Grievant also maintains that his other responsibilities left him no time to work on the project. The agency has rebutted grievant's argument in two ways. First, a detailed analysis showed that grievant did have ample time to work on the project. Second, the VBS Director extended the original deadline by one full month. During this extra month, grievant did not make any efforts to even begin the project. It is apparent from grievant's written explanation and his testimony that he felt that he should not have been assigned this project, and because of that, he procrastinated and never attempted to start the project.

Whether there was ample time to complete the project as assigned is debatable. Nonetheless, grievant could have begun the project and taken it as far as he could. He could have met with his supervisor and/or the Director to ask for more time. He could also have met with them to discuss those issues about which he had questions. Grievant could also have requested assistance if needed. However, grievant failed to take any of these steps. Instead, grievant just ignored the project, did not begin working on it, and did not seek assistance or answers to his questions. This calculated decision to ignore the specific instructions of supervision was both a failure to perform assigned work and insubordination.

Grievant has offered a very lengthy and detailed explanation for the test failures that occurred from August 23-26, 2004. From the testimony and evidence taken in this case, it is impossible for someone not trained in video conferencing, television operational procedures, network connectivity, encoding and diagnostics to determine whether grievant was responsible for the test failures. The agency maintains that grievant, as the primary scheduler, was the one responsible for the templates that ultimately caused the problems. Grievant's convoluted explanations are not enlightening to an untrained observer. However, it is clear that grievant had primary responsibility for the work that caused the test failures.

Grievant's failure to read e-mails from the Director is the real issue herein. When the VBS Director e-mailed grievant each day, grievant deliberately chose not to read the e-mails. This resulted in the same problem recurring for four consecutive days. Had grievant read the e-mails, he might have been able to correct the problem and thereby prevent it from recurring three more times. Grievant similarly failed to read e-mails from the Director regarding the training project.

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.

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice for failing to perform assigned work 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

[17] Grievant Exhibit 3H. E-mail from grievant to Director of Engineering and Network Support, March 28, 2004.
[18] Grievant Exhibit 3H. *Ibid.*

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: 7965

Hearing Date:	February 9 & 10, 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

[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.

the EDR Director and to the Department of Human Resource Management (DHRM). Grievant avers that the agency's personnel department gave him incorrect information 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 states that the equipment user manual for which he was tasked to provide an outline would necessitate producing written scripts. The VBS manager testified that grievant was not required to write scripts – only to prepare an outline. Other people would be provided to help with scripts once the outline was complete. Because grievant knew that his writing style was poor, he felt that "it made no sense to me to try to do this." Grievant argues that he had an inadequate amount of time to complete an outline but then acknowledges that "I could have possibly done it for the

[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.

normal operations, but I doubt it." Despite the ambiguity in grievant's statement, he admits that could have accomplished at least part of the task. However, he never made any real attempt to accomplish what he could in the available time. More significantly, grievant did not request to meet with his supervisor, the manager, or the director to request more time or assistance.

Grievant argues that his project should have been delayed because the department planned in the fall of 2004 to write official policies and procedures. Grievant suggests that an equipment operation manual would constitute official department procedures. Grievant's argument is not persuasive. Department policies and procedures deal with personnel and operations issues – not equipment. The correct method to operate equipment or use a software program will remain the same regardless of departmental operational policies.

Grievant admits that he twice did not report for scheduled meetings (at Whittemore) regarding this project. Then grievant attempts to shift responsibility to his supervisor for failing to "make sure" grievant reported. When a supervisor gives a direction to an employee, the supervisor is not expected to "make sure" the employee follows the direction. A supervisor is not a babysitter looking over employees' shoulders every minute of the working day. The supervisor's responsibility is to respond to employee questions, and to monitor projects to assure that the employee completes the task. If the employee does not follow instructions, then the supervisor has to take appropriate corrective action.

Grievant alleges that this project was abandoned after he was removed from employment. In fact, the agency testimony indicates that the project has only been temporarily delayed until someone else can be assigned to it.

Second offense in written notice

Grievant's contention was addressed on page 3 of the Decision. In essence, grievant disagrees with the weight assigned by the hearing officer to the testimony of agency witnesses.

Third, fourth, fifth & sixth offenses in written notice

Grievant focuses on a very technical explanation of how ISDN assignments are made when scheduling classes on a bridge. The evidence suggests that grievant is probably quite technically proficient at his job. However, he admits that he is confused about what was attempted to correct the problems that occurred. Trying to understand these problems months after the fact is difficult. However, the problem in this case – which grievant does not address – resulted from grievant's deliberate decision not to read e-mails generated by the Director each day. Had grievant read these e-mails at the time, and spoken with his supervisor about the problems, he might have been able to nip this problem in the bud.

Grievant asserts that his supervisor used a different procedure in reporting the problem, and that the supervisor sent reports out late. Assuming grievant is correct

about both of his assertions, the fact remains that grievant was notified about the problem but did not resolve it. Regardless of the method by which the supervisor notified grievant and regardless of the timeliness of the notification, grievant knew from the supervisor's reporting that a problem existed.

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.[24]

David J. Latham, Esq.
Hearing Officer

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