Issue: Group II Written Notice (inappropriate, aggressive, unprofessional, loud, boisterous, confrontational, and intimidating behavior); Hearing Date: 01/06/06; Decision Issued: 01/09/06; Agency: NVCC; AHO: David J. Latham, Esq.; Case No. 8225; Outcome: Agency upheld in full; **Administrative Review: HO Reconsideration Request received 01/24/06; Reconsideration Decision issued 01/27/06; Outcome: Original decision affirmed (agency upheld in full); Administrative Review: EDR Ruling Request received 01/24/06; EDR Ruling No. 2006-1271 issued 03/14/06; Outcome: HO's decision affirmed; Administrative Review: DHRM Ruling Request received 01/24/06; DHRM form letter issued 12/04/06; Outcome: Issues alleging violation of grievance procedure are to be addressed by EDR. DHRM will not address – HO's decision affirmed.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8225

Hearing Date: January 6, 2006
Decision Issued: January 9, 2006

APPEARANCES

Grievant
Representative for Grievant
Two witnesses for Grievant
Acting Dean
Representative 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 inappropriate, aggressive, unprofessional, loud, boisterous, confrontational, and

intimidating behavior.[1] Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[2] The Virginia Community College system (Hereinafter referred to as "agency") has employed grievant as an administrative assistant for 12 years.

In 2000, grievant was counseled because she had become involved in a shouting match with a faculty member; she was warned that a repetition of such an incident could result in discipline up to and including removal from state employment.[3] In 2004, grievant was counseled about her use of profanity in the workplace.[4]

The dean of the division in which grievant is employed has an office suite in which he, his senior administrative assistant (SAA), and another administrative assistant work. Down the hall is another office in which are housed an assistant dean and other technical support personnel, including grievant. Since all office supplies are purchased by the division, it has been a routine practice to share supplies when either office runs out. On August 15, 2005, the SAA had run out of copy paper. She and the acting dean went to the technical support office to obtain a case of copy paper. When they entered the office, the SAA told grievant that they needed a case of paper. Grievant became angry and loudly said "you are not taking my paper."[5] The SAA assumed grievant was joking and again said that she and the dean needed copy paper. Grievant became louder and again said "you're not taking my paper." The SAA said, "I'll order my own paper" and left the office. Grievant closed the door and asked the dean about a meeting scheduled later that day. The SAA then decided to return to the office. As she tried to reenter the office, grievant told her "This is none of your business" and slammed the door closed.[6]

The acting dean returned to his office suite with a case of copy paper. A few minutes later, he and the SAA were talking in his inner office when grievant entered. She closed the door and loudly said that she had not slammed the door in the SAA's face. As she did so, grievant walked toward the SAA while speaking loudly, assertively, and in what appeared to be a threatening manner. He immediately stepped between grievant and the SAA. The SAA began crying and left the office. After asking the acting dean another question about the upcoming meeting, grievant walked into the outer office where the SAA and other administrative assistant work. She again began talking loudly towards the SAA. Hearing the loud commotion, the acting dean came into the outer office and again positioned himself between grievant and the SAA.[7] At this point, he asked grievant to leave the office and opened the outer door to indicate that she should

[1] Agency Exhibit A. Group II Written Notice, issued September 1, 2005.
[2] Agency Exhibit A. Grievance Form A, filed September 29, 2005.
[3] Agency Exhibit C. Memorandum from dean to grievant, October 10, 2000.
[4] Agency Exhibit C. Memorandum from acting dean to grievant, August 2004.
[5] Agency Exhibit C. Statement of acting dean, undated.
[6] Agency Exhibit B. Statement of senior administrative assistant, August 24, 2005.
[7] Agency Exhibit B. Statement of administrative assistant, August 17, 2005.

leave. Grievant said she was not going to leave. The acting dean said "Call the campus police" and he reached for a telephone. Grievant then left the office.

The SAA was so upset that she left the campus for about 20 minutes to compose herself and then returned to work. When she returned, grievant approached her in a hallway and said she had only been kidding. The SAA said words to the effect of, "We have kidded each other in the past but this time you were definitely not kidding." During this time, the acting dean had reported the incident to his supervisor - the provost - and then to the human resources director.

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 her evidence first and must prove her claim by a preponderance of the evidence.[8]

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

[8] § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, effective August 30, 2004.

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 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. Disruptive behavior is a Group I offense; insubordination (refusing to comply with a supervisor's instructions) is a Group II offense.[9]

The agency has demonstrated by a preponderance of evidence that grievant's behavior on August 15, 2005 was loud, confrontational, intimidating, aggressive, insubordinate, and unprofessional. Three witnesses testified credibly and consistently that grievant exhibited such behavior. None of the witnesses found credible grievant's assertion that she had just been "kidding." Moreover, grievant's credibility was tainted by her denial that she had had previously engaged in action that could have resulted in her removal from employment.[10] Grievant's testimony regarding the August 15, 2005 incident was also inconsistent. At one point, grievant stated that the other administrative assistant told her she never heard the acting dean say "Call the campus police." A few minutes later, grievant testified that the administrative assistant said she didn't think the assistant dean was talking to her when she he requested the police be called. The two statements are inconsistent with each other and further taint grievant's credibility.

Grievant denied that she had slammed the door when the SAA tried to reenter the technical support office. Neither the acting dean nor the SAA said anything to grievant about her slamming the door. The issue was not raised by anyone until shortly thereafter when grievant came to the acting dean's office and denied slamming the door. Since no one had yet accused her of slamming the door, grievant's preemptive attempt to deny the action strongly suggests that she felt some guilt about having slammed the door and was trying to disavow that her action had been intentional.

Grievant said she feels like an outsider in her job, and does not trust the college authorities. While it is unfortunate that grievant feels this way, she was unable to show that any of those involved in this incident were the cause of her feelings. More importantly, grievant has not shown that the incident did not occur as described by the three witnesses.

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[9] Agency Exhibit A. DHRM Policy 1.60, *Standards of Conduct*, effective September 16, 1993.

[10] During cross-examination, grievant denied that she had had ever done anything that could have resulted in removal from state employment. The agency then submitted written evidence demonstrating that grievant had falsified her application for employment (see Agency Exhibit E, memorandum from Human Resource Director to Division Chairperson, July 9, 1993.)

Grievant argued that the incident was, to use her expression, much ado about nothing. The evidence in this case demonstrates otherwise. Grievant's behavior was so loud and aggressive that it caused the senior administrative assistant to begin crying and have to leave campus for 20 minutes to compose herself. Grievant's behavior was also sufficiently aggressive and insubordinate that the acting dean had to twice position himself between grievant and the SAA and threaten to call the campus police when grievant refused to comply with his instruction to leave the office.

Grievant suggests that because an independent investigation was not conducted the disciplinary action was not warranted. The agency did not need an independent investigation because the consistent evidence provided by the three witnesses is preponderant and more than sufficient to justify taking disciplinary action. Grievant also suggests that the acting dean did not have "permission" to issue discipline. However, grievant failed to offer any policy or procedure requiring the acting dean to obtain permission. In contrast, the *Standards of Conduct* policy not only permits supervisors to issue discipline but makes it the responsibility of supervision to issue discipline when circumstances warrant.

Grievant also objected to the second step in the grievance resolution process, claiming that the second step respondent did not conduct a thorough or sufficient investigation. The purpose of the second-step meeting is fact finding.[11] It is within the authority of the second-step respondent to determine how much evidence is needed to respond to the grievance. In this case, the second-step respondent concluded that she had sufficient evidence to uphold the disciplinary action. Therefore, there is no evidence that the second-step respondent failed to comply with the grievance procedure. Even if the respondent's review had been insufficient, the purpose of this hearing is to give both parties a full and complete opportunity to present all available evidence so that the hearing officer can conduct a *de novo* evaluation of the case. Accordingly, this hearing cures any potential defect that might have occurred at the second step.

Finally, grievant asserts that, if the agency is deemed to have proven its case, the evidence should warrant only a Group I Written Notice. For three reasons, however, the evidence in this case supports a Group II disciplinary action. First, there is no question but that grievant's behavior was disruptive – a Group I offense. While a first offense of disruptive behavior normally warrants a Group I Written Notice, a second or third offense of the same behavior can warrant a higher level of disciplinary action. In this case, there is sufficient evidence to show that grievant had previously been counseled about her loud, rude, and disruptive behavior. Second, grievant's behavior included a failure to follow the supervisor's instruction to leave the office; such insubordinate behavior is a Group II offense. Finally, grievant's intimidating behavior (yelling and moving aggressively towards the SSA on two occasions) is a violation of DHRM Policy 1.80, Workplace Violence. Shouting and creating an intimidating presence, or

[11] § 3.2 EDR *Grievance Procedure Manual*, effective August 30, 2004.

engaging in behavior that subjects another individual to extreme emotional distress is defined as workplace violence.[12] Violation of Policy 1.80 can result in discipline up to and including termination of employment.

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice for loud, inappropriate, confrontational, aggressive, intimidating, and unprofessional behavior issued on September 1, 2005 is 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.

[12] DHRM Policy 1.80, *Workplace Violence*, effective May 1, 2002.

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.[13] 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.[14]

[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]

S/David J. Latham

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David J. Latham, Esq.
Hearing Officer

[13] 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).

[14] 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: 8225

Hearing Date:	January 6, 2006
Decision Issued:	January 9, 2006
Reconsideration Request Received:	January 24, 2006
Response to Reconsideration:	January 27, 2006

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.[15]

OPINION

Grievant's request for reconsideration raises several issues which will be addressed in this decision in the same order as raised in grievant's request.

Grievant asserts that it was a misapplication of policy to include written statements that were attached to the written notice. Since the written notice was the action grieved, that document and its attachments are not only admissible but are the *raison d'etre* for the hearing.

[15] § 7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

Grievant contends that the agency was arbitrary in deciding to issue a Group II Written Notice. In fact, the evidence supports a conclusion that the agency was not arbitrary and selected a level of discipline commensurate with the offense.

Grievant argues that the issue of misapplication of policy was not adjudicated. Grievant stated in her grievance that issuance of discipline was the purported misapplication of policy. That issue of whether discipline should have been issued was the entire subject of the hearing and was, therefore, fully adjudicated.

Grievant alleges that she was not given an opportunity to rebut or dispute evidence. In fact, grievant had ample opportunity to cross-examine all agency witnesses, to thoroughly examine her own witnesses, and to testify about all relevant issues.

Grievant testified, under oath, that she had not engaged in any action that could have resulted in her removal from employment. Following this, the agency submitted as rebuttal evidence, documentation demonstrating that grievant falsified her state employment application. Thus, the hearing officer properly found that grievant's false testimony under oath tainted her credibility. The hearing officer did not state that her testimony should be disregarded. When a trier of fact finds that testimony is tainted by a false statement, it means that all other testimony of that witness should be more closely examined to assess its veracity.

Grievant alleges, but has not demonstrated, that admission of the subject documentation violates DHRM Policy 6.10. First, the documentation was necessary as evidence to rebut grievant's testimony and therefore is relevant and admissible at hearing. Second, the documentation was submitted in grievant's *own* grievance hearing and, therefore, does not violate the confidentiality requirements of the policy. Grievant also asserts that these documents should have been destroyed at an earlier time. There was no evidence presented as to the origin of these documents. However, since the key document was written by the Human Resources Director, it is more likely than not that this document was retained by human resources and/or may be in grievant's personnel file. In any case, this issue was not explored during the hearing and therefore there is no evidence on this point.

Grievant objects to the characterization of her behavior as insubordinate. The preponderance of evidence educed at hearing established that grievant's refusal to comply with the direct instruction of the acting dean was insubordinate. However, grievant's insubordination was *not* the justification for the issuance of a Group II Written Notice. As the decision clearly states, the written notice was for grievant's loud, inappropriate, confrontational, aggressive, intimidating, and unprofessional behavior.

Grievant charges that the adjudicator was not objective because he pointed out that grievant's behavior was so loud and aggressive that it caused the SAA to begin crying and leave campus for 20 minutes to compose herself. This is a factual statement established by the preponderance of witness testimony. Grievant also disputes the fact that the SAA left campus. In fact, the SAA offered *unrebutted* testimony that she lives nearby and went home during that 20-minute period. Grievant now asserts that the SAA did not leave campus but during the hearing grievant failed to dispute that testimony and failed to offer any rebuttal evidence that would contradict the SAA's testimony.

Grievant alleges that the SAA and other witnesses were not given a *proper* cross-examination. The tape recording confirms that grievant was represented during the hearing, and that her representative cross-examined every witness. If the representative's cross-examination was not *proper,* responsibility lies with grievant and/or her representative.

Grievant suggests that the hearing officer acted as if he was a witness. Apparently grievant does not recognize that, as the trier of fact, a hearing officer is obligated to listen to the evidence offered by both parties and then make an independent determination of facts based on the preponderance of that evidence. In this case, grievant refused to comply with the acting dean's instruction to leave the office; he then said he would call the police. After he said this, grievant decided to leave. Therefore, when grievant finally left, there was no further need for assistance from the campus police and so the dean did not call them.

Grievant again argues, as she did during the hearing, that her offense should be considered a Group I. The offense for which grievant was disciplined includes the totality of her actions from the time the acting dean and SAA came to grievant's work area to pick up paper through the time grievant came to the acting dean's office, engaged in the behavior previously cited, and finally left the office. For the reasons stated in the decision, the totality of grievant's actions, when considered in conjunction with previous counseling for similar behavior, easily justifies a Group II Written Notice.

Grievant was disciplined for her behavior which, according to state policy, constitutes workplace violence. It is not necessary for the Written Notice to cite chapter and verse of each applicable policy when the evidence clearly demonstrates that grievant violated policy. The hearing decision cites the policy to demonstrate to grievant that state policy prohibits this type of behavior.

Grievant attempted on multiple occasions during the hearing to discuss certain aspects of the resolution step process which she believed were handled incorrectly. As the hearing officer pointed out, the purpose of a hearing is to conduct a new and thorough examination of all aspects of the incident that precipitated discipline. A grievance hearing is a *de novo* review of all facts <u>leading up to</u> the disciplinary action. Accordingly, anything that occurred *after* discipline was issued (including the resolution step process) has no bearing on the incident itself. A grievance hearing affords a grievant full due process opportunity to present all witnesses and evidence that can shed light on what occurred *up to and during* the incident.

Grievant enumerates 15 points which she characterizes as issues and events. Most of these points are critical of the agency's handling of the matter; it would be inappropriate for the hearing officer to respond to those criticisms. Other points require response and are addressed below using the same alpha or numeric references used by grievant.

> 3c) Grievant refers to Ms T (labeled as other administrative assistant in the decision) and suggests that she was not an eyewitness. This is factually incorrect. Ms T was *in* the dean's outer office and was an eyewitness when grievant left the dean's office, had a confrontation in the outer office, and was directed by the dean to leave. Therefore, her testimony about these events was direct eyewitness testimony – not hearsay.

3d) Grievant has proffered with her request for reconsideration an e-mail dated September 1, 2005. Grievant has not demonstrated that she could not have produced this document during the hearing. Because she did not offer this document at hearing, the opposing party did not have an opportunity to examine the document or challenge its authenticity. Therefore, this e-mail is not admissible as evidence.

3e) It is assumed that grievant is referring to her contention that the acting dean should have had permission to *issue* the disciplinary action. This issue was addressed in the first full paragraph of page 5 of the Decision.

3f) During the hearing, agency witnesses satisfactorily explained why there are two copies of a document with different dates. This is a red herring since the August 25, 2005 memorandum was routed to several people for initialing but was photocopied twice – once when one person had initialed it, and once when all had seen and initialed it.

3k) There is no mention of finger pointing by the SAA because grievant is the only person who alleges that it occurred. The other witnesses state that the SAA was gesturing with her hands but did not point a finger.

5) Grievant has proffered with her request for reconsideration an e-mail dated October 12, 2005. Grievant has not demonstrated that she could not have produced this document during the hearing. Because she did not offer this document at hearing, the opposing party did not have an opportunity to examine the document or challenge its authenticity. Therefore, this e-mail is not admissible as evidence.

Grievant has not identified any constitutional provision, statute, regulation, or judicial decision as a basis to challenge the hearing officer's conclusions of law. Grievant takes issue with certain Findings of Fact, and with the hearing officer's Opinion. The grievant's disagreements, when examined, simply contest the weight and credibility that the hearing officer accorded to the testimony of the various witnesses at the hearing, the resulting inferences that he drew, the characterizations that he made, or the facts he chose to include in his decision. Such determinations are entirely within the hearing officer's authority.

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 to change the Decision issued on January 9, 2006.

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.[16]

S/David J. Latham

David J. Latham, Esq.
Hearing Officer

[16] 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).

December 4, 2006

RE: **Grievant v. Northern Virginia Community College**
Case No. 8225

Dear Grievant:

The Agency head, Ms. Sara Wilson, has asked that I respond to your request for an administrative review of the hearing officer's decision in the above referenced case. During discussions with you on several occasions, you requested that this Agency not respond to your administrative review request until you could provide more data to support your challenge. To date, you have provided neither that data nor identified more specifically which state or agency policy with which the hearing decision is inconsistent. Therefore, this Agency issues it ruling based on the available data.

Please note that a hearing officer's original decision is subject to three types of administrative review, and an employee may file an administrative review request within 15 calendar days of the date the original hearing decision is issued if any or all of the following apply:

1. A request to reconsider a decision or reopen a hearing is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a decision.

2. A challenge that the hearing decision is inconsistent with state or agency policy is made to the Director of the Department of Human Resource Management (DHRM). This request must refer to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.

3. A challenge to the hearing decision does not comply with the grievance procedure is made to Director of the Department of Employment Dispute Resolution. This request must state the specific requirement of the grievance procedure that is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.

A review of the information you provided reveals that you raised issues of compliance regarding the grievance procedure and how the hearing officer

accepted and handled the evidence. We also note that you raised the same issues in an appeal to the agency authorized to address those issues, the Department of Employment Dispute Resolution, and that agency addressed those issues in its ruling. Therefore, DHRM will not address those issues further. Thus, effective the date of this letter, we are closing this case.

Ernest G. Spratley, Manager
Employment Equity Services

c: Sara R. Wilson, Director, DHRM
Claudia T. Farr, Director, EDR
Barbara R. Shufflebarger, HR Director, NVCC