Issue: Group III Written Notice with termination (sexual harassment); Hearing Date: 05/30/06; Decision Issued: 06/01/06; Agency: DOC; AHO: William S. Davidson, Esq.; Case No. 8353; Outcome: Employee granted full relief; **Administrative Review: HO Reconsideration Request received 06/16/06; Reconsideration Decision issued 06/26/06; Outcome: Upheld original decision; Administrative Review: EDR Ruling Request received 06/16/06; EDR Ruling No. 2006-1387 issued 07/31/06; Outcome: Remanded back to hearing officer; Revised Decision issued 08/07/06; Outcome: Original decision affirmed; Judicial Review: Appealed to Circuit Court in Richmond County; Outcome pending**

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 8353

Hearing Date: May 30, 2006
Decision Issued: June 1, 2006

APPEARANCES

Grievant
Warden
Advocate for Agency
Advocate for Grievant
Four (4) Witnesses for Agency (including Warden)
Two (2) Witnesses for Grievant (including Grievant's Advocate)

ISSUES

Did the Grievant's conduct warrant disciplinary action under the Standards of Conduct? If so, what is the appropriate level of disciplinary action for the conduct at issue?

PROCEDURAL ISSUE

The Hearing Officer, prior to the commencement of the hearing, requested that both the Agency and the Grievant exchange notebooks which contained all of the documentary evidence that they would introduce at the hearing. A copy of each notebook was sent to the Hearing Officer. At the commencement of the hearing, the Hearing Officer asked each of the advocates if there was any objection to the introduction of the notebooks in their entirety for the appropriate party. There being no objection, each notebook was introduced in its entirety as Grievant Exhibit 1 and Agency Exhibit 1, respectively. During the course of the hearing, the Grievant introduced three (3) other exhibits which the Hearing Officer, after no objection by the Agency, placed in Grievant Exhibit 1, behind Tab 5.

FINDINGS OF FACT

Grievant filed a timely grievance from a Group III Written Notice issued for sexual harassment. As part of the disciplinary action, Grievant was removed from employment.

Following failure to resolve the grievance at the third resolution step, the Agency head qualified

the grievance for a hearing.[1]

The Department of Corrections (Hereinafter referred to as: "Agency") has employed Grievant for more than twenty (20) years. He was a Lieutenant. Grievant has one (1) prior active disciplinary action, a Group II Written Notice for violation of DPT policy 2.30 Sexual Harassment. Grievant also has an inactive Group I Written Notice for "inadequate or unsatisfactory job performance."[2] The Commonwealth's policy on sexual harassment defines this term as:

> Any unwelcome sexual advance, request for sexual favors, or verbal, written or physical conduct of a sexual nature by a manager, supervisor, co-workers, or non-employee (third party). [3]

The Grievant became Officer D's Supervisor on or about May 25, 2005.

On August 9, 2005, Officer D requested a transfer from night shift to day shift. [4]

On September 24, 2005, the Grievant reported Officer D for excessive absences from work, which resulted in her being issued a Group I Written Notice for excessive absences for the period beginning February 1, 2005 through September 25, 2005. [5]

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[1]Grievant Exhibit 1,Tab 1, Page 4. Grievance Form A, filed April 3, 2006

[2]Agency Exhibit 1,Tab 6, Pages 1 & 2. Written Notices

[3]Agency Exhibit 1, Tab 1, Page 3. Department of Human Resource Management (DHRM Policy Number 2.30, *Workplace Harassment*, May 1, 2002

[4]Grievant Exhibit 1, Tab 5. Letter from Officer D to Major

[5]Grievant Exhibit 1, Tab 4, Page 2. Second Resolution Step

On November 7, 2005, Officer D, filed a written complaint with a Major and a Captain at the Agency alleging that Grievant had sexually harassed her on Friday, November 4, 2005, as follows:

> I was on break in the staff dining, I was standing taking off my coat when out of nowhere Grievant touched me on my buttocks. Saturday, November 5, 2005, he entered the Control Room of Building 5 to conduct security checks, as I went to unlock the Control Room door again he touched my buttocks. [6]

Officer D met with another officer on November 7, 2005, and indicated to her that she was being sexually harassed. She did not reveal the name of the person who was harassing her, but she did state to this officer the following:

> she was on break yesterday (11-5-05), in the staff dining room and when she went to pass this person, they patted her on the butt; one night she was going into the control booth and when she went passed [sic] him, he grabbed her butt; one night she was in SHU and she went to let this person out of the control room and they squeezed

[6]Grievant Exhibit 1, Tab 2, Page 1. Incident Report Form dated November 7, 2005

her right breast. . . . [7]

Subsequent to this allegation, the Agency requested the services of The Inspector General's Office, which assigned this case to a Special Agent of the Department of Corrections. On November 14, 2005, that Special Agent interviewed Officer D. The Special Agent's summary of this investigative interview states as follows:

> Regarding the inappropriate touches and remarks, this has been going on since 99-98. The summer of 2005 while I was assigned to the Special Housing Unit he grabbed my breast as I was opening the door for. [sic] On November 4, 2005, he hit me on my buttocks while I was in staff dining. The next night, he was in the Control Room of Building 5 when he asked me if I liked to be f***ed in the ass. [8]

APPLICABLE LAW AND OPINION

The General Assembly has enacted the Virginia Personnel Act, Va. Code § 2.2-2900 *et seq*., which establishes the procedures and policies applicable to employment with 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

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[7] Grievant Exhibit 1, Tab 1, Page 2. Report from Lieutenant to Major

[8] Grievant Exhibit 1, Tab 3, Page 3. Investigative Interview of Special Agent dated November 14, 2005

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 prove his claim by a preponderance of the evidence. [9]

To establish procedures for 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 employees' professional and personal conduct and acceptable standards for employees' work performance. The Standards serve to establish a fair and objective process to correct or address 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.3 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.[10] The Department of Corrections (DOC) has promulgated its own Standards of Conduct patterned on the state Standards, but tailored to the unique needs of the Department. Section XII(19) of the DOC Standards of Conduct addresses Group III offenses; one example of such an offense is violation of DHRM Policy 2.30 Workplace Harassment.[11]

During her testimony, Officer D stated that the Grievant, "touched me on my buttocks, while I was standing in the staff dining room taking off my coat." This incident took place on November 4, 2005. She then stated that on November 5, 2005, while she was in the Control Room of Housing Unit 5, the Grievant came into the Control Room and, "asked if I wanted to be f***ed in the ass." In summary, Officer D's testimony chronologically was as follows:

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[9] §5.8, EDR *Grievance Procedure Manual*, effective August 30, 2004

[10] DHRM Policy Number 1.60, *Standards of Conduct*, effective September 16, 1993

[11] Agency Exhibit 1, Tab 7, Pages 1-14. *Standards of Conduct*, September 1, 2005

November 4, 2005	While standing in the staff dining room taking her coat off, Grievant touched Officer D on my buttocks
November 5, 2005	While in Housing Unit 5 Control Room, Grievant asked Officer D if she wanted to be f***ed in the ass. And, as she opened the door for him to leave, he grabbed her buttocks.

This is the fourth version of Officer D's complaint produced to the Hearing Officer. The first is contained in her Written Report of November 7, 2005 in which she said that, while she was taking off her coat in the staff dining room, the Grievant touched her buttocks. Later, on November 5, 2005, when he entered the Control Room, he touched her buttocks as she was unlocking the door.[12] In this version, there was no reference to the question of whether or not she would like to be "f***ed in the ass."

The second version of her allegation is found in the report made by the Special Agent who investigated this matter.[13] In this interview with the Special Agent, she stated that on November 4, 2005 the Grievant, "hit me on my buttocks while I was in the staff dining room." Further she stated in that interview that on November 5, 2005, while she was in the Control Room, he asked if she, "would like to be f***ed in the ass." In this version of the story, there was no mention of touching taking place on November 5, 2005.

The third version of this allegation is found in the Report made by the Lieutenant to the Major who is Chief of Security.[14] The Lieutenant reports that Officer D told her that on November 4, 2005 she went to pass this person and he patted her on the butt. And there she said he squeezed her right breast. In this version, there is no reference to the verbal assault of asking whether she wanted to be "f***ed in the ass" and there was an allegation of having her right breast touched.

Officer D, in her sworn testimony, stated that she was very clear in her memory of all of the incidents. She made that statement several times, both on direct examination by the Agency and cross examination by the Grievant and subsequent questioning by the Hearing Officer. While there is some commonality between her oral testimony, the statement she gave the Special

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[12]Grievant Exhibit 1, Tab 2, Page 1. Incident Report Form dated November 7, 2005

[13]Grievant Exhibit 1, Tab 3, Page 3. Investigative Interview dated November 14, 2005

[14]Grievant Exhibit 1, Tab 1, Page 2. Report of Lieutenant to Chief of Security dated November 7, 2005

Investigator, the statement she produced when she filed her charge against the Grievant, and the statement she produced when she spoke to the Lieutenant, there are significant differences between each of those accounts. A witness's credibility is damaged when she testifies that she is certain as to what happened on each occasion, but provides four (4) different descriptions of the salient portions of the events.

Furthermore, Officer D testified that this behavior had been going on for years and years, but gave no rational answer for why she did nothing for years and years. Upon receipt of the harassment claim, the Warden transferred Officer D to the day shift in order to separate Officer D and Grievant, thereby fulfilling Officer D's August request to be transferred. The Hearing Officer finds it probative that it was only after she had requested a transfer to day shift in August and received a Group I Written Notice in September because of Grievant's follow-up on her excessive absences that Officer D came forward in November with a claim of sexual harassment.

A polygraph test was administered in this matter. Virginia Code Section 40.1-54.4:4 provides as follows:

> The analysis of any polygraph test charts produced during any polygraph examination administered to a party or witness **shall not** be submitted, referenced, referred to, offered or presented in any manner in any proceeding conducted pursuant to Chapter 10.01 (§2.2-1000 et seq.) of Title 2.2....[15] (Emphasis added)

In his testimony before the Hearing Officer, the Warden indicated that he was aware of the polygraph results before making his decision. The Warden, in the Second Resolution Step, denied relief requested by the Grievant and allowed the Group III Written Notice and Termination to stand.[16] In that document, the Warden stated as follows:

> I personally spoke to both of the Licenced Polygraph Examiners, Special Agent X and Special Agent Y, who stated you were clearly deceptive on all three separate polygraph examinations when asked if you had inappropriately touched Officer D.

The Warden further stated that as follows:

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[15]Va. Code Ann. § 40.1-51.4:4 Prohibition of use of polygraphs in certain employment situations.

[16]Grievant Exhibit 1, Tab 1, Page 9. Second Resolution Step

> Based on the information derived from this investigation...I believe you did in fact violate DRHM Policy 2.30, subject: Workplace Harassment.

It is clear to the Hearing Officer that the Warden relied on the results of the polygraph tests as reported to him by the Special Agents. The Warden, in his testimony, indicated that it was a piece of his decision making process and that he did not necessarily rely on it. The Warden indicated that he relied on his interview of the Grievant and Officer D, the prior written notices against the Grievant and the other facts that were produced by the Special Investigator. However, while the interviews with the two (2) parties and the prior written notices were known at a very early date, the decision was not made until the results from the polygraph examiners were produced. As no decision was made prior to the results' production, the Hearing Officer can only conclude that the polygraph information was a significant piece of the decision-making process.

The Hearing Officer also heard from a Special Agent of the Department of Corrections. The Special Agent testified that his report indicated that the evidence was "inconclusive." The Hearing Officer would add parenthetically that the Inspector General reported that no such report as of May 16, 2006.[17] The Hearing Officer is concerned that the Special Agent testified that such report was in existence, that he had filed it weeks earlier and that the only way he could explain this inconsistency was that reports go through a more than extensive vetting process in the Inspector General's Office and that they may have deemed it "not available" as it was not in final form.

The Warden testified that he had been in touch with the Special Agent during the investigation and, in his Step 2 Resolution Notice, wrote that he had remained in contact by telephone. Considering the fact that the Special Agent deemed the evidence inconclusive, it is difficult for the Hearing Officer to understand how the Warden could depend on information derived from this investigation as part of his decision-making process and come to the conclusion that the Grievant had sexually harassed Officer D. The Special Agent's investigation produced a result of "inconclusive," not a result of "the Grievant did what Officer D alleged that he did."

In the first step Resolution Process, the Major in charge of security wrote,

> Further review of your personnel record indicted that you also have an inactive Group I Written Notice that was issued in October 2002, for Inappropriate Touching of a female subordinate officer. While the Inactive Group I Written Notice is not being used to determine the level to be taken, in this case termination of employment, it is used to demonstrate a pattern of predatory and/or /inappropriate [sic] behavior toward subordinate staff.[18]

[17]Grievant Exhibit 1, Tab 3, Page 2. Letter from Inspector General dated May 16, 2006

[18]Grievant Exhibit 1, Tab 1, Page 5. Response from First Resolution Step

The Group I Written Notice to which he refers was introduced by the Agency at Agency Exhibit 1, Tab 6, Page 2. The Title of the Written Notice is Inadequate or Unsatisfactory Job Performance. It references two (2) items. The first is placing hands on a female officer as if performing a frisk search. The second is giving an officer educational leave for an unapproved activity. The Agency introduced as part of its exhibits Grievant's Explanation for the Alleged Inappropriate Touching that gave rise to the Group I offense.[19] The Grievant's statement is that he touched an officer on her shoulder when she assumed a shake-down position and told her that she would have to wait until the Control Room Officer came down to search her. The Agency did not contradict its own exhibit. Group I Written Notices have an active period of two (2) years. Written Notices that are no longer active shall not be taken into consideration as to the degree of discipline in a new offense.[20] The Agency, through its witnesses, has been very careful to testify that it was simply using the Group I to show a pattern of behavior (in this case, one of being a predator). The Hearing Officer finds that is an extreme use for this Group I Written Notice and an extreme use of a matter that is four (4) years old.

On behalf of the Agency, the Hearing Officer heard from both the Warden and the Major that managers that fail to respond to allegations such as those made by Officer D may be considered a party to the offense.[21] An overriding theme of the testimony for the Agency was a concern that people would be held personally responsible if they did not act. The Hearing Officer heard nothing about protections for the Grievant.

CONCLUSION

The most unbiased witness that testified before the Hearing Officer was the Special Agent who was brought in to investigate this matter. This Special Agent was assigned this case because of his expertise. His testimony was that, at the conclusion of his investigation, the results were inconclusive. There is no other evidence upon which the Warden or, by extension, the Hearing Officer could rely as the Grievant and Officer D attempt to corroborate their respective statements. The Warden, indicating that he was relying on the investigative results (a part of which were the polygraph tests and the out-of-date prior Group I offense) and inconclusive results produced by the Special Agent, found the Grievant had sexually harassed Officer D based solely on her statements to the Warden. Excluding the polygraph results and the reliance on an out-of-date Group I Written Notice which only partially dealt with matters involved in this issue, and considering the lack of consistency of Officer D's testimony in relationship to her prior statements, then it is clear that the Warden was in error in his dismissal from employment of the Grievant.

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[19]Agency Exhibit 1, Tab 2, Page 13. Third Resolution Step, received March 15, 2006

[20]Grievant Exhibit 1, Tab 6, Page10. Standards of Conduct

[21]Agency Exhibit 1, Tab 1, Page 5. Workplace Harassment Policy number 2.30

DECISION

The decision of Agency is hereby REVERSED by the Hearing Officer.

The Group III Written Notice issued on January 27, 2006 for Sexual Harassment and Grievant's removal from employment are RESCINDED. Grievant is reinstated to his position with full back pay, less any interim earnings.

APPEAL RIGHTS

You may file an administrative review request withing **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.

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.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer withing 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 a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.[22] 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.[23]

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[22]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).

[23]Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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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William S. Davidson
Hearing Officer

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8353

Hearing Date:	May 30, 2006
Decision Issued:	June 1, 2006 (mailed June 7, 2006)
Reconsideration Request Received:	June 16, 2006
Response to Reconsideration:	June 26, 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. [24]

OPINION

The Agency seeks reconsideration of the Hearing Officer's decision based on newly discovered evidence and the allegation of six incorrect legal conclusions in the Hearing Officer's original Decision. The Agency offers, as newly discovered evidence, statements from three female officers alleging inappropriate touching or use of words by the Grievant and a statement by one male officer who approached the Grievant on behalf of one of these female officers regarding this inappropriate touching or use of words.

[24] §7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

The use of after-discovered or newly discovered evidence that was not available at the time of the trial or hearing is a concept that has been well discussed and defined by the Courts of the Commonwealth of Virginia. A motion to reconsider or to grant a new trial based on newly discovered evidence is a matter submitted to the sound discretion of the Circuit Court (herein the "Hearing Officer") and will be granted only under unusual circumstances after particular care and caution has been given to the evidence.[25]

A moving party's burden of proof before the Circuit Court based on newly discovered evidence is well established. The moving party must establish that such evidence:

> (1) Appears to have been discovered subsequent to the trial; (2) could not have been secured for use at the trial in the exercise of reasonable diligence by the movant; (3) is not merely cumulative, corroborative or collateral; and (4) is material, and such as should produce opposite results on the merits of another trial. [26]

It does appear to the Hearing Officer that at least two of the statements are potentially statements that were discovered subsequent to the trial. The Hearing Officer would note that the statement by one of these officers was a statement made by a witness for the Grievant at the hearing. Further the Hearing Officer would note that one of the statements was a statement that the Agency attempted to introduce in its rebuttal at the hearing. This particular issue will be addressed more extensively in this Opinion.

The Agency makes no proffer to the Hearing Officer as to why these statements could not have been secured prior to the hearing. The alleged offense for which this hearing was held occurred in early November of 2005. The hearing did not take place until May 30, 2006. The Agency had approximately seven months to obtain this evidence. Nothing in these proffered statements addresses the specific incident for which the Grievant was issued a Group III Written Notice.

Further, there is an interesting issue wherein one of the officers submitted a statement on May 26, 2006 and that statement is included with the Agency's request to the Hearing Officer. The Agency, at the hearing, attempted to have a letter from this officer introduced as rebuttal evidence. The Hearing Officer refused that as there was no evidence for which it could be used as proper rebuttal. Further, the Agency told the Hearing Officer that it had this letter in hand slightly prior to the beginning of the hearing, yet the Agency waited until rebuttal to attempt to use it. The Hearing Officer did not maintain a copy of the Agency's proposed offering as it was rejected. The Grievant, in the papers that he has filed with the Hearing Officer, has another draft of this letter which the Grievant alleges is the draft that the Agency attempted to introduce as rebuttal evidence. The Hearing Officer will note, while these letters are similar in content, they have distinctly different dates and locations concerning the alleged inappropriate actions contained therein. While the Hearing Officer need not reach an issue regarding the change in the

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[25] Commonwealth v. Tweed, 264 Va.524, 528, 570 S.E. 2d 797, 800 (2002); Stockton v. Commonwealth, 227 Va. 124, 149, 314 S.E. 2d 371, 387 (1984).

[26] Odum v. Commonwealth, 225 Va. 123, 130, 301 S.E. 2d 145, 149 (1983).

contents in these letters, nor what may be a discrepancy in the handwriting of these letters, it is intriguing that the Hearing Officer has two different letters from this particular officer.

This particular officer, in both drafts of her letter, indicated that she reported the inappropriate behavior to her very best friend, Officer Z. In one draft of her letter, she said that she was afraid to report the incident to her fellow officers because she would be deemed to be a snitch and she gave the impression that she only reported this to her closest friend, Officer Z. Yet, in another of the proffered statements from the Agency, Officer W indicates that she was told of this event as well. These internal discrepancies are bothersome for the Hearing Officer.

The Hearing Officer finds no evidence that these alleged statements could not have been secured by the Agency prior to the hearing with the exercise of even minimal diligence, much less reasonable diligence. In fact, the Agency had one of these statements, or at least one version of one of these statements in its possession prior to the hearing and made the tactical decision to wait to attempt to use it as rebuttal evidence when in fact it turned out there was no evidence for which this letter could rebut. Further, another one of the statements was produced by one of the Grievant's witnesses who was present the morning of the hearing. Even if these new statements met the requirement of not being able to be secured prior to the hearing and the exercise of reasonable diligence, at the very best, they are merely cumulative and they offer no direct evidence to assist the Hearing Officer in making a determination of the issue that was at hand on May 30, 2006.

The Agency alleges that there were six incorrect legal conclusions. The first is that the Decision appeared to give no weight to a Group II Written Notice that was issued against the Grievant on May 16, 2005 and, "that was ignored and not mentioned in the hearing decision." The Hearing Officer would point out that on both pages 2 and 6 of his Decision, he made reference to the active Group II Written Notice. On page 2, such reference is made in the second paragraph, third line. And on page 6, such reference is made in the last full paragraph, wherein the Warden indicated that he relied on, "...the prior written notices against the Grievant..." Further, the Group II Written Notice was amply documented in both the Agency and the Grievant's exhibits. The Hearing Officer gave the Group II offense the weight that he deemed it should have been given in his Decision.

Second, the Agency alleges that, "The Hearing Officer may give the Group I little weight, ...it appears that he has considered this exhibit adverse to the Agency." The Agency complains that the Hearing Officer accepted the statement made by the Grievant in response to the Third Step Response to this written notice as factual. The Agency is correct that the Hearing Officer gave the Group I offense, which was out of date, little weight. The Agency of its own accord, chose to introduce the Group I Written Notice and the Grievant's response to it. The mere fact that the Grievant accepted the punishment does not categorically render his statement as to what took place at that time a non factual statement. The fact that the Agency chose to introduce that and to do nothing further, was a decision made by the Agency.

Third, the Agency correctly states that the Grievant did not testify. The Agency points out that there are case Decisions of the Department of Employment Dispute Resolution that hold as follows:

"This grievance case must be adjudicated solely on the evidence

presented at the hearing. The sworn denial of the grievant carries more evidentiary weight than the unsworn written allegation of his accuser." [27]

Unfortunately, the Agency misses the point in this regard. The Hearing Officer did not give more weight to the Grievant's unsworn statements than to the alleged victim's sworn statements. The Hearing Officer gave more weight to the Agency's other witnesses' sworn testimony than he did to the alleged victim's sworn testimony. As the Hearing Officer stated at page 8 of his Decision, the most persuasive and unbiased witness who testified before the Hearing Officer was the Special Agent presented by the Agency as its witness. The Hearing Officer did in fact give more weight to his testimony than to the testimony of the alleged victim.

Fourth, the Agency alleges that inconsistencies in the alleged victim's testimony may have been attributed to her difficulty in hearing. At no time during the hearing did the alleged victim or anyone from the Agency make any statement or reference to the Hearing Officer that the alleged victim had a hearing problem. If she were having a hearing problem or if it was suspected by the Agency that she was having a hearing problem, a reference and an objection should have been made at that time so that the issue could be corrected.

Fifth, the Agency alleges that the Hearing Officer incorrectly used his own personal experience as a frame of reference. The Agency fails to state that the Hearing Officer was attempting to understand what level, if any, of touching was acceptable within this fact setting. The line of questioning that the Hearing Officer used was an attempt to determine if one could shake hands, if one could congratulate someone with a pat on the back, or if this Agency deemed that any touching, however inconsequential, was subject to a Group III sexual harassment written notice. After the line of questioning was finished, the Hearing Officer now had sufficient understanding of what this Agency expects from its employees and made his findings based on what this Agency seems to expect.

[27] Case 2001-5144.

Sixth, the Agency alleges that the Hearing Officer improperly did not allow the letter from Officer Q, that is a part of the Agency's proposed newly discovered evidence, as rebuttal evidence at the hearing. Generally, after the Agency has presented its case, and the Grievant has presented his case, the Agency is entitled to reply to or rebut the Grievant's evidence by introducing additional evidence to refute the matters brought out by the Grievant in his case. This rebuttal may consist of recalling prior witnesses or calling additional witnesses, but the privilege of rebuttal is limited to refutation of the Grievant's case. It is not proper to introduce matter which is merely cumulative, or not responsive to points raised by in the Grievant's case; nor is it proper to try to remedy omissions in the Agency's original evidence by filling in the gaps on rebuttal. Rebuttal is intended solely to provide the Agency with an opportunity to reply to the Grievant's case. [28] The Agency stated to the Hearing Officer that this letter was in hand prior to the commencement of the hearing. At no point, until both the Agency has rested, the Grievant had rested and the Agency was offered rubuttal, did the Agency advise the Hearing Officer of the existence of this evidence. The Agency stated that it had been trying during the course of the day to establish the ability to have a phone conversation with this witness and have testimony produced telephonically. The Agency had several hours to inform the Hearing Officer of the possibility of this evidence being introduced and, for whatever reason, the Agency made an affirmative decision to not inform the Hearing Officer. As it turned out, this was not proper rebuttal evidence and the Agency cannot now argue for this evidence to be introduced, either as rebuttal evidence or newly discovered evidence.

Finally, the Agency makes two allegations that the Hearing Officer must address, even though they are not in numbered paragraphs. The Agency pointed out at the hearing that the Special Agent was assigned to this case because of his expertise. The Agency now alleges that is incorrect and that he was assigned to this matter simply because he was assigned to handle cases at this location. The Agency seems to allege that it was a random selection. The Hearing Officer makes an assumption, hopefully a correct assumption, that Special Agents have some investigative expertise. Hopefully, the State did not send someone to make an investigation who was wholly unqualified, but rather, someone who was qualified and had some expertise in making the investigation.

Finally, the Agency, in its penultimate paragraph, states that there is no sworn testimony to refute the alleged victim's testimony. Unfortunately, there is sworn testimony and it is from one of the Agency's own witnesses.

DECISION

The Agency has not proffered either any newly discovered evidence or any evidence of incorrect legal conclusions. The Hearing Officer has carefully considered the Agency's arguments and concludes that there is no basis to change the Decision issued on June 1, 2006.

APPEAL RIGHTS

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

[28] Law of Evidence in Virginia, 6th Edition, Charles E. Friend §1-4(e) Page 13

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 DHRM, 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. [29]

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William S. Davidson
Hearing Officer

[29] 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).

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8353

Hearing Date:	May 30, 2006
Decision Issued:	June 1, 2006 (mailed June 7, 2006)
Reconsideration Request Received:	June 16, 2006
Response to Reconsideration:	June 26, 2006
Administrative Review of Director	July 31, 2006
Hearing Officer's Response to Administrative Review of Director	August 7, 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. [30]

OPINION

The Agency sought an administrative review of the Hearing Officer's Decision by the Director and in that request for review the Agency asked the Director to consider a review of the following matters:

(1) Weight of evidence;
(2) Questioning by Hearing Officer;
(3) Newly discovered evidence; and
(4) Consideration of Grievant's Advocate's testimony.

The Director determined that all matters regarding numbers 1, 2 and 4 above were handled correctly by the Hearing Officer and directed the Hearing Officer to admit and consider

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

as newly discovered evidence a written statement made by another female Corrections Officer, which statement the Agency attempted to introduce as rebuttal evidence on the date of the hearing. The Director ordered the Hearing Officer to "admit into evidence the statement that was excluded at [the] hearing and give it the weight he deems appropriate. We note that the Hearing Officer observed that there appeared to be two different versions of the statement with internal discrepancies that the hearing officer found troubling. The hearing officer is free to admit both versions into evidence."

The Agency submitted, with its Request for Reconsideration, a handwritten statement by a female officer dated May 26, 2006. In the Grievant's response to the Agency's Request for Reconsideration, the Grievant provided the Hearing Officer with a copy of a letter from the same female Correction's Officer that the Agency attempted to introduce into evidence as rebuttal on the date of the original hearing. In his response to the Request for Reconsideration, the Hearing Officer indicated that he had in his possession two (2) letters of the same date from the same female officer which were materially different both in facts and, in many places, handwriting. In its request to the Director, for her administrative review, it appears that the Agency did not dispute the existence of two (2) different versions of the same letter from the same female Correction's Officer as the Director stated to the Hearing Officer that he may receive both versions into evidence. The Hearing Officer chooses to receive both letters dated May 26, 2006 from the female Correction's Officer into evidence.

In the version of the letter that the Agency proposed to introduce during rebuttal evidence on the hearing date, the female Correction's Officer starts her letter as follows:

"On or about November, 2005...in building 1."

In the version of this letter that was presented to the Hearing Officer for the Agency's Request for Reconsideration, the Correction's Officer starts her letter as follows:

"On August 4, 2005...in building 3."

It is clear that we have a significant date change and even a location change. Both of these are important as the allegation for which this Hearing Officer held a hearing regarding the Grievant took place on November 4, 2005. While the first version of this letter indicates that this Correction's Officer's incident with the Grievant took place generically in November of 2005, the second version is very specific and says that date was August 4, 2005. The earlier date is important because it clearly pre-dates the matter for which this hearing was held. The later date could quite possibly have occurred and indeed more probably occurred after November 5, 2005 than prior to November 5, 2005, assuming it took place sometime during the month of November. It is difficult to understand having the wrong month and it is even more difficult to understand having the wrong building.

In the second paragraph of the original version of this letter, the female Correction's Officer states as follows:

"On another occasion during the same time period..."

This implies another occasion during November, 2005. In the second draft of her letter, she states:

"On another occasion on October 10th..."

Again, the dates are substantially different.

Because of these discrepancies in both time and location, the Hearing Officer places very little credibility in either of these versions of this female Correction's Officer's written statement of May 26, 2006, and accordingly, gives it the weight which he deems appropriate. Finally, the Hearing Officer notes that, while he is in no way a handwriting expert, the handwriting in these two (2) documents is significantly different. The Hearing Officer inquired of the Director if the Agency had funds for the Hearing Officer to hire a handwriting expert and was told that it did not have such funds. The Director instructed the Hearing Officer that it was within his role as a Hearing Officer to make such determinations as he could regarding the authenticity of the handwriting on both letters. While not needing to resolve this issue in order to reach his decision, the Hearing Officer believes that two (2) separate people drafted these documents.

DECISION

Pursuant to the Director's finding, the Hearing Officer has admitted and has considered both versions of the female Correction's Officer's letter of May 26, 2006 and has given it the weight that he deems appropriate. Because of the discrepancies in time and location in each of these letters, the Hearing Officer finds that neither is entitled to significant weight in the Hearing Officer's decision-making process. Accordingly, the Hearing Officer finds no basis to change the Decision issued on June 1, 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. [31]

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William S. Davidson
Hearing Officer

[31] 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).