Issues: Group II Written Notice (failure to report to work without proper notification), and Group III Written Notice with termination (threatening a coworker); Hearing Date: 06/20/06; Decision Issued: 06/21/06; Agency: DMHMRSAS; AHO: David J. Latham, Esq.; Case No. 8364; Outcome: Agency upheld in full; **Administrative Review: HO Reconsideration Request received 07/06/06; Reconsideration Decision issued 07/17/06; Outcome: Original decision affirmed**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8364

Hearing Date: June 20, 2006
Decision Issued: June 21, 2006

PROCEDURAL ISSUE

As is routine in grievance hearings, the agency was directed to provide to the hearing officer the complete grievance package including the grievance form and all attachments. The agency submitted the grievance form and two pages of a handwritten memo prepared by grievant. At the hearing, grievant submitted a copy of her entire memorandum which consisted of five pages. The agency had submitted only pages 1 and 4. The agency is hereby instructed, that in future cases, its submission of documents must include ALL attachments that a grievant submits with the grievance form.[1]

APPEARANCES

Grievant
Director of Program Services
Advocate for Agency
Three witnesses for Agency

[1] Likewise, the agency must submit ALL documents that were attached to the Written Notice at the time of issuance.

ISSUES

Did grievant's actions warrant disciplinary action under the Commonwealth of Virginia 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 two disciplinary actions – a Group II Written Notice for failure to report to work without proper authorization and, a Group III Written Notice for threatening a coworker.[2] As part of the disciplinary actions, grievant was removed from state employment effective April 26, 2006. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing.[3]

The Department of Mental Health, Mental Retardation and Substance Abuse Services (hereinafter referred to as "agency") has employed grievant for five years as a direct service associate.[4] Grievant has two prior active disciplinary actions – both of which are Group I Written Notices for unsatisfactory attendance.[5] On October 18, 2005, grievant was counseled in writing regarding her failure to report to work.

On March 30, 2006, a phlebotomist from a nearby agency hospital had come to the training center cottage in which grievant was working. The phlebotomist was there to draw blood from two clients. Grievant entered the room where the phlebotomist was in the process of drawing blood from a client. Also in the room was a student trainee and another employee. Grievant noticed that the phlebotomist had the name Antonio tattooed on her leg; grievant's boyfriend is named Antonio. Grievant said, "This bitch got Antonio on her leg." Grievant left the room and then returned, calling the phlebotomist a "stupid bitch." At one point, the male student trainee felt it necessary to step between grievant and the phlebotomist to prevent the altercation from becoming physical. Grievant and the phlebotomist argued with each other, had "words" and then grievant left the room. When the phlebotomist left the building several minutes later, grievant was standing outside near the phlebotomist's state vehicle. Grievant noticed the facility director approaching them and told the phlebotomist words to the effect of,

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[2] Agency Exhibit 1. Group III Written Notice, issued April 26, 2006. See also Agency Exhibit 2. Group II Written Notice, issued April 26, 2006.
[3] Agency Exhibit 3. *Grievance Form A*, filed April 27, 2006.
[4] Agency Exhibit 5. Grievant's Employee Work Profile Work Description, September 29, 2004.
[5] Agency Exhibit 6. Group I Written Notices issued August 29, 2005, and October 18, 2005.

"You're saved by the bell but it's OK because I know where you live."[6] The phlebotomist said to the student, "Yes, she does know where I live." Grievant and the phlebotomist have had "words" prior to this incident.[7]

On April 10 & 11, 2006, grievant traveled out of state to attend the funeral of a relative. At about 9:20 p.m. on the evening of April 11, grievant called her supervisor to request the day off on April 12th. The supervisor denied grievant's request because there was a staff shortage. Grievant asked the supervisor whether she would be charged with an "occurrence" if she did not report the next day; the supervisor told her she would acquire an occurrence.[8] Grievant asked if she could leave after working half a day on April 12th. The supervisor told her she could do so only if staffing was adequate. On the following morning, grievant called her supervisor at 6:12 a.m. and left a message stating that she could not come to work because she was tired and didn't feel good. In fact, on April 12th, grievant stated that she attended the funeral of a friend's brother at 2:00 p.m.[9] Grievant knew that policy provides that when an employee requests a day off which is not granted and then fails to report for work, the employee is given leave without pay.[10]

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 . . .

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[6] Agency Exhibit 4. Investigator's report, undated.
[7] *Id*. Grievant's statement to the investigator.
[8] The facility policy on attendance is an "occurrence" policy. I.E., each absence, regardless of the reason for the absence, is counted as an "occurrence." When an employee incurs a specified number of occurrences, the agency takes corrective action such as counseling or discipline up to and including removal from employment.
[9] Grievant Exhibit 1, p.2. Grievant's handwritten statement, April 27, 2006.
[10] Agency Exhibit 2. Memorandum from supervisor to employee services manager, April 26, 2006.

> 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 grievant must present her evidence first and prove her claim by a preponderance of the evidence.[11]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management (DHRM) promulgated *Standards of Conduct* Policy No. 1.60 effective September 16, 1993. The *Standards* 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 of Policy No. 1.60 provides that Group III offenses include acts and behavior that are the most severe and of such a serious nature that a first occurrence normally should warrant removal from employment.[12] Threatening a coworker is an example of a Group III offense. Failure to report to work without proper authorization is a Group II offense.

Grievant acknowledged during the hearing that she should be disciplined for calling the phlebotomist a bitch. The agency has shown, by a preponderance of evidence, that grievant also made an implied threat to the phlebotomist when grievant told her that she knows where the phlebotomist lives. Although grievant denied making such a statement, the testimony of the phlebotomist and the corroborative statements of two witnesses outweigh grievant's denial. Grievant acknowledged that she had never met the student witness prior to March 30th. Therefore, it must be presumed that he had no reason to tell the investigator anything but what he actually saw and heard. His statement is generally consistent with the phlebotomist's version of events. In addition, another witness interviewed by the investigator also partially corroborated the phlebotomist's version because that witness said she heard the phlebotomist say to the student, "Yes, the bitch know where I live." Accordingly, the agency has demonstrated that grievant threatened the phlebotomist – a Group III offense.

The undisputed evidence reflects that, on April 11th grievant requested the following day off but her supervisor could not approve the request because of

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[11] § 5.8, EDR *Grievance Procedure Manual*, effective August 30, 2004.

[12] Agency Exhibit 7. Department of Human Resource Management (DHRM) Policy 1.60, *Standards of Conduct*, effective September 16, 1993.

short staffing. Grievant nevertheless did not report for scheduled work on April 12th and instead attended the funeral of a friend's brother. Accordingly, her contention that she did not report because she was tired is insufficient to justify not reporting for work. Grievant also said she "didn't feel good" but has not submitted any evidence to show that she was treated by a physician, and has not explained why she wasn't feeling good – other than being tired. When considered in the context of her request for the day off and being refused, it must be concluded that grievant failed to report for work as scheduled without proper notice to supervision – a Group II offense.

Mitigation

The normal disciplinary action for a Group III offense is removal from employment. The policy provides for reduction of discipline if there are mitigating circumstances such as (1) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or (2) an employee's long service or otherwise satisfactory work performance. In this case, grievant has been employed for five years which is not generally considered to be long service. She has performed her work satisfactorily. However, there are aggravating circumstances. Grievant has been disciplined twice during the past year for unsatisfactory attendance, and, on a third occasion, was counseled in writing for failing to report to work. The fact that she now has had to be disciplined for a third time for not reporting to work suggests that the previous counseling and discipline were not effective in curtailing her absence problem. Grievant's threat to a coworker is one of the most severe offenses under the *Standards of Conduct*. Grievant allowed her personal situation with her boyfriend to come into the workplace and initiated a verbal confrontation in the presence of both a student and a client. The verbal altercation was sufficiently heated that the student trainee felt it necessary to step between the protagonists to prevent escalation to a physical altercation. Accordingly, the aggravating circumstances outweigh the mitigating circumstances. Therefore, the discipline in this case is within the limits of reasonableness.[13]

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice, Group II Written Notice, and the removal from employment effective April 26, 2006 are hereby UPHELD.

[13] *Cf.* Davis v. Dept. of Treasury, 8 M.S.P.R. 317, 1981 MSPB LEXIS 305, at 5-6 (1981) holding that the Board "will not freely substitute its judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"

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 one copy of any appeal to the other party and one copy to the Director of the Department of Employment Dispute Resolution. 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.[14] 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

[14] 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).

decision becomes final.[15] You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution.

[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

[15] 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: 8364

Hearing Date:	June 20, 2006
Decision Issued:	June 21, 2006
Reconsideration Request Received:	July 6, 2006
Response to Reconsideration:	July 17, 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.[16]

OPINION

[16] § 7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

In its request for reconsideration, the agency takes issue with the hearing officer's decision because of an instruction to the agency to include, in future cases, all attachments that a grievant submits with the grievance form.

Background

In the instant case, the grievant's Grievance Form A consisted of the form itself and attachments which grievant had specifically referenced on the form.[17] To wit, in "The Issues are (use attachments if necessary)" portion of the grievance form, grievant wrote, "A Group III and II, see memo attached please." In "The facts supporting this are (use attachments if necessary)" section, grievant wrote, "See attachments." When grievant initially filed her grievance on April 27, 2006, she included, *inter alia*, a five-page handwritten memorandum explaining the nature of her grievance. Despite the hearing officer's pre-hearing written instruction to the agency to include the complete grievance, the agency attached only pages one and four of the five-page memorandum.[18]

Discussion

The Grievance Procedure Manual provides a remedy when a party believes that the hearing officer is noncompliant in pre-hearing matters.[19] However, that remedy requires that the party must make its objection to the hearing officer *at the time the noncompliance occurs.* In this case, the agency did not raise its objection when the hearing officer issued the pre-hearing order. Instead, the agency raised its objection after the hearing had been concluded and the decision was issued. Accordingly, the agency failed to timely raise its objection to the purported noncompliance. Nonetheless, the hearing officer will respond to the agency's objection. There are multiple reasons for requiring the agency to submit all attachments to the grievance form:

First, the hearing officer is required to adjudicate all aspects of the grievance. In order to fully evaluate and decide the merits of a grievance, the hearing officer must have access to the entire grievance, as it was prepared by the grievant. The grievance consists of whatever the grievant wrote on the grievance form *and* whatever grievant attached to the grievance form at the time of filing. Frequently, grievants require more space to write issues and facts than is provided on the grievance form. In such cases, grievants attach additional pages to the grievance form to explain grievance issues and to illustrate facts they believe support their position. The official and sole record of the grievance is contained in the written grievance filed by the grievant. The agency is often

[17] Agency Exhibit 3. Grievance Form A, filed April 27, 2006.
[18] It is not known whether the omission of certain pages was inadvertent or deliberate. However, similar omissions have occurred in some previous cases.
[19] § 6.4, Grievance Procedure Manual, effective August 30, 2004.

the only entity in possession of the grievance.[20] Accordingly, the agency must provide the full grievance package as submitted by grievant so that the hearing officer can give the grievant a complete and fair hearing.

Second, the hearing officer is obligated to create a complete record of all relevant evidence. The hearing record is subject to appeal to Virginia Circuit Court, the Virginia Court of Appeals, and even to the Virginia Supreme Court. The courts want a complete hearing record when reviewing a case.[21] It is axiomatic that the seminal document in a grievance hearing is the grievance itself. The grievance includes not only the grievance form but also all attachments which the grievant intended to be part and parcel of the grievance.

Third, the *Grievance Procedure Manual* gives hearing officers authority to issue orders for the production of documents.[22] This authority extends to any document(s) that the hearing officer reasonably believes is relevant to the grievance issue(s) being adjudicated. Further authority is contained in the *Rules for Conducting Grievance Hearings*, which states that all relevant grievance-related information must be produced under the grievance statute.[23] The complete grievance, as written by the grievant, is obviously a relevant document.

The agency cites two EDR administrative reviews which it believes support its position.[24] In both of those cases, the grievants asserted that the agency had violated the grievance procedure by failing to provide the entire grievance to EDR. In its reviews, EDR noted that neither the *Grievance Procedure Manual* nor the *Rules for Conducting Grievance Hearings* specifically require submission of the entire grievance. However, the agency's reliance on these two administrative reviews is misplaced.[25] The reviews observe only that neither the *Manual* nor the *Rules* <u>automatically</u> require submission of the entire grievance.

However, the administrative reviews do not state that a hearing officer's orders can be ignored. When a hearing officer orders production of documents deemed relevant, the parties must comply with the order. In the instant case, as in all cases adjudicated by this hearing officer, the hearing officer included with the Notice of Hearing letter an attachment that specifically directs the agency to submit the Grievance Form A with *all attachments* and resolution step responses. As noted above, the hearing officer has authority to issue such an order.

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[20] Often, at the time of filing a grievance, a grievant fails to make or obtain a copy of the grievance form and attached documentation. In such cases, the agency is the only entity in possession of the complete grievance.

[21] In some instances, courts have remanded cases when the evidentiary record is incomplete.

[22] § 5.7.3, *Grievance Procedure Manual*, effective August 30, 2004.

[23] Section III.E, *Rules for Conducting Grievance Hearings*, effective August 30, 2004.

[24] Ruling Number 2006-1150 and, Ruling Number 2005-1053.

[25] Neither of the requests for review argued that the hearing officer had ordered the agency to produce the entire grievance package. Therefore, neither of the administrative reviews addressed the issue of the agency's duty to comply with a hearing officer's order.

DECISION

The agency has not proffered either any newly discovered evidence, any evidence of incorrect legal conclusions, or improper instructions to the agency. The hearing officer has carefully considered the agency's argument and concludes that there is no basis to change the Decision issued on June 21, 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.[26]

S/David J. Latham

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David J. Latham, Esq.
Hearing Officer

[26] 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).