Issue: Group III Written Notice with Termination (patient neglect); Hearing Date: 04/21/10; Decision Issued: 04/28/10; Agency: DBHDS; AHO: William S. Davidson, Esq.; Case No. 9304; Outcome: Full Relief; **Administrative Review: AHO Reconsideration Request received 05/12/10; Reconsideration Decision issued 05/21/10; Outcome: Original decision affirmed; Administrative Review: DHRM Ruling Request received 05/13/10; DHRM Ruling issued 07/14/10; Outcome: Remanded to AHO; Remand Decision issued 07/303/10; Outcome: Original decision affirmed.**

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 9304

Hearing Date: April 21, 2010
Decision Issued: April 28, 2010

PROCEDURAL HISTORY

The Grievant was issued a Group III Written Notice on February 12, 2010 for:

> On December 26, 2010 you violated Hospital Policy 050-57 and DI 201 which resulted in a substantiated finding of neglect. You admitted to knowing the escaped client but denied contact with him on the outside of [facility]. However, Police spoke with you on the phone following an incident that possibly involved the escaped client and you supplied information and an address to that officer. You denied any involvement and ultimately denied talking to the police officer. The officer involved spoke to you a second time and stated that you were the same person who gave him the address and other information. This violation of policy shows extremely poor judgment and unprofessional behavior. [1]

Pursuant to the Group III Written Notice, the Grievant was terminated on February 12, 2010. [2] On February 17, 2010, the Grievant timely filed a grievance to challenge the Agency's actions. [3] On March 22, 2010, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On April 21, 2010, a hearing was held at the Agency's location.

APPEARANCES

Agency Representative
Grievant
Advocates for Grievant
Witnesses

ISSUE

[1] Agency Exhibit 1, Tab 1, Page 1
[2] Agency Exhibit 1, Tab 2, Page 1
[3] Agency Exhibit 1, Tab 1, Page 3

Did the Grievant violate Hospital Policy 050-57 and DI 201 by neglecting a client of the Agency?

AUTHORITY OF HEARING OFFICER

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs,* 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

> While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") §5.8. A preponderance of the evidence is sometimes characterized as requiring that facts to be established more probably than not occurred, or that they were more likely than not to have happened. [4] However, proof must go beyond conjecture. [5] In other words, there must be more than a possibility or a mere speculation. [6]

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Agency provided the Hearing Officer with a notebook containing nine (9) tabbed sections and that notebook was accepted in its entirety as Agency Exhibit 1.

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[4] *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991
[5] *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)
[6] *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

The Grievant provided the Hearing Officer with a notebook containing five (5) tabbed sections and that notebook was accepted in its entirety as Grievant Exhibit 1. The Grievant called no witnesses on her behalf in this matter and the Grievant, herself, did not testify.

The Agency had a client escape in September, 2009. On December 26, 2009, a Police Officer witnessed a vehicle traveling at a high rate of speed on [highway]. He stopped this car and the driver, pursuant to subsequent investigation, turned out to be the escaped client. The driver was able to elude the Officer and the Officer continued his investigation. [7] Pursuant to this further investigation, in the Officer's Written Report, he stated in part as follows:

> Ms. A's friend, Grievant... contacted me... [The Grievant] stated that Ms. A brought [the escaped client] home with her a few days ago and [the escaped client] left with Ms. A's vehicle a couple of days ago. However, as [the Grievant] stated, Ms. A had allowed [the escaped client] to take her vehicle and was too embarrassed to report the vehicle as stolen after [the escaped client] had not returned after a day. [8]

Nothing further happened regarding the Grievant or the escaped client for the next several days. An Investigator for the Agency, who did testify before the Hearing Officer, prepared an Investigator's Report which was dated January 25, 2010 and was received by the Director's Office on January 27, 2010. In that Report, that Investigator summarizes the Police Officer's Report regarding the phone call as follows:

> Officer J stated that when he inquired about A's address she was reluctant to give it to him stating that she was staying with a friend. He stated the friend called him back and gave her information and she was found to [be the Grievant]. He stated that [the Grievant] told him that A was staying with her and brought the [escaped] Client home with her a few days ago and he was allowed to leave with her vehicle and had not returned. [9]

During the course of this Investigator's Report, she interviewed the Grievant. The Grievant's written report states as follows:

> I [the Grievant] met [the escaped client] outside of Davis building when he asked me could I watch him because in [sic] was no staff members in the café to watch him and I said that I would be in there to see about my pts. And I [sic] that I could watch him too. In no way did I have contact with the [the escaped client] escaping had nothin [sic] to do with his where abouts, or have any connection with him in any way. Nor have I [been] involved with this whole situation. [10]

[7] Agency Exhibit 1, Tab 6, Page D.1.3(1)
[8] Agency Exhibit 1, Tab 6, Page D.1.3(4)
[9] Agency Exhibit 1, Tab 6, Page 6

The interview that this Investigator had with the Grievant took place on January 22, 2010. Because the Grievant denied talking to a police officer, the Investigator placed a call to the Officer and asked the Grievant to talk to him. Subsequent to a brief conversation between the Grievant and this Officer, the Investigator took the phone back and spoke with the Officer. The Officer stated that the person with whom he was just speaking was the same person that he had spoken with earlier regarding this matter. [11]

The Agency offered undisputed testimony that the escaped client was a person who needed to be under counseling and be receiving medication. The failure to receive his medication and/or continued counseling would allegedly result in neglect. There was no dispute that, were he an inpatient client, the failure to provide him medication and/or counseling would be neglect. The question before the Hearing Officer is whether or not it is neglect to fail to report his whereabouts once he has escaped and whether or not this failure to report rises to the level of neglect.

The Agency relies on Departmental Instruction 201(RTS)03. Section 201-2 sets forth the purpose of such policy as follows:

> The purpose of this Departmental Instruction (DI) is to establish policies, procedures, and responsibilities for reporting, responding to, and investigating allegations of abuse and neglect of individuals receiving services **in Department facilities**. [12] (Emphasis added)

Section 201-3 of this policy defines abuse as follows:

> This means any act or **failure to act by an employee** or other person responsible for the care of an individual **in a Department facility** that was performed or **was failed to be performed knowingly, recklessly or intentionally**, and that caused or might have caused physical or psychological harm, injury or death to a person **receiving care or treatment for mental illness, mental retardation or substance abuse.** Examples of abuse include, but are not limited to, acts such as:
>
> -Rape, sexual assault, or other criminal sexual behavior,
>
> -Assault or battery;
>
> -Use of language that demeans, threatens, intimidates or humiliates the person;
>
> -Misuse or misappropriation of the person's assets, goods or property;

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[10] Agency Exhibit 1, Tab 6, Page C.1.13
[11] Agency Exhibit 1, Tab 6, Page 5
[12] Agency Exhibit 1, Tab 7, Page 1

-Use of excessive force when placing a person in physical or mechanical restraint;

-Use of physical or mechanical restraints on a person that is not in compliance with federal and state laws, regulations, and policies, professionally accepted standards of practice or the person's individualized services plan; and

-Use of restrictive or intensive services or denial of services to punish the person or that is not consistent with his individualized services plan. [13] (Emphasis added)

Section 201-3 of this policy defines neglect as follows:

> **This means the failure by a person**, program or facility operated, licensed, or funded by the department, **responsible for providing services to do so**, including nourishment, treatment, care, goods, or services necessary to the health, safety, or welfare of a person receiving care or treatment for mental illness, mental retardation, or substance abuse. [14] (Emphasis added)

Section 201-5 of this policy states in part as follows:

> Each individual receiving services **in a state facility** has the right to:
>
> Be protected from harm including abuse, neglect and exploitation (See Section 37.2-400, 12 VAC35-115-50(B)(2) and (D)(3)...[15] (Emphasis added)

Section 201-6 of this policy states in part as follows:

> Any workforce member who has any knowledge or reason to believe that an individual **residing in a state facility may have been abused or neglected, or both, shall immediately report** this
>
> information directly to the facility director, or designee, as

[13] Agency Exhibit 1, Tab 7, Page 1
[14] Agency Exhibit 1, Tab 7, Page 2
[15] Agency Exhibit 1, Tab 7, Page 5

appropriate... [16] (Emphasis added)

Section 201-7 of this policy states in part as follows:

> Upon receipt of an allegation of abuse or neglect, the facility director or designee shall immediately:
>
> -Ensure that appropriate and necessary steps are taken to protect the safety and welfare of the individual receiving services. ..
>
> -Ensure that any physical evidence is protected... [17]

The Agency also relies on Policy Statement #RI- 050-57. This policy essentially mimics the policies set forth in DI 201(RTS)03. [18]

The Hearing Officer notes that all of the relevant evidence before him in this matter is hearsay. The entirety of this case rises and falls on whether or not the Grievant placed a phone call to the Police Officer indicating that the escaped client had been at her home, and, if so, did the placing of the call or the failure to place the call earlier result in the neglect of this client. The Hearing Officer has a written notarized statement from the Police Officer stating that he received the original phone call of December 26, 2009 and that he verified the identity of the caller when he received the second phone call on January 22, 2010. The Hearing Officer also has before him a written statement by the Grievant indicating that she never talked to the Police Officer on December 26, 2009. When neither of the two (2) parties who are a party to the phone call are before the Hearing Officer so that the Hearing Officer can observe their demeanor as they answer question, the Hearing Officer then looks to who has the greatest bias regarding the statement. The Hearing Officer finds that the Police Officer has no reason to fabricate such a statement and that it is more likely that the phone call did occur.

The more difficult question before this Hearing Officer is what exactly took place on December 26, 2009 that resulted in neglect or abuse of the client. If one assumed that the Grievant placed the phone call to the police notifying them of the location of the client, then the mere fact of making the call would not seem to amount to neglect. Indeed, it appears to be the Agency's posture that the Grievant had an affirmative duty to place such a call. The Agency's position appears to be that the Grievant had prior knowledge of the clients whereabouts and did not report his locality as soon as she had knowledge of it and thus she was guilty of abuse and neglect towards the client.

All of the definitions of abuse or neglect proffered by the Agency in this matter deal with care or treatment **in** the Facility. The examples given in the Agency's Policy Statement regarding abuse, while clearly stating that they are simply examples and are not intended to be all inclusive, speak of abuse as rape, assault, demeaning language, misuse of a person's assets, excessive force, physical and/or mechanical restraint, use of more restrictive or intensive services or denial of services to punish a person. In this matter, none of those were present. At most, there was a failure to notify. This patient was not physically abused by the Grievant nor is there

[16] Agency Exhibit 1, Tab 7, Page 7
[17] Agency Exhibit 1, Tab 7, Page 8
[18] Agency Exhibit 1, Tab 8, Page 2

any such allegation. This patient did not have his assets misused by the Grievant nor is there any such allegation. There is no allegation that this Grievant used excessive force or physical or mechanical restraints, or denied him service or provided too much service. The allegation is that by failing to more timely notify the police, she denied him the possibility of a service.

The Agency attempts to argue the Grievant's failure to report the location of the client amounts to a denial of service. The theory is that if she reported him earlier and if he was captured earlier, then he could receive his services earlier. In fact, she reported his location and he still has not been captured. The Hearing Officer can find no policy statement in either [Agency] Policy RI-050-57 or DI 201(RTS) 03 dealing with the particular fact set that is present in this matter. All of the Agency's policies are directed at abuse or neglect of a client who is receiving treatment in **a facility**. None of them speak to the issue of an escapee. All of the language of these two (2) policies indicate that they are meant to deal with clients who are within one of the Agency's facilities. It appears that none of these policies contemplated dealing with an escaped client.

The Hearing Officer is fully cognizant that there may be certain locations that are deemed to be legitimate extensions of the facility. For instance, if a client is being transported to another facility or to a court for a hearing, the vehicle in which he is being transported would legitimately be considered an extension of the facility and he could not be abused or neglected simply because he was not within the walls of the facility. There may well be other viable examples where the nexus of the facility is expanded. However, in this matter, the client escaped. The question then becomes, whether or not the facility goes with him wherever in the world he might travel. If one assumes that it does, then the issue becomes whether or not this Grievant failed to act regarding this client in a knowingly, recklessly or intentional manner that caused him harm or could have caused him harm. To reach that conclusion, the Hearing Officer would need to hear evidence that this Grievant had sufficient knowledge of the client's condition and required medications and services to understand that her failure to immediately report his location would likely result in harm to him or to the public. The Agency presented two (2) witnesses who testified that failure to receive his medications and treatment would be both harmful to the Grievant and to the public. However, there was no testimony to indicate that the Grievant had actual knowledge of this fact and that her failure to act immediately would rise to the level of knowingly, recklessly or intentionally causing him harm.

Finally, we have the issue of time. Section 2.10-6 states that a workforce member who has any knowledge or reason to believe that an individual **residing in a state facility** is being abused or neglected shall immediately report this. Again, the Hearing Officer is confronted with the concept of residing in a state facility. If one assumes that the state facility can extend to wherever an escaped client is now located, the issue becomes one of the definition of 'immediate.'

The statement that was recorded by the Police Officer was that, "Ms. A brought [the escaped client] to her home a few days ago," and "[the escaped client] left with Ms. A's vehicle a couple of days ago." There is no way for the Hearing Officer to know whether the escaped client was there for five minutes, five hours, or five days. The logical extension of the Agency's position is that if he was there for a second, then the Grievant had a duty to report him. The Grievant did, in fact, call the police and report his whereabouts. The Agency's posture would appear to be that she needed to make that report the very second that she saw him. The Hearing

Officer does not know what amount of time expired from the time that the Grievant saw the escaped client and the time that she reported him.

The Agency's posture is that the facility is located wherever an escaped client is located. Accordingly, if the escaped client is in North Dakota, then the facility is with him. That being the case, any employee who may see the escaped client while the employee is on vacation, who knows that the client is an escapee, who knows that the escapee requires medications and treatment and who fails to immediately notify the Agency of the escapee's location, is guilty of neglect and abuse. The Hearing Officer, within this fact pattern, declines the Agency's invitation to extend the meaning of policies 201(RTS)03 and [Agency] Policy RI-050-57 in such a way as to render the Grievant guilty of abuse or neglect of the escaped client.

DECISION

For reasons stated herein, the Hearing Officer finds that the Agency has not bourne its burden of proof regarding this matter. Accordingly, the Hearing Officer directs that the Grievant be reinstated to her former position or, if occupied, to an objectively similar position; that she be awarded full back pay and the restoration of full benefits and seniority.

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. Please address your request to:

Director
Department of Human Resource Management
101 North 14th Street, 12th Floor
Richmond, VA 23219

3. If you believe that 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. Please address your request to:

Director
Department of Employment Dispute Resolution
600 East Main Street, Suite 301
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 and to the EDR Director. 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.[19] You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[20]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant]

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William S. Davidson
Hearing Officer

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

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

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS

DECISION OF HEARING OFFICER
In re:

Case No: 9304

Hearing Date:	April 21, 2010
Decision Issued:	April 28, 2010
Reconsideration Request Received:	May 12, 2010
Response to Reconsideration:	May 21, 2010

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. [21]

OPINION

The Agency seeks reconsideration of the Hearing Officer's Decision based on the following:

1. A Memorandum dated May 5, 2010 from an Agency doctor to the Agency representative indicating that the resident in this matter had not been discharged from the Agency and that he continued to need medical treatment.

2. A Memorandum dated May 6, 2009 from an Agency Investigations Manager to the Agency representative which opined that the patient had not been discharged and remained under the jurisdiction of the Agency.

[21] §7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

3. Pursuant to Department Risk Management Policy Statement #LD 050-09, the Grievant had a duty to report information about the escaped resident immediately.

Normally, as set forth in Section 7.2(a)(1) of the Grievance Procedure Manual, a request for reconsideration deals with newly discovered evidence or evidence of incorrect legal conclusions. Because of the need for finality, documents not presented at the hearing cannot be considered upon administrative review unless they are "newly discovered evidence." Newly discovered evidence is evidence that was in existence at the time of the hearing but was not known (or discovered) by the aggrieved party until after the trial ended. However, the fact that a party discovered the evidence after the trial does not necessarily make it "newly discovered." Rather, the party must show that:

1. The evidence is newly discovered since the judgment was entered;
2. Due diligence on the part of the movant to discover the new evidence has been exercised;
3. The evidence is not merely cumulative or impeaching;
4. The evidence is material; and
5. The evidence is such that is likely to produce a new outcome if the case were retried or is such that would require the judgment to be amended. [22]

Here, the Agency has provided no information to support a contention that these additional documents should be considered newly discovered evidence under the above-stated standard. Indeed, the opinion of the Agency's Investigations Manager is merely that, her opinion. That opinion could have been obtained prior to the hearing in this matter and, it would have been accepted as merely an opinion of an Agency employee. It is ultimately the role of the Hearing Officer to make determinations as to whether or not the Agency policy, that the Grievant is asserted to have violated, was in fact violated by the Grievant.

The statement dated May 5, 2010 by an Agency doctor that the resident was an escapee and that he continued to need medical treatment has no bearing on this case, as that was a stipulated fact before the Hearing Officer.

The issue before this Hearing Officer continues to be whether or not there is any Agency policy that requires an Agency employee to immediately report the location of an escaped resident months after the date of the escape and would the failure to do so rise to the level of abuse and neglect. Based on the documents provided to the Hearing Officer at the hearing, the Hearing Officer ruled that there was no such policy. In this Request for Reconsideration, the Agency has proffered a third policy statement which is Risk Management Number LD 050-09. Clearly this document was in existence prior to the date of the hearing and therefore it cannot be deemed as new evidence. The Agency relies upon the language found at page 5 of that document. That language is as follows:

> Any discipline receiving additional information will report it to [facility] Police Department immediately...

[22] Administrative Review Ruling of Director, Dated December 12, 2009, Ruling No. 2010-2467, Page 3

While it is clear that this is not new evidence and is not otherwise admissible as such, the Hearing Officer has considered it and again finds that the totality of it's language deals with the immediate requirements of a missing resident. It does not in any way address dealing with an escaped resident who has been escaped for months or years. Further, the word "discipline" is not identified. The Hearing Officer, in looking at Webster's Third International Dictionary, finds that the word "discipline can mean:

1. Teaching, instruction, tutoring;
2. A subject that is taught;
3. Training or experience that corrects;
4. Punishment;
5. Control gained by enforcing obedience;
6. A rule or system of rules;
7. To whip or punish;
8. To train by instruction or exercise; and/or
9. To bring a group under control.

Even if this new policy statement, which was clearly in existence at the time of the hearing, was valid to be considered in this Request for Reconsideration, there is nothing before the Hearing Officer to indicate that the Grievant was a "discipline."

DECISION

The Hearing Officer finds that none of the reasons given for reconsideration by the Agency rise to a level that would require him to reconsider his original Decision. The Hearing Officer has carefully considered the Agency's arguments and has concluded that there is no basis to change the Decision issued on April 28, 2010. In its Request for Reconsideration, the Agency quite correctly states in part as follows:

> I respectfully submit that your conclusions are inconsistent with the **intent** of Agency policy. (Emphasis added)

The problem before the Agency here is that the Hearing Officer must deal with the policy as it is written. All three (3) of the policies presented to the Hearing Officer deal with what must be immediately done when a resident is missing. None of the policies presented deal with the eventuality of that resident being missing for weeks, months or years. The Agency is taking an existing policy and attempting to push the envelope for a meaning to a point where the Hearing Officer finds that the envelope is broken.

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 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. [23]

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William S. Davidson
Hearing Officer

[23] 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).

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Department of Behavioral Health and
Developmental Services

July 14, 2010

The agency has requested an administrative review of the hearing officer's decision in Case No. 9304. The agency is challenging the hearing officer's decision on the basis that it is inconsistent with the Department of Behavioral Health and Developmental Services (DBHDS) policy. For the reason stated below, we are remanding the decision to the hearing officer so he can revise it as directed. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has asked that I respond to this request for an administrative review.

FACTS

The Department of Behavioral Health and Developmental Services employed the grievant as a Direct Service Associate II until she was issued a Group III Written Notice and terminated.

In his **Findings of Facts,** the hearing officer states, in part, the following:

> The Agency had a client escape in September, 2009. On December 26, 2009, a Police Officer witnessed a vehicle traveling at a high rate of speed on [highway]. He stopped this car and the driver, pursuant to subsequent investigation, turned out to be the escaped client. The driver was able to elude the Officer and the Officer continued his investigation. Pursuant to this further investigation, in the Officer's Written Report, he stated in part as follows:
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> > Ms. A's friend, Grievant... contacted me... [The Grievant] stated that Ms. A brought [the escaped client] home with her a few days ago and [the escaped client] left with Ms. A's vehicle a couple of days ago. However, as [the Grievant] stated, Ms. A had allowed [the escaped client] to take her vehicle and was too embarrassed to report the vehicle as stolen after [the escaped client] had not returned after a day.
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> Nothing further happened regarding the Grievant or the escaped client for the next several days. An Investigator for the Agency, who did testify before the Hearing Officer, prepared an Investigator's Report which was dated January 25, 2010 and was received by the Director's Office on January 27, 2010. In that Report, that Investigator summarizes the Police Officer's Report regarding the phone call as follows:
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> > Officer J stated that when he inquired about A's address she was reluctant to give it to him stating that she was staying with a friend. He stated the friend called him back and gave her information and she was found to [be

> the Grievant]. He stated that [the Grievant] told him that A was staying with her and brought the [escaped] Client home with her a few days ago and he was allowed to leave with her vehicle and had not returned.

During the course of this Investigator's Report, she interviewed the Grievant. The Grievant's written report states as follows:

> I [the Grievant] met [the escaped client] outside of Davis building when he asked me could I watch him because in [sic] was no staff members in the café to watch him and I said that I would be in there to see about my pts. And I [sic]that I could watch him too. In no way did I have contact with the [the escaped client] escaping had nothing [sic] to do with his whereabouts, or have any connection with him in any way. Nor have I [been] involved with this whole situation.

The interview that this Investigator had with the Grievant took place on January 22, 2010. Because the Grievant denied talking to a police officer, the Investigator placed a call to the Officer and asked the Grievant to talk to him. Subsequent to a brief conversation between the Grievant and this Officer, the Investigator took the phone back and spoke with the Officer. The Officer stated that the person with whom he was just speaking was the same person that he had spoken with earlier regarding this matter.

The Agency offered undisputed testimony that the escaped client was a person who needed to be under counseling and be receiving medication. The failure to receive his medication and/or continued counseling would allegedly result in neglect. There was no dispute that, were he an inpatient client, the failure to provide him medication and/or counseling would be neglect. The question before the Hearing Officer is whether or not it is neglect to fail to report his whereabouts once he has escaped and whether or not this failure to report rises to the level of neglect.

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person **receiving care or treatment for mental illness, mental retardation or substance abuse.**

Examples of abuse include, but are not limited to, acts such as:

-Rape, sexual assault, or other criminal sexual behavior,
-Assault or battery;
-Use of language that demeans, threatens, intimidates or humiliates the person;
-Misuse or misappropriation of the person's assets, goods or property;
-Use of excessive force when placing a person in physical or mechanical restraint;
-Use of physical or mechanical restraints on a person that is not in compliance with federal and state laws, regulations, and policies, professionally accepted standards of practice or the person's individualized services plan; and
-Use of restrictive or intensive services or denial of services to punish the person or that is not consistent with his individualized services plan.

Section 201-3 of this policy defines neglect as follows:

This means the failure by a person, program or facility operated, licensed, or funded by the department, **responsible for providing services to do so**, including nourishment, treatment, care, goods, or services necessary to the health, safety, or welfare of a person receiving care or treatment for mental illness, mental retardation, or substance abuse.

Section 201-5 of this policy states in part as follows:

Each individual receiving services **in a state facility** has the right to:

Be protected from harm including abuse, neglect and exploitation (See Section 37.2-400, 12 VAC35-115-50(B)(2) and (D)(3)…

Section 201-6 of this policy states in part as follows:

Any workforce member who has any knowledge or reason to believe that an individual **residing in a state facility may have been abused or neglected, or both, shall immediately report** this information directly to the facility director, or designee, as appropriate...

Section 201-7 of this policy states in part as follows:

Upon receipt of an allegation of abuse or neglect, the facility director or designee shall immediately:

-Ensure that appropriate and necessary steps are taken to protect the safety and welfare of the individual receiving services. ..
-Ensure that any physical evidence is protected...

The Agency also relies on Policy Statement #RI- 050-57. This policy essentially mimics the policies set forth in DI 201(RTS)03.

The Hearing Officer notes that all of the relevant evidence before him in this matter is hearsay. The entirety of this case rises and falls on whether or not the Grievant placed a phone call to the Police Officer indicating that the escaped client had been at her home, and, if so, did the placing of the call or the failure to place the call earlier result in the neglect of this client. The Hearing Officer has a written notarized statement from the Police Officer stating that he received the original phone call of December 26, 2009 and that he verified the identity of the caller when he received the second phone call on January 22, 2010. The Hearing Officer also has before him a written statement by the Grievant indicating that she never talked to the Police Officer on December 26, 2009. When neither of the two (2) parties who are a party to the phone call are before the Hearing Officer so that the Hearing Officer can observe their demeanor as they answer the questions, the Hearing Officer then looks to who has the greatest bias regarding the statement. The Hearing Officer finds that the Police Officer has no reason to fabricate such a statement and that it is more likely that the phone call did occur.

The more difficult question before this Hearing Officer is what exactly took place on December 26, 2009 that resulted in neglect or abuse of the client. If one assumed that the Grievant placed the phone call to the police notifying them of the location of the client, then the mere fact of making the call would not seem to amount to neglect. Indeed, it appears to be the Agency's posture that the Grievant had an affirmative duty to place such a call. The Agency's position appears to be that the Grievant had prior knowledge of the client's whereabouts and did not report his locality as soon as she had knowledge of it and thus she was guilty of abuse and neglect towards the client.

All of the definitions of abuse or neglect proffered by the Agency in this matter deal with care or treatment **in** the Facility. The examples given in the Agency's Policy Statement regarding abuse, while clearly stating that they are simply examples and are not intended to be all inclusive, speak of abuse as rape, assault, demeaning language, misuse of a person's assets, excessive force, physical and/or mechanical restraint, use of more restrictive or intensive services or denial of services to punish a person. In this matter, none of those were present. At most, there was a failure to notify. This patient was not physically abused by the Grievant nor is there any such allegation. This patient did not have his assets misused by the Grievant nor is there any such allegation. There is no allegation that this Grievant used excessive force or physical or mechanical restraints, or denied him service or provided too much service. The allegation is that by failing to more timely notify the police, she denied him the possibility of a service.

The Agency attempts to argue the Grievant's failure to report the location of the client amounts to a denial of service. The theory is that if she reported him earlier and if he was captured earlier, then he could receive his services earlier. In fact, she reported his location and he still has not been captured. The Hearing Officer can find no policy statement in either [Agency] Policy RI-050-57 or DI 201(RTS) 03 dealing with the particular fact set that is present in this matter. All of the Agency's policies are directed at abuse or neglect of a client who is receiving treatment in **a facility**. None of them speak to the issue of an escapee. All of the language of these two (2) policies indicate that they are meant to deal with clients who are within one of the Agency's facilities. It appears that none of these policies contemplated dealing with an escaped client.

The Hearing Officer is fully cognizant that there may be certain locations that are deemed to be legitimate extensions of the facility. For instance, if a client is being transported to another facility or to a court for a hearing, the vehicle in which he is being transported would legitimately be considered an extension of the facility and he could not be abused or neglected simply because he was not within the walls of the facility. There may well be other viable examples where the nexus of the facility is expanded. However, in this matter, the client escaped. The question then becomes, whether or not the facility goes with him wherever in the world he might travel. If one assumes that it does, then the issue becomes whether or not this Grievant failed to act regarding this client in a knowingly, recklessly or intentional manner that caused him harm or could have caused him harm. To reach that conclusion, the Hearing Officer would need to hear evidence that this Grievant had sufficient knowledge of the client's condition and required medications and services to understand that her failure to immediately report his location would likely result in harm to him or to the public. The Agency presented two (2) witnesses who testified that failure to receive his medications and treatment would be both harmful to the Grievant and to the public. However, there was no testimony to indicate that the Grievant had actual knowledge of this fact and that her failure to act immediately would rise to the level of knowingly, recklessly or intentionally causing him harm.

Finally, we have the issue of time. Section 2.10-6 states that a workforce member who has any knowledge or reason to believe that an individual **residing in a state facility** is being abused or neglected shall immediately report this. Again, the Hearing Officer is confronted with the concept of residing in a state facility. If one assumes that the state facility can extend to wherever an escaped client is now located, the issue becomes one of the definition of 'immediate.'

The statement that was recorded by the Police Officer was that, "Ms. A brought [the escaped client] to her home a few days ago," and "[the escaped client] left with Ms. A's vehicle a couple of days ago." There is no way for the Hearing Officer to know whether the escaped client was there for five minutes, five hours, or five days. The logical extension of the Agency's position is that if he was there for a second, then the Grievant had a duty to report him. The Grievant did, in fact, call the police and report his whereabouts. The Agency's posture would appear to be that she needed to make that report the very second that she saw him. The

Hearing Officer does not know what amount of time expired from the time that the Grievant saw the escaped client and the time that she reported him.

The Agency's posture is that the facility is located wherever an escaped client is located. Accordingly, if the escaped client is in North Dakota, then the facility is with him. That being the case, any employee who may see the escaped client while the employee is on vacation, who knows that the client is an escapee, who knows that the escapee requires medications and treatment and who fails to immediately notify the Agency of the escapee's location, is guilty of neglect and abuse. The Hearing Officer, within this fact pattern, declines the Agency's invitation to extend the meaning of policies 201(RTS)03 and [Agency] Policy RI-050-57 in such a way as to render the Grievant guilty of abuse or neglect of the escaped client.

DECISION

For reasons stated herein, the Hearing Officer finds that the Agency has not borne its burden of proof regarding this matter. Accordingly, the Hearing Officer directs that the Grievant be reinstated to her former position or, if occupied, to an objectively similar position; that she be awarded full back pay and the restoration of full benefits and seniority.

The agency requested a Reconsideration Decision and the hearing officer stated, in relevant part, the following:

The Agency seeks reconsideration of the Hearing Officer's Decision based on the following:

1. A Memorandum dated May 5, 2010 from an Agency doctor to the Agency representative indicating that the resident in this matter had not been discharged from the Agency and that he continued to need medical treatment.

2. A Memorandum dated May 6, 2009 from an Agency Investigations Manager to the Agency representative which opined that the patient had not been discharged and remained under the jurisdiction of the Agency.

3. Pursuant to Department Risk Management Policy Statement #LD 050-09, the Grievant had a duty to report information about the escaped resident immediately.

In his Reconsideration Decision, the hearing officer continues:

Normally, as set forth in Section 7.2(a)(1) of the Grievance Procedure Manual, a request for reconsideration deals with newly discovered evidence or evidence of incorrect legal conclusions. Because of the need for finality, documents not presented at the hearing cannot be considered upon administrative review unless they are "newly discovered evidence." Newly discovered evidence is evidence that was in existence at the time of the hearing but was not known (or discovered) by the aggrieved party until after the trial ended. However, the fact that a party discovered

the evidence after the trial does not necessarily make it "newly discovered." Rather, the party must show that:

1. The evidence is newly discovered since the judgment was entered;
2. Due diligence on the part of the movant to discover the new evidence has been exercised;
3. The evidence is not merely cumulative or impeaching;
4. The evidence is material; and
5. The evidence is such that is likely to produce a new outcome if the case were retried or is such that would require the judgment to be amended.

Here, the Agency has provided no information to support a contention that these additional documents should be considered newly discovered evidence under the above-stated standard. Indeed, the opinion of the Agency's Investigations Manager is merely that, her opinion. That opinion could have been obtained prior to the hearing in this matter and, it would have been accepted as merely an opinion of an Agency employee. It is ultimately the role of the Hearing Officer to make determinations as to whether or not the Agency policy, that the Grievant is asserted to have violated, was in fact violated by the Grievant.

The statement dated May 5, 2010 by an Agency doctor that the resident was an escapee and that he continued to need medical treatment has no bearing on this case, as that was a stipulated fact before the Hearing Officer.

The issue before this Hearing Officer continues to be whether or not there is any Agency policy that requires an Agency employee to immediately report the location of an escaped resident months after the date of the escape and would the failure to do so rise to the level of abuse and neglect. Based on the documents provided to the Hearing Officer at the hearing, the Hearing Officer ruled that there was no such policy. In this Request for Reconsideration, the Agency has proffered a third policy statement which is Risk Management Number LD 050-09. Clearly this document was in existence prior to the date of the hearing and therefore it cannot be deemed as new evidence. The Agency relies upon the language found at page 5 of that document. That language is as follows:

> Any discipline receiving additional information will report it to [facility] Police Department immediately...

While it is clear that this is not new evidence and is not otherwise admissible as such, the Hearing Officer has considered it and again finds that the totality of it's language deals with the immediate requirements of a missing resident. It does not in any way address dealing with an escaped resident who has been escaped for months or years. Further, the word "discipline" is not identified. The Hearing Officer, in looking at Webster's Third International Dictionary, finds that the word "discipline can mean:

1. Teaching, instruction, tutoring;
2. A subject that is taught;
3. Training or experience that corrects;

4. Punishment;
5. Control gained by enforcing obedience;
6. A rule or system of rules;
7. To whip or punish;
8. To train by instruction or exercise; and/or
9. To bring a group under control.

Even if this new policy statement, which was clearly in existence at the time of the hearing, was valid to be considered in this Request for Reconsideration, there is nothing before the Hearing Officer to indicate that the Grievant was a "discipline."

DECISION

The Hearing Officer finds that none of the reasons given for reconsideration by the Agency rise to a level that would require him to reconsider his original Decision. The Hearing Officer has carefully considered the Agency's arguments and has concluded that there is no basis to change the Decision issued on April 28, 2010. In its Request for Reconsideration, the Agency quite correctly states in part as follows:

I respectfully submit that your conclusions are inconsistent with the **intent** of Agency policy. (Emphasis added)

The problem before the Agency here is that the Hearing Officer must deal with the policy as it is written. All three (3) of the policies presented to the Hearing Officer deal with what must be immediately done when a resident is missing. None of the policies presented deal with the eventuality of that resident being missing for weeks, months or years. The Agency is taking an existing policy and attempting to push the envelope for a meaning to a point where the Hearing Officer finds that the envelope is broken.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found, but the hearing officer determines that the disciplinary action is beyond reasonableness, he may reduce the discipline. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

The grievant was charged with neglect of a client and terminated. She filed a grievance and when she did not get the remedy she sought during the management steps, she asked for a hearing. In his decision, the hearing officer reinstated the grievant with backpay. The agency requested a

reconsideration decision from the hearing officer and an administrative review from the Department of Human Resource Management. In a reconsideration decision dated May 21, 2010, the hearing officer held to his original decision.

The relevant policy regarding disciplinary action, the Department of Human Resource Management's Policy No. 1.60, Standards of Conduct, states, "It is the policy of the Commonwealth to promote the well-being of its employees in the workplace by maintaining high standards of work performance and professional conduct." The policy states as its purpose, "The purpose of the policy is to set forth the Commonwealth's Standards of Conduct and the disciplinary process that agencies must utilize to address unacceptable behavior, conduct, and related employment problems in the workplace, or outside the workplace when conduct impacts an employee's ability to do his/her job and/or influences the agency's overall effectiveness. Attachment A, Unacceptable Standards of Conduct, of that policy sets forth examples of unacceptable behavior for which specific disciplinary action may be warranted. These examples are not all-inclusive. In addition, the employees of the agency are bound by the provisions of Departmental Instruction 201 (RTS), *Reporting and Investigating Abuse and Neglect of Individuals Receiving Services* (DI 201) and Eastern State Hospital Policy No. RI 050-57.

In its request for reconsideration and administrative review, the agency does not contend that the hearing officer's original decision is inconsistent with agency policy. Rather, the agency states, in part, "I submit that the agency did meet its burden of proof at the hearing…" As such, the agency concerns regarding the original ruling represent an evidentiary issue for which this Department has no authority to intervene.

In his Reconsideration Decision, the hearing officer rejected two of the three documents the agency offered as newly discovered evidence. While he indicated that the third document, Risk Management Number LD 059-09, was in existence and available at the time of the hearing and thus was not newly discovered evidence, the hearing officer evaluated that policy and determined that the policy did not support the disciplinary action of ESH. Based on those actions, it appears that the hearing officer, indeed, accepted LD 059-09 as applicable to this case.

Because he apparently accepted LD 059-09 as new evidence and deemed it to be applicable to this case, the DHRM reviewed it as it relates to its application and interpretation. Section 7 of the Policy at *Request to Issue a Warrant or Temporary Detention Order* states:

> Any discipline receiving additional information will report it to the ESH Police Department immediately. The ESH Police is responsible for providing changes to or additional information by telephone to the appropriate local Police Department. The ESH Police Department will keep a written log on follow-up calls to area Police Departments concerning warrants issued, contacts made and responses given.

The hearing officer states the following, in part:

> … the totality of its language deals with the immediate requirements of a missing resident. It does not in any way address dealing with an escaped resident who has been escaped for months or years. Further, the word "discipline" is not identified…

It is the opinion of DHRM that the hearing officer's interpretation of the subject policy is inconsistent with the intent of the policy. The intent of the policy is to establish procedures to

govern staff performance when dealing with either missing residents or escapees. Critical to ESH's mission is the inherent expectation that staff report any information they possess about an escapee, regardless of the time elapsed since the escape, in a timely manner to the appropriate authorities. Moreover, it is the opinion of DHRM that, in the instant policy, the word "discipline" refers to the various occupational categories of staff employed at ESH.

In his original decision, the hearing officer determined that the evidence did not support that the grievant had either abused or neglected the escapee, especially since he was no longer in custody. Concerning the issue of timeliness, the hearing officer, in the original ruling, emphasized that the evidence supported that the grievant did report the location of the escapee. He stated the following:

> The statement that was recorded by the Police Officer was that, "Ms. A brought [the escaped client] to her home a few days ago," and "[the escaped client] left with Ms. A's vehicle a couple of days ago." There is no way for the Hearing Officer to know whether the escaped client was there for five minutes, five hours, or five days. The logical extension of the Agency's position is that if he was there for a second, then the Grievant had a duty to report him. The Grievant did, in fact, call the police and report his whereabouts. The Agency's posture would appear to be that she needed to make that report the very second that she saw him. The Hearing Officer does not know what amount of time expired from the time that the Grievant saw the escaped client and the time that she reported him.

Based on the foregoing information, the DHRM directs the hearing officer to modify his interpretation of the Eastern State Hospital Policy LD 059-09. Given that the foregoing findings regarding timeliness were issued before the agency requested a reconsideration decision and before introduction of LD 059-09, the hearing officer is directed to clarify the applicability of LD 059-09 to the findings in the original hearing decision..

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Ernest G. Spratley

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS

DECISION OF HEARING OFFICER
In re:

Case No: 9304

Hearing Date:	April 21, 2010
Decision Issued:	April 28, 2010
Agency Reconsideration Request Received:	May 12, 2010
Response to Reconsideration:	May 21, 2010
DHRM Reconsideration Request Received:	July 15, 2010
Response to Reconsideration:	July 30, 2010

APPLICABLE LAW

A Hearing Officer's original decision is subject to administrative review by both the Department of Human Resource Management ("DHRM") and the Department of Employee Dispute Resolution ("EDR"). 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. A request to the Hearing Officer to Reconsider his Decision 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 Grievant, on May 13, 2010, requested of DHRM a Review of the Hearing Officer's Decision, which was issued on April 28, 2010. On July 14, 2010, DHRM in a Policy Ruling of the Department of Human Resource Management ("PR of DHRM") directed the Hearing Officer as follows:

> Based on the foregoing information, DHRM directs the Hearing Officer to modify his interpretation of the Eastern State Hospital Policy LD 059-09. Given the foregoing findings regarding timeliness were issued before the Agency requested a Reconsideration Decision and before introduction of LD 059-09, the Hearing Officer is directed to clarify the applicability of LD 059-09 to the finding in the original Decision. [25]

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

[25] Policy Ruling of DHRM, dated July 14, 2010, Pages 10 and 11

In its Ruling, the Assistant Director of DHRM sets forth verbatim much of the Hearing Officer's original Decision. This matter arose based on the Hearing Officer's response to a Request for Reconsideration of his original Decision by the Agency. In its Request for Reconsideration, the Agency asked the Hearing Officer to consider three (3) additional pieces of documentary evidence. The Hearing Officer ruled that all three (3) of the documents did not meet the definition of "newly discovered" evidence. DHRM has requested that the Hearing Officer reconsider his Decision as stated above based on its mistaken belief that the Hearing Officer deemed the Department of Risk Management Policy LD 059-09 as a document that did meet the qualification for being "newly discovered."

As set forth in the Hearing Officer's Response to Reconsideration, and as cited in the PR of DHRM, the Hearing Officer stated that, "**while it is clear that this is not new evidence and is not otherwise admissible as such**, the Hearing Officer has considered it and again finds the totality of its language deals with the immediate requirement of a missing resident. It does not in any way address dealing with an escaped resident who has been escaped for months or years. Further the word, 'discipline' is not identified." [26] (Emphasis added) The Hearing Officer only mentioned this Policy to attempt to induce clarifying language for future application. Indeed, DHRM's Ruling reiterates the obliqueness of the language used when referring to a discipline. The Grievant in no way was a "discipline."

In the PR of DHRM it concedes that:

> This Department has no authority to rule on the merits of a case or to review the Hearing Officer's assessment of the evidence unless the assessment results in a decision that is in violation of policy and procedures. [27]

The Hearing Officer's Decision was and is that Policy LD 059-09 was not admissible.

Solely for the purpose of attempting to obviate the need for an additional Ruling, if DHRM or EDR were to rule that Policy LD 059-09 was a document that the Hearing Officer should consider, the Hearing Officer would find that it did not at all address the issue of timeliness of notifying the Agency of the location of the escaped resident. Accordingly, the Hearing Officer's Decision would not change.

As an aside, the Agency's letter to DHRM requesting a ruling was received by DHRM on May 13, 2010. This request was clearly directed to the Hearing Officer's original Decision which was filed on April 28, 2010. DHRM seems to be using a Request that it received on May 13, 2010 to review the Hearing Officer's Response to Reconsideration which was not filed until May 21, 2010.

DECISION

The Hearing Officer, having considered the policy Ruling of DHRM, concludes that there is no reason to set aside his original Decision in this matter.

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[26] Hearing Officer's Response to Reconsideration, dated May 21, 2010, Pages 2 and 3
Policy Ruling of DHRM, dated July 14, 2010, Page 8

[27] Policy Ruling of DHRM, dated July 14, 2010, Page 9

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 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. [28]

_____

William S. Davidson
Hearing Officer

[28] 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).