Issue: Group III Written Notice with Termination (failure to follow instructions, unauthorized use of State property, insubordination); Hearing Date: 03/08/11; Decision Issued: 03/16/11; Agency: VEC; AHO: William S. Davidson, Esq.; Case No. 9521; Outcome: No Relief – Agency Upheld; **Administrative Review: AHO Reconsideration Request received 03/31/11; Reconsideration Decision issued 04/08/11; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 03/31/11; EDR Ruling No. 2011-2946 issued 04/25/11; Outcome: AHO's decision affirmed.**

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 9521

Hearing Dates: March 8, 2011
Decision Issued: March 16, 2011

PROCEDURAL HISTORY

The Grievant was issued a Group III Written Notice on December 1, 2010 for:

> You have demonstrated unacceptable conduct under the Standards of Conduct Policy 1.60 Failure to follow supervisory instructions, unauthorized use of state property, and insubordination. [1]

Pursuant to the Group III Written Notice, the Grievant was terminated on December 1, 2010. [2] On December 21, 2010, the Grievant timely filed a grievance to challenge the Agency's actions. [3] On February 9, 2011, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On March 8, 2011, a hearing was held at the Agency's location.

APPEARANCES

Counsel for the Agency
Advocate for Grievant
Grievant
Witnesses

ISSUE

1. Did the Grievant fail to follow supervisory instructions and, pursuant to that failure, commit insubordination, and;

2. Did the Grievant use state property in an unauthorized manner?

AUTHORITY OF HEARING OFFICER

[1] Agency Exhibit 1, Tab 1, Page 12
[2] Agency Exhibit 1, Tab 1, Page 12
[3] Agency Exhibit 1, Tab 1, Pages 2 through 4

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 three (3) tabbed sections and that notebook was accepted in its entirety as Agency Exhibit 1.

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.

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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 facts in this matter are largely uncontested. The location where the Agency operates was purchased by the Agency as an existing structure several years ago. That structure had a three (3) bay garage attached to it. Each of the bays had an entrance door and an exit door that opened in such a fashion that you could drive a vehicle into and out of each bay. Accordingly, there were six (6) doors as a part of this attached three-car garage. The Agency, not needing a garage, obtained the necessary permits from the county so that this area could be used as an overflow area for the Agency's clients. This area had tables and chairs and for several years has not been used as a garage. It is used as an area for people to either wait for service or for the Agency to have meetings.

On the morning of the event that created this grievance, the Grievant drove her daughter's car to work. During the morning hours, the Grievant observed tow trucks in the parking lot removing vehicles. The Grievant, concerned that her daughter had missed payments on her car loan, contacted her daughter and verified her concern. The Grievant, portraying herself as her daughter, called the lender and again verified that the loan payments were in arrears. The Grievant, fearful that the car would be towed, asked one fellow employee if she could follow the Grievant to a more discrete location to park the car. That employee indicated that she could not leave work at that time and, accordingly, could not assist the Grievant.

The Grievant, obtained the keys to the doors of the former garage, moved some chairs and tables to clear one (1) of the bays, opened the garage door and put her daughter's car inside the garage and then closed the door. The Grievant did not seek permission from any level of management.

Sometime later, the Grievant's first level manager ("Ms. A"), while on a smoking break, noticed a vehicle inside of the building. Ms. A went to the break room where her manager ("Ms. M") was and asked if she was aware that there was a vehicle inside the building. The Grievant was in this same break room and immediately left the break room and indicated to Ms. A that she wished for her to step out into the hall and to say no more about the vehicle. The Grievant then explained to Ms. A why the vehicle was in the break room.

Ms. A testified before the Hearing Officer that she told the Grievant, "not to do this ever again," and to "immediately remove the vehicle from the building." The first area of dispute in testimony before the Hearing Officer was that the Grievant denied that Ms. A told her to immediately remove the vehicle.

Ms. A testified that she then told Ms. M about this situation immediately after the conversation with the Grievant. These two (2) conversations took place at approximately 2:45 p.m.

At approximately 4:45 p.m., that same day, the vehicle was still in the building and both Ms. A and Ms. S met with the Grievant to ascertain why the vehicle was placed in the building and why it was still in the building.

Pursuant to the investigation of this matter, the Human Resources Manager came to the Agency the day after this took place and interviewed various parties. When she interviewed the Grievant, the Grievant testified that no one assisted her in placing the car inside the building.

When she interviewed the security guard, who was on his first day of work for this Agency, he testified that the Grievant had asked him to help move furniture and he had.

When the Grievant testified, she stated that she did not talk to anyone before she moved the car into the building. She testified that she wanted to keep the issue of repossession confidential. She admitted that Ms. M then came to the break room and asked Ms. A if she was aware that there was a car inside the building. The Grievant denied that Ms. M told her to move the car immediately. The Grievant did admit that Ms. M told her not to do it again. The Grievant admitted that, in the years that she had worked at this Agency at this location, she had never seen a vehicle parked inside the building.

The Grievant called as a witness the fellow employee, whom she asked to help her move the vehicle. That employee testified that she certainly would not park a car inside the building.

The Grievant admits that she placed a car inside the building and it is incredible to assume that she did not know that this would be an unauthorized use of the building. The Grievant testified that she felt the Agency had a positive burden to notify employees in writing that the area was not suitable for parking a vehicle. The Hearing Officer finds that to be an incredible statement.

The Hearing Officer finds that the Agency, based upon the credibility of the witnesses, has bourne its burden of proof regarding Ms. M's statement to the Grievant that she should remove the vehicle immediately and her failure to remove the vehicle. This is clearly a violation of supervisory instructions and, accordingly, is insubordination.

In her grievance form, the Grievant alleged that this was a retaliation. In testimony by both the Grievant and the Agency, it appears that another employee filed a grievance regarding the Grievant's work performance evaluation. This Grievant may have offered an oral statement regarding that grievance. The evidence before this Hearing Officer is unclear as to whether or not such an oral statement was actually given. This other grievance was withdrawn and it is clear from the testimony before this Hearing Officer that the author of the current grievance had no prior knowledge of the Grievant's participation in the prior grievance. The Grievant offered no other credible testimony to indicate any form of retaliation by the Agency. The Grievant has not bourne her burden to establish retaliation.

MITIGATION

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the Agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution..." [7] Under the Rules for Conducting Grievance Hearings, "a Hearing Officer must give deference to the Agency's consideration and assessment of any mitigating and aggravating circumstances. Thus a Hearing Officer may mitigate the Agency's discipline only if, under the record evidence, the Agency's discipline exceeds the limits of reasonableness. If the Hearing Officer mitigates the Agency's discipline, the Hearing Officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received

[7] Va. Code § 2.2-3005

adequate notice of the existence of the rule that the employee is accused of violating, (2) the Agency has consistently applied disciplinary action among similarly situated employees, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

The Grievant offered no other reasons for mitigation and the Hearing Officer finds no reason to mitigate the Agency's decision to terminate.

DECISION

For reasons stated herein, the Hearing Officer finds that the Agency has bourne its burden of proof regarding this matter and upholds the Agency's position to terminate the Grievant.

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.[8] 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.[9]

[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

[8] 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).

[9] 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: 9521

Hearing Date:	March 8, 2011
Decision Issued:	March 16, 2011
Reconsideration Request Received:	March 31, 2011
Response to Reconsideration:	April 8, 2011

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. [10] (Emphasis added)

OPINION

The Grievant seeks reconsideration of the Hearing Officer's Decision "based on information that was recently discovered to reflect workplace harassment and wrongful termination." However, the Grievant, in her reconsideration request, provided no such evidence to the Hearing Officer.

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;

[10] §7.2(a) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

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. [11]

Here, the Grievant has not only not provided any information to support a contention that the supposed new evidence should be considered newly discovered evidence under the above stated condition, she has not provided the Hearing Officer with any new evidence.

DECISION

For the reasons stated herein, the Hearing Officer finds that the Grievant's Request for Reconsideration is denied.

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. [12]

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William S. Davidson
Hearing Officer

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

[12] 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).