

Issues: Retaliation, request to rescind memorandum dated 01/21/03, request to order revision of evaluation, request to rescind a letter of caution, failure to follow pre-disciplinary suspension policy, request for relief from alleged retaliation because Agency refused to permit return to work, Group III Written Notice with termination (inappropriate behavior directed at the Chief), Group III Written Notice (undermining the Agency's effectiveness); Hearing Date: 02/05/03 and 04/24-25/03; Decision Issued: 05/24/03; Agency: Dept. of Military Affairs; AHO: Carl Wilson Schmidt, Esq.; Case No. 5638/5694/5695/5696/5697/5698/5699; **HO Reconsideration Request received 06/03/03; HO Reconsideration Decision issued 06/11/03; Outcome: No newly discovered evidence or incorrect legal conclusions. Request to reconsider or reopen hearing denied; Administrative Review: EDR Ruling Request received 06/03/03; EDR Ruling issued 06/23/03; Outcome: HO neither abused his discretion nor exceeded his authority [Ruling No. 2003-113]; Administrative Review: DHRM Ruling Request received 06/03/03; DHRM Ruling dated 07/02/03; Outcome: HO's decision does not violate any policy promulgated by DHRM or DMA. Therefore, no reason to interfere with decision; Judicial Review: Appealed to Nottoway County Circuit Court on 07/31/03; Outcome: Court cannot find any matters contradictory to law. HO's decision is affirmed [CL03-055] (01/23/04)**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5638 / 5695 / 5696 / 5697 / 5698 / 5699

Hearing Date: April 25, 2003
Decision Issued: May 24, 2003

PROCEDURAL HISTORY

Grievant filed eight grievances. Grievant was not satisfied with the Agency's response to those grievances so she sought qualification for a hearing. On May 1, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. For three full days, the parties presented evidence to the Hearing Officer.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Counsel
Twenty-seven witnesses

ISSUES

Whether the Agency retaliated against Grievant.
Whether to rescind a memorandum dated January 21, 2003.
Whether Grievant's evaluation was arbitrary or capricious.

Whether to rescind a letter of caution given to Grievant.
Whether the Agency followed pre-disciplinary suspension policy.
Whether the Agency retaliated against her by refusing to permit her to return to work.
Whether Grievant should receive a Group III Written Notice of disciplinary action with removal.
Whether Grievant should receive a Group III Written Notice of disciplinary action with removal for actions undermining the Agency's effectiveness.

BURDEN OF PROOF

In disciplinary actions and dismissals for unsatisfactory performance, the agency must present its evidence first and must show by a preponderance of the evidence that the action was warranted and appropriate under the circumstances. In all other actions, the employee must present her evidence first and must prove her claim by a preponderance of the evidence. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT and CONCLUSIONS OF POLICY

Retaliation¹

Facts. The Department of Military Affairs established a police department² within one of its bases. Grievant began working at the department on August 10, 2001 as a Law Enforcement Officer I. The Chief of Police hired her. The Chief indicated to Grievant he intended to place her in a supervisory position³ overseeing security and that he needed Grievant to help develop the police department.

The Chief gave Grievant her own office⁴ so that she could store applications, conduct background investigations, and handle sensitive documents. She coordinated interview panels for new police and dispatch hirees, conducted background

¹ Grievant submitted two grievances regarding retaliation and continued retaliation.

² The Agency's facility was formerly a Federal military base. When the Agency took over the facility, several Federal employees were permitted to remain employed at the Facility. Rather than becoming State employees, those employees retained their Federal status but worked along side State employees. Sergeant B reported to the Chief even though Sergeant B was a Federal employee.

³ Grievant attended "front line" supervisor's school in April 2002. The Chief authorized Grievant to attend the training.

⁴ Grievant's office was located directly across from the Chief's office. Unlike the other police officers, Grievant had her own computer and telephone.

investigations, screened applications, notified personnel that they had been removed⁵ from employment by the Chief.

On June 18, 2002, Grievant submitted a memorandum to the Chief regarding Sergeant B⁶. Her memorandum states:

I am writing this letter so that I can better recall all the things that are heavy on my heart, and because sometimes words are better conveyed through written words that are not interrupted.

The development of this department is a great concern to me because I have made [Facility] my home station for my Military Career and my Civilian Career. I am grateful that I have the opportunity to work with a God Fearing Ambassador as yourself.

Many of the department employees and other [Facility] Employees have felt a need to vent their frustrations about [Sergeant B] to me. I can no longer ignore it as something that will pass, because I too have been affected by his behavior.

The image of this department and the morale of its employees will continue to be negatively affected if the issue is not addressed.

The following are just some of the ongoings in the department that I have been told or witnessed myself.

- Per [Ms. CS] and [Ms. P], [Mrs. Pal] left because she could not work with [Sergeant B]'s constant belittling of people.
- Per [MSG B], on or about May 16th 2002 [Sergeant B] flung the policies, that I had laid on his chair for review, across the room and was upset because I had set them on his chair.
- Per [Officer CD], [Sergeant B] had been saying derogatory things about me since they got out of the academy. On June 17, [Officer CD] told him to take the matters up with me if he had any complaints, and that we were supposed to be a team, [Sergeant B] got upset, slammed

⁵ One employee who was removed by the Chief stated:

On January 4, 2002 [Grievant] along with [Sergeant B] arrived at my home to notify me of my termination from the [police department] where I had been an employee since Oct. '00. [Grievant] then notified me that "The Chief was letting me go." [Grievant] also gave me a letter written by [the Chief] stating the same. [Grievant] asked for my keys to bldg. 316 (DMA). I handed my prox card to [Grievant]. She told us that she was very sorry and then her and [Sergeant B] left. [Sergeant B] was present although we had no conversation. [Chief] never notified me of my termination. [Grievant] was the only person to notify me of this.

⁶ Sergeant B began working at the Facility in 1990.

his fist on the desk and blew up saying “God Damn It...” and continued to argue with her. Later that day [Sergeant B] tried to tell me that she had an attitude problem, and I told him that the news was curious to me because I had no trouble with [Officer CD]. She is very receptive of any corrections that need to be made and makes any necessary adjustments.

- That same day when in the dispatchers’ room [Sergeant B], [Officer W], [Ms. CS], [Ms. Pe], and me were present and discussing a person who [Officer P] had stopped over the weekend. The defendant’s husband had called here to question our jurisdiction on route 40 and [Sergeant B] stated “Pardon my French but that guy is an ASSHOLE.” I later told him that it was hard to tell the new officers not to curse if we had a SGT that was cursing. His response was that he asked to be excused before he cursed, and that he was trying to watch his language.
- The dispatchers have reported to me that he has cursed in numerous occasions.
- Some of the dispatchers are afraid to log him a call because he may get angry with them and belittle them on the radio or in front of other people. Like he has me on any occasion he can find an opportunity to do so.
- [Sergeant B] has often called me a “canidiot” in front of other people that do not even work for the department or that are a complainant on legitimate calls for service. I ask you what is the purpose of this type behavior.
- Per [Ms. CS], [Sergeant B] stated that if he stopped learning anything else about law enforcement for the rest of his life, he would still know more than I ever would.
- Per [Officer CD], [Officer H] is willing to go to another department rather than working with [Sergeant B]. On the day of the night vision goggle larceny I asked [Officer H] in passing what he was doing. [Officer H] was very frustrated and said that he had no idea what he was doing because [Sergeant B] did not guide him through any report writing steps he just barked orders. I helped [Officer H] with his report, and he felt a little better after that.
- When I go to building 316 people tell me that if they ever need any help that they would rather I go up there and not the “other guy” ([Sergeant B]), because he does not know how to treat people.

I know that you have tried to work with him on his behavior, but at what underlying cost? The morale of this department? The image of this department?

These issues, if not addressed, will eventually come to a head and someone who would have been an asset to this department may end up leaving.

I know that you are bogged down in work, and that is why I have overlooked a lot of [Sergeant B]'s behavior that is not mentioned here. But, when the grumbling starts and good people become discouraged enough to leave it makes for poor morale, which eventually affects our department image.

I will be waiting to hear from you on these issues Sir. I have already tried to talk to [Sergeant B] and so have others to no avail. Take your time in digesting these issues, as I know you will. I hope that I have not become a thorn on your side for reporting the department's morale deterioration.

On June 21, 2002, the Adjutant General approved creation of a police supervisor position and another position within the police department. On or about July 1, 2002, the Adjutant General instructed that the positions would not be filled due to budget concerns.⁷ He also instructed that the police department focus on its core responsibilities. This meant the Agency wanted its police officers to be "out on the street" doing patrol work.

On July 1, 2002,⁸ Grievant submitted another memorandum to the Chief stating:

On June 11, 2002 [Officer H] asked me what to do with his summons and I inadvertently told him that he did not need two of the carbon copies, so I tore those up and threw them away.

That day [Sergeant B] told me real nicely that I had to keep those carbon copies, one for the dispatcher and one for the court outcome.

On June 27th I found out that during that same time period⁹ that day [Sergeant B] went into the dispatchers room, placed both his hands on the desk immediately to the left of the entrance, and stated "DO YOU ALL MIND IF I GO POSTAL". [Ms. Ca Da] stated that he was visibly upset with me, and that he stated that I did not I know what I was doing, referring to the incident with the summons. [Ms. Ca Da] did not find any humor in his comment and [Ms. LD] laughed thinking that [Sergeant B] was just joking.

I have received information from [MSG B], who is a very credible person, that the unit tried to have [Sergeant B] mentally evaluated once. [Ms. PG] stated that [Sergeant B] had another Law Enforcement Officer on his knees by using a pressure hold on him while they were arguing. [Ms. PG]

⁷ A hiring freeze was imposed officially on July 23, 2002.

⁸ Grievant first submitted her memorandum on June 27, 2002. The Chief returned it to Grievant for her to correct some typing errors.

⁹ Sergeant B made his going postal comment on June 11, 2002.

also stated that [Sergeant B] had been suspended on numerous occasions for some of the negative actions that he has taken on the job against other people.

Per our conversation on June 27, 2002, I find it hard to believe that there was nothing found in his personnel record. [MSG B] stated that they had a stack of files that reflected [Sergeant B]'s negative behavior in the work place. If these are still on hand at [Facility], should be conducted by CID. I trust that this department will get a full personnel background on [Sergeant B] from [Facility], or other personnel who may have kept a copy of these "negative" files on hand.

Per our conversation on June 27, 2002 I feel like I am the one being chasten for bringing these (Previous letter dated June 18, 2002) precipitating factors to light. You stated that I was "over reacting", in cases of irrational behavior and senseless deaths in the work place there have often been "Statements made by the Perpetrator" in which people always report "I thought they were just kidding." I pray that this will not be the case in our working environment. The precipitating factors that I reported in my first letter dated June 18, 2002 should not be ignored.

I realize that I am still on probation, and there will be a job announcement coming up for a supervisor position. Per our conversation of June 27, 2002 you mentioned that you needed someone who was innovative in handling these type problems, I felt like you were implying that I did not have these skills even though I have been doing the following since I have been working here: Payroll, policies, backgrounds, coordinating training sessions, and many other things. I have no authority to be innovative in handling this type of problem, especially since I am the object of [Sergeant B]'s aversion, which he has made clear in front of my cohorts and civilian and military personnel. This aversion started soon after I began working here. I am a very patient and professional person, and I know that you have a tremendous amount of responsibility, and I have tried the "one on one" conversation with [Sergeant B] to no avail.

I hope that bringing these factors to light will not negatively influence my opportunity to apply for the supervisor position. My concern is that the supervisor position will be announced while I am gone to my annual training making me ineligible because I am not able to be there for the application process.

I also realize that you are aware that I have reported different incidents with different organizations to the EEO/EEOC. I pray that you do not conclude in your mind that this is my only purpose for this issue, as it has not gone that far, although I do have a right to go that route.

My only purpose in this issue is to keep a safe working environment that is conducive to professionalism and non-violent behavior. A working environment that is free from slander and intimidation.

Grievant asked the Chief if Sergeant B had any negative information in his personnel file. He responded he did not have any such information. Later he discovered that a complaint had been made against Sergeant B before he began working for the police department. Since the matter occurred before he began working for the department, he set the matter aside.

On July 19, 2002, Grievant submitted a memorandum indicating she had uncovered information about Sergeant B despite the Chief's statements that no such information existed. This memorandum stated:

[Chief] after our numerous discussions and you stating that there was nothing negative in [Sergeant B]'s file. I did some of my own investigation.

On 7-17-02 I was told by a person who wishes to remain unknown that there was an incident that happened with the Fire Department personnel a few years back, involving [Sergeant B]'s behavior.

On 7-19-02 I interviewed some of the fire department personnel who wish to remain unknown at this point in time.

Thru my interviews I discovered that on 11-20-99 [Sergeant B] responded to an accident at Armistead and Military. [Sergeant B] was treating the incident as a DUI. When [Mr. JW] (medic) went to tell [Sergeant B] that he had a diabetic not a DUI, [Mr. JW] placed his hands on [Sergeant B]'s forearm and came in close to tell [Sergeant B] in a discrete way. [Sergeant B] then abruptly pulled back and drew his weapon threatening the Medic with arrest for assaulting a POLICE OFFICER. [Sergeant B] then later returned to the Fire Department to arrest the Medic but did not, because [MAJ F] stopped him from making the arrest.

At 1130 hours on 7-19-02, I went to interview [LTC C] and he told me that he personally gave the personnel file to [Chief] when he took over the department in 2000, and all the witness statement and actions taken against [Sergeant B] were in the file.

So wherein lies the truth? Have the files been misplaced or thrown away? If either of these are apparent then files of past incidents that involved [Sergeant B]'s display of violence and unreasonable behavior in the work place should be reconstructed by interviewing everyone from the Fire Department and other past incidents.

I hope to hear the outcome of this investigation when I return from Annual Training.

When Grievant returned from Military Training, the Chief took many of her responsibilities away and told her that he wanted her to concentrate on drafting policies for the department.¹⁰ The Chief began avoiding Grievant unless the matter was work related. Grievant and four other police officers were placed on rotating shifts. Grievant had the same duties as the other officers.

On August 14, 2002, the Chief completed his investigation regarding Grievant's eleven allegations against Sergeant B. The Chief substantiated five of the allegations. Those allegations related to temper tantrums, making improper remarks about fellow employees, use of improper phrases, cursing, and creating morale problems, which damaged the image of the police department. The Chief recommended that Sergeant B receive a letter of warning (Counsel and Reprimand) for his conduct and that Grievant receive a letter of caution (Counsel) regarding her improper investigation of Sergeant B.

Since three of Grievant's allegations were against the Chief, the Chief recommended to the Adjutant General that the Chief not be responsible for investigating those allegations. The Adjutant General contacted the Superintendent of State Police and requested assistance. A Sergeant with the State Police began an investigation.

On August 20, 2002, Grievant submitted¹¹ a memorandum titled UNSAFE WORK ENVIRONMENT, in which Sergeant B responded to an assault in progress, August 14, 2002, without his duty weapon.¹² Grievant gave three copies to the Chief so that he could give one to the Colonel D (Post Commander) and one to Colonel C (Safety Officer). At about 10:30 a.m., the Chief told Grievant "I got your letter, and I will decide whether it needs to go higher".

Grievant spoke with the Chief about his comment. The Chief said "I am not going to drop everything every time you bring a complaint in here. I think you are being very divisive against this man." Grievant told the Chief that she knew he was going to take it (UNSAFE WORK ENVIRONMENT memo) as a personnel problem issue rather than the safety issue at hand. The Chief told Grievant she was the problem, because she was asking other employees about Sergeant B. Grievant told the Chief that people come to her with the information. The Chief said, "Ask yourself why they come to you with information?" Grievant told him that it was because she did something about it, and that the Chief just coddled Sergeant B.¹³

¹⁰ It appears the Agency did not effectively communicate to Grievant that she was being placed "out on the street" because of the directive of the Adjutant General.

¹¹ When Grievant submitted her August 20, 2002 memorandum, she was not aware that the Chief had completed his investigation and presented a report to Colonel D. She learned in January 2003 that the Chief had completed an investigation.

¹² The State Police investigation concluded that Sergeant B should have carried his weapon when he responded to the call.

¹³ The Chief instructed Grievant not to investigate Sergeant B any more. She complied with his instruction.

Grievant asked the Chief what his intentions were for her work because she found out from a recruit officer that she was going to be placed on rotating shifts. The Chief stated that he was going to keep Grievant on daylight until she finished drafting department policies and then he was going to put her on rotating shifts. Grievant questioned why she was being placed on rotating shifts. The Chief said he never promised Grievant a permanent daylight. Grievant reminded the Chief that he was not going to be able to hire a supervisor at this time, and she asked him what he was going to do with the work load. Grievant explained that she was getting ready to delegate some of the duties to the dispatchers by training them to lighten some of the administrative load, and that she had ideas for further developing the department.

Grievant asked the Chief why the Department of Defense officers were not going on rotating shifts and he stated that they were under contract and he could not place them on rotating shifts or 10 hour shifts like the rest of the State Police employees.

Although Sergeant B was an employee of the police department, he was a Federal employee subject to Federal disciplinary procedures.¹⁴ The grievance process for State employees did not apply to Sergeant B and, thus, the Chief could not issue written notices to Sergeant B. The Chief could recommend disciplinary action against Sergeant B, but the decision whether to implement that recommendation rested with Federal authorities.

On September 9, 2002, Grievant filed her first grievance alleging retaliation. Grievant met with a step respondent on September 18, 2002. The Chief was also present during that meeting. The Chief made several statements that Grievant believed were untruthful. On October 2, 2002, the Adjutant General denied Grievant's request for relief. Shortly thereafter, Grievant went on short-term disability leave due to depression.

On November 13, 2002, the State Police finished its investigation¹⁵ of the allegations Grievant made against the Chief. Once the 28 page State Police report was presented to the Adjutant General, he concluded that the "investigation does not substantiate any allegations of illegal or improper conduct by [the Chief]"¹⁶

¹⁴ Federal and State police officers were also treated differently on occasion. Following the terrorist attacks on September 11, 2001, the Federal police officers began working 12 hour shifts. The Chief told Grievant she could not work 12 hour shifts because the Agency could not afford to pay for overtime work.

¹⁵ A State Police investigator first interviewed the Chief on September 20, 2002 and Grievant on September 24, 2002. Grievant was on duty and in uniform. Grievant made additional allegations during that interview.

¹⁶ The Adjutant General's conclusion is consistent with the information reported by the State Police.

In preparation for the grievance hearing, the Representative began interviewing Agency employees (see discussion below). DMA wished to stop the Representative from upsetting its employees, so Colonel D banned the Representative from the Facility. He drafted a letter, dated January 22, 2003, to the Representative stating:

This is to inform you that you are ordered not to reenter the confines of [Facility], Virginia, effective immediately upon your receipt of this letter. This action is a direct result of your unauthorized entry into several work areas between January 18 – 20, 2003, and complaints by [Facility] employees of harassment, intimidation, and disruption of the workplace environment by you.

You are ordered not to enter upon or to be found, day or night, within the limits of the [Facility]. This bar does not apply to travel over State Routes 40 and 46 where these roads cross the military boundary. As a limited exception to this order, you may enter [Facility] as required to participate in the formal EDR Grievance Hearing concerning your spouse, [Grievant], currently scheduled for 5 February 2003 at the Post Headquarters conference room, Building 472. You will use the most direct route from your entry onto the installation to the [Facility] Headquarters conference room, and from there to the closest exit from the installation; you will not deviate from that route.

Violation of this bar may lead to prosecution in state court for trespassing under Virginia Code Section 18.2-11, a Class 1 misdemeanor punishable by confinement of not more than one year and a fine of up to \$1000. Violation of this bar may also subject you to prosecution in US Magistrate Court under United States Code, Title 18, Section 1382, which is punishable by a fine of up to \$500 or imprisonment for up to 6 months, or both.

You may request reconsideration of this bar to the installation at any time. Such request, with supporting information, should be submitted in writing for my consideration.¹⁷

Discussion. An Agency may not retaliate against its employees. Retaliation is defined by Section 9 of the Grievance Procedure Manual as: “Actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority (e.g. ‘whistleblowing’).” To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;¹⁸ (2) suffered an adverse employment action; and (3) a causal link

¹⁷ In an email dated January 24, 2003, Colonel D advised Grievant that if she wished to gain access to witnesses employed by the Agency, she should contact the Agency’s counsel and arrange for a time to speak with the witnesses.

¹⁸ See Va. Code § 2.2-3004(A)(v). Only the following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a

exists between the adverse employment action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity.

Grievant engaged in a protected activity when she filed her initial complaints with the Chief regarding what she considered illegal and/or inappropriate behavior and when she filed grievances. Grievant has established that she suffered an adverse employment action because her duties were materially changed and she was no longer on the “management track.” She also was prohibited from entering the Agency’s Facility. What Grievant has failed to establish is the connection between the protected activities and the adverse employment actions.

Grievant’s dispute with the Agency focuses on the conflict she had with the Chief. Managers other than the Chief, however, made the decisions affecting her employment. For example, the decision to put Grievant and the other police officers “out on the street” was made by the Adjutant General and not by the Chief. Working police officers on a rotating shift is part of getting police officers on the street. The duties Grievant considered to be supervisory were removed because they were not consistent with the Agency’s need for a more public police presence. In addition, the Agency’s plan to create a supervisory position was changed because of budget cuts. It was no longer necessary for the Chief to continue “grooming” Grievant for a supervisory position when it became unlikely there would be a supervisory position in the police department any time soon. In short, the Agency’s legitimate business decisions were the cause of any material change in Grievant’s work duties and status within the Agency.

Grievant has demonstrated that the Chief’s opinion of her and her judgment changed after she filed complaints with him. A change in a manager’s opinion of an employee is not, in itself, retaliation, especially where that opinion falls within a supervisor’s right to evaluate and manage an employee.

Grievant’s pursuit of Sergeant B was excessive. Although Sergeant B was jealous¹⁹ of Grievant and was sometimes abrasive, none of his actions were so egregious as to require the Chief to immediately suspend the operations of the department and prosecute Sergeant B to the maximum possible extent. Grievant considered Sergeant B’s postal comment to be a “death threat.” No credible evidence was presented supporting this conclusion. Sergeant B’s comments were inappropriate in the workplace, especially for a police sergeant. He did not direct his comment to Grievant personally and she only learned about it sixteen days later. If Sergeant B had made the comment in anger, his anger would have passed by the time Grievant learned of the comment. At least one of the two people who heard the postal comment believed Sergeant B was joking. If Sergeant B intended harm to Grievant, it would have been

violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

¹⁹ Sergeant B had referred to Grievant as the Chief’s “golden girl.”

illogical for him to announce his intent in the presence of others. No evidence was presented suggesting Sergeant B had previously threatened Grievant. The evidence supports the Chief's conclusion that Grievant had overstated her concerns about Sergeant B.²⁰

Based on the Chief's perception that Grievant had overstated her concern with Sergeant B and that she was involved in unnecessary battle with Sergeant B, the Chief's opinion of Grievant's judgment and ability to assume a supervisory role changed.

There is a difference between the actions of the Chief and the actions of the Agency.²¹ If the changes in Grievant's job duties resulted from decisions made by the Agency managers (other than the Chief) without an intent to retaliate against Grievant, then Grievant has not establish a claim for retaliation even if the Chief's actions would have otherwise established a claim for retaliation.

Grievant contends the Agency retaliated against her by having one of its senior managers call her health care provider to obtain information about her. The evidence showed that the person who called for the Agency was a medical doctor and the reason for the call was because Grievant carried a weapon and the Agency wished to determine what action it should take regarding her possession of a weapon. Grievant has not established that the Agency retaliated against her by calling her health care provider.

By banning the Representative from the Facility, the Agency did not retaliate against Grievant. DMA's actions were based on its perceived legitimate business needs not to permit disruption of Agency operations. Several employees testified that the Representative's actions upset them.²² It was appropriate for the Agency to act to prevent further disruption caused by the Representative.

²⁰ Early in the relationship between Grievant and Sergeant B, Sergeant B came into the Chief's office and complained that Grievant was always telling him what to do yet she was not his supervisor. Grievant had presented Sergeant B with a policy she drafted that was signed by the Chief. Grievant handed the policy to Sergeant B personally. The Chief questioned why Grievant had to make the policy a confrontation rather than simply putting it in Sergeant B's mailbox. The Chief told both Grievant and Sergeant B that he felt like he was beginning to be their father and they were children because they acted like ones. He told them the childlike behavior had to stop. He told them he was going to lunch and expected them to work things out before he returned. When the Chief returned, both Grievant and Sergeant B apologized to the Chief for their immaturity. They said they went to lunch and talked it through and everything was forgiven.

²¹ Grievant's claim of retaliation is against the Agency. Grievant alleges the Agency retaliated against her.

²² Grievant alleged the Agency retaliated against her by attempting to influence the testimony of witnesses working at the Agency. No credible evidence was presented to support this allegation. Indeed, many of the witnesses upon whom Grievant was relying, were more offended by the Representative's actions than by any action taken by the Agency.

Grievant contends the Agency retaliated against her by substituting a different person as a step respondent rather than the person previously identified as a step respondent. The evidence showed that the Agency has not had a significant number of grievances and its Human Resource staff incorrectly selected a respondent. The error was harmless. No evidence was presented suggesting the outcome of Grievant's case would have been different had the Agency not erred. The EDR Director addressed this issue in her rulings 2003-056 and 2003-060.

Memo Dated January 21, 2003

Facts. On January 21, 2003, the Chief issued to Grievant a memorandum stating:

You have been on excused leave since October 3, 2002. You remain in temporary disability status. There is no reason for you to be at the workplace. You are hereby directed not to return to your work place ... and its grounds unless you have official business to perform. In such case you will call me in advance and receive approval.

You are advised that your actions in calling Romeo 30 to the Police Building to inquire about a police ride along was improper. You were not assigned to conduct an investigation of this incident neither were you in duty status. You are to refrain from such actions in the future. If you have reason to believe improper personnel acts are occurring you are to report them to your immediate supervisor who is the Chief of Police.

Discussion. The first paragraph of the memorandum restricts Grievant's access to the Agency's Facility. As with other conditions of employment, agencies are free to restrict employee access to specific buildings and grounds as long as their actions do not violate statutes, regulations, or policies. There is no statute, regulation, or policy requiring the Agency to permit her to enter the Agency's Facility under the facts of this case. Since Grievant was on disability leave at the time the memorandum was issued, she was not able to work. Other than pursuing her grievance, there was no reason for Grievant to be at the Facility. Nothing in the grievance procedure requires agencies to permit employees' access to agency property solely for the purpose of pursuing a grievance.

Grievant contends the Agency restricted her in order to retaliate against her. Given the disruption caused when Grievant and her Representative came to the Facility to speak with other employees, the Agency's restriction was reasonable and not a form of improper retaliation for engaging in a protected activity.²³

²³ The Agency did not restrict Grievant, her Representative, or any of her witnesses from coming to the hearing.

The second paragraph is in essence a counseling memorandum. As discussed below, the Hearing Officer lacks the authority to reverse a counseling memorandum based on its content.

Negative Evaluation for Annual Rating

Facts. Grievant received an interim evaluation in May 2002 so that she could qualify for a bonus offered to State employees. Her overall rating was Contributor. The May 2002 evaluation rates Grievant's core responsibility of "Conducts routine patrols" as Extraordinary Contributor and states:

Employee has had limited time for routine patrols due to her assignment to administrative duties during the early stages of creating the new department. She has excelled in assisting in policy review. She has assisted in the supervision of personnel in an outstanding manner. These are not assignments normally required of an employee in this classification. Her attitude, energy, and talent have made her an idea candidate to assist in these roles until positions that are frozen can be filled.

She was described as a Contributor regarding the core responsibility of "Practices Community Policing Techniques" which states:

Employee has made herself known among the residents of the [Facility] as a friendly, caring professional. She seized opportunities to interact with her constituency and is well liked and respected by all.

Grievant received another evaluation in October 2002 covering the period from October 2001 to October 2002. The core responsibility of "Conducts routine patrols" was lowered to Contributor and states:

Employee has had limited time for routine patrols due to her assignment to administrative duties during the early stages of creating the new department. She has done a good job in assisting with policy implementation. She has assisted in the scheduling and time keeping of personnel in an outstanding manner. Her energy and talent have made her an idea candidate to assist in these roles. During the last few months of rating period she had a problem staying on task.

Grievant's the core responsibility of "Practices Community Policing Techniques" was lowered to Below Contributor and states:

Employee has made herself known among the residents of the [Facility] as a friendly, caring professional. She seizes opportunities to interact with

her constituency. She needs improvement in the area of team work and acting professional when things don't go her way.

Grievant's duties changed in July 2002 to focusing on drafting policies. She did not display good teamwork during that period of time, according to the Chief. She also independently began investigating another employee without the Agency's approval and outside the scope of her position requirements.

Discussion. State agencies may not conduct arbitrary or capricious performance evaluations of their employees. Arbitrary or capricious is defined as "Unreasonable action in disregard of the facts or without a determining principle." GPM § 9. If a Hearing Officer concludes an evaluation is arbitrary or capricious, the Hearing Officer's authority is limited to ordering the agency to re-evaluate the employee. GPM § 5.9(a)(5).

Grievant's evaluation is based on the direct observation of the Chief. His opinion is supported by the facts he observed. Thus, the Agency's evaluation of Grievant is not arbitrary or capricious.²⁴

Letter of Caution

Grievant filed a grievance challenging the Agency's action of issuing her a letter of caution. Although not expressly titled as such, the letter of caution is a written counseling memorandum.

Facts. On August 14, 2002, the Chief drafted a letter of caution to present to Grievant. The letter was not presented until February 19, 2003 because the Agency's ongoing investigation and Grievant's absence from employment due to being on short-term disability. The Memorandum states:

This letter is to advise you that your actions in conducting an investigation without authority into the background of [Sergeant B] is inappropriate. You questioned employees of the Police Department and Fire Department as well as other employees of the MTC with regard to actions, which are personnel issues. Personnel issues are private and you are not privy to them.

These actions create an atmosphere of divisiveness within the Department where teamwork is essential. They also create an impression among members of the MTC and other customers of the ... Police that is damaging to the image of the Department.

²⁴ It is not necessary for the Hearing Officer to agree with the Agency's evaluation of an employee in order to conclude that an evaluation is not arbitrary or capricious.

Future actions of this nature without the approval of the Chief of Police or higher authority will result in disciplinary actions, which can range from counsel to termination.

Discussion. DHRM Policy 1.60 governs the issuance of a written counseling memorandum. Section VI(C)(2) provides:

2. Counseling

a. While it is hoped that most performance and behavior problems can be resolved through informal counseling, counseling is not a prerequisite to formal disciplinary action.

b. Counseling should consist of private discussion between employees and their supervisors regarding:

(1) the desired course of action to improve the employees' performance and/or behavior; and

(2) supervisors' expectations for employees.

c. Documentation of counseling

(1) Documentation permissible

Counseling may be documented by a letter or memorandum, but not on the Written Notice form.

(2) Retention of counseling documentation

Documentation regarding counseling should be retained in the supervisors' files, not in employees' personnel files, except as necessary to support subsequent formal disciplinary action.

No credible evidence was presented showing that the Agency failed to comply with DHRM § 1.60(VI)(C)(2). There is no basis for the Hearing Officer to conclude that the Agency has failed to comply with policy.

Grievant objects to the content of the letter of caution. Under Section 5.9 of the *Grievance Procedure Manual*, the Hearing Officer's authority is limited to "Upholding, reducing, or rescinding disciplinary actions." A counseling memorandum is not a disciplinary action. Thus, the Hearing Officer lacks the authority to reverse a counseling memorandum based on the content of that memorandum. Thus, Grievant's request for relief must be denied.

Pre-Disciplinary Suspension

Facts. On February 19, 2003, the Chief drafted a memorandum to Grievant stating:

1. Effective immediately, you are placed on Pre-disciplinary Action Leave, which is leave with pay without charge to your employee leave balance, pursuant to DHRM Standards of Conduct, Policy 1.60, Section VII.E.4. This action is necessary to remove you from the workplace pending investigation of allegations of misconduct.
2. Due to your extended absence from the workplace on VSDP short-term disability leave, the agency has not had reasonable opportunity to provide you with advance notification of any intended disciplinary action. It is my intention to provide this notification and evidence of the offense for which disciplinary action is being contemplated to you not later than Friday, February 21, 2003, and to provide you with a reasonable opportunity to respond before taking any disciplinary action.
3. Pending further notice, you are directed not to return to your workplace, Building 471, and its grounds unless you have official business to conduct or as directed by your supervisor. In such cases, you must call me in advance for approval.

Discussion. The Agency cites DHRM § 1.60(VII)(E)(4) as its authority to issue its memorandum to Grievant dated February 19, 2003. This policy addresses disciplinary suspension with pay without advance notification and states:

a. Management may immediately remove an employee (with pay) from the work area, without providing advance notification, when the employee's continued presence:

- (1) may be harmful to the employee, other employees, clients, and/or patients;
- (2) makes it impossible for the agency to conduct business; or
- (3) may constitute negligence in regard to the agency's duties to the public and/or other employees.

The February 19, 2003 memorandum states the Agency is taking action “pending investigation of allegations of misconduct.” No mention is made of harm to others or conduct of business or possibility of negligence. Thus, the Agency has not complied with DHRM § 1.60(VII)(E)(4).

When an Agency fails to comply with policy, the Hearing Officer's authority is limited to ordering the Agency to comply with policy. From a practical standpoint, it is not possible to permit Grievant to return to work on February 19, 2003 as if the memorandum had not been issued to her. It is possible, however, to order the Agency to correct its records to remove the memorandum and correct Grievant's personnel records to reflect that she returned to work on February 19, 2003. The Hearing Officer will so order.

Grievant contends the suspension was without pay. The Agency's memorandum states that Grievant is to be "with pay". In light of the Agency's failure to comply with policy, the Hearing Officer will order the Agency to review Grievant's compensation during the period of suspension and verify that Grievant was compensated during that period of time.

Return to Work After Doctor's Release

Facts. Grievant intended to return to work in February 2003. Her health care provider wrote a letter dated February 13, 2003 to the Chief stating that Grievant "has improved substantially over the last several months so that I do not currently see any residual signs of her depression. I do not believe that there are any mitigating clinical circumstances which would compromise this woman's return to work." VDSP released Grievant to return to work on February 14, 2003.

The Agency did not permit Grievant to return to work despite being release to return to work.

Discussion. Grievant contends the Agency retaliated against her. The evidence showed that the Agency delayed Grievant's return to work while it continued its investigation into whether to discipline Grievant and whether Grievant was fit to return to duty and carry a weapon. Grievant has not established the Agency retaliated against her for any protected activity.

Removal From Employment

Facts. On January 22, 2003, Grievant and her husband and young son arrived at the Facility to deliver a memorandum to Agency managers. Grievant carried a memorandum addressed to the Chief, Colonel D, LTC M, The Adjutant General, and Colonel A. The memorandum stated:

I Plan to return to work on 17 February 2003. I request the following:

1. My service weapon be returned, so that I can familiarize myself with the use of it again.

2. Based on the founded complaint of the Postal Threat and other violations that have not been dealt with, I request that [Sergeant B] be removed from the day shift; I will not be subject to a hostile work environment.

OSHA recommendations are for the perpetrator to be removed to another shift away from the grievant. The grievant is not to be removed from the shift and schedule that they were working unless they personally request to do so, I request that [Sergeant B] be moved, I will stay on the day shift on the Monday through Friday schedule, which I have worked since August 2001.

OSHA and Virginia State Laws and policies dictate that you, as the employer, encourage me to report any further violations in the workplace, and that you take them seriously and act on them.

On January 21, 2003, the Chief had drafted a memorandum to Grievant restricting her from the workplace. He intended to mail the letter to Grievant but when he learned that Grievant was on the worksite, he decided to present it to her. The memorandum stated:

You have been on excused leave since October 3, 2002. You remain in temporary disability status. There is no reason for you to be at the workplace. You are hereby directed not to return to your work place Building 471 and its grounds unless you have official business to perform. In such case you will call me in advance and receive approval.

You are advised that your actions in calling Romeo 30 to the Police Building to inquire about a police ride along was improper. You were not assigned to conduct an investigation of this incident neither were you in duty status. You are to refrain from such actions in the future. If you have reason to believe improper personnel acts are occurring you are to report them to your immediate supervisor who is the Chief of Police.

Grievant and her husband met with the Chief and Colonel D in Colonel D's office. Colonel D described the events as follows:

On 22 January I had my secretary prepare a memorandum for [Representative] which banned him from post except for specific occasions. The exclusion was based on the repeated visits he was making and upsetting the work force. The memorandum explains that the intent was written with the consult of the JAG officer.

When I returned to my office at 1505 (3:05 pm) I saw [Representative] and his wife [Grievant] coming towards my office. I had intended to mail the memo, registered/certified this afternoon. I called [LTC M], state JAG, and

stated that [Representative] was in my building. He advised me to call [Chief], give the memo to [Representative] and have him escorted off post.

I called [Chief] over and then invited [Representative] to my office. He read the memo and started asking questions about why he was banned. I told him the reasons were in the memo. [Chief] presented [Grievant] with another memo. [Representative] tried to intervene and take the memo but [Chief] insisted that [Grievant] take the memo. She finally did. [Grievant] became extremely agitated and started towards [Chief]. [Representative] restrained her and I started leading her towards the door. She lunged over [Representative]'s shoulder yelling "You liar, you liar. You are going to hell! With some difficulty, [Representative] dragged [Grievant] to their vehicle. My secretary carried a child of the [family] to their car. [Grievant] opened the passenger side door on three or four occasions shouting towards me and [Chief], "I can't believe you believe that liar. You liar, You liar. We've got evidence." [Chief] got in the patrol car and followed the [Representative]'s car to make sure he left post.

Sergeant B was standing outside of a building next to the building Grievant and the Representative exited.²⁵ He made the following observation:

At approximately 1500 hrs 22 Jan 2003, I was in front of Bldg #471 talking to [SPC W], when [Grievant] exited Bldg #472 with her husband, and followed by [Chief] and [Colonel D]. [Grievant] yelled out in my direction that you are worthless, you ain't nothing. She seemed to be very upset and out of control, her husband grabbed her and stopped her from coming in my direction, he then directed her to their vehicle. After she [Grievant] was in the vehicle she kept yelling derogatory remarks towards me. She then called [Chief] a liar. [Representative] then entered the vehicle, made a remark that I did not hear, towards [Chief] and [Colonel D]. Closed his door and departed that area. [Chief] then asked me to get a vehicle. Then the Chief and I followed them off of the post.

On March 6, 2003, DMA issued Grievant a Group III Written Notice with removal stating:

On January 22, 2003, at the office of [Colonel], you became agitated and used insulting and offensive language towards your supervisor, [Chief] and [Colonel]. You moved aggressively towards [Chief] and had to be physically restrained by your husband. Upon exiting the building, you continued to use offensive language towards [Chief], [Colonel], and

²⁵ Grievant contends the Agency planted Sergeant B within view of Grievant in order to antagonize her. There is no evidence to support this conclusion. The Agency did not know Grievant would be appearing at the workplace when she did. No evidence was presented suggesting Sergeant B knew or could have known Grievant was present at the Facility.

[Sergeant], an on-duty police officer. Your conduct was disruptive to the operations of the Department.

Discussion. “[A]ny offense which, in the judgement of agency heads, undermines the effectiveness of agencies' activities may be considered unacceptable and treated in a manner consistent with the provisions of this section.”²⁶ DMA considers Grievant’s behavior on January 22, 2003 to have been so egregious as to undermine the effectiveness of the Agency’s activities such that Grievant should be given a Group III Written Notice and removed from employment. The Hearing Officer agrees.

The police department is a paramilitary organization within a military agency. Employees hold rank, wear uniforms, carry weapons, and are expected to comply with orders from superior officers. On January 22, 2003, Grievant displayed contempt for a higher ranking supervisor. She insulted her supervisor. She threatened her supervisor. All of this took place within the view of several employees. Grievant’s behavior eliminated any hope that her working relationship with the Chief and Agency managers could be restored upon her return to work. She brought the police department’s operations to a standstill.

Grievant contends the disciplinary action against her should be mitigated because she was suffering from depression at the time of her actions. Although Grievant’s depression may have influenced her actions in part, the evidence is insufficient for the Hearing Officer to conclude that Grievant would have acted differently if she had not been suffering from depression.

Undermining the Agency’s Effectiveness

Facts. In order to prepare for Grievant’s hearing, the Representative began interviewing witnesses. Grievant’s Representative considered Officer CD as a potential witness for Grievant. He pursued her for questioning. She described her interaction with the Representative and Grievant as follows:

On Friday, January 10, 2003 at approximately 5:30 p.m., [Representative] and [Grievant] and family came to my home. I was under the impression that it was a social visit due to the fact they had come over before. At approximately 5:40 p.m, [Representative] asked me if he could talk to me in my office that he needed to talk to me about some things. I agreed and we proceeded to my office. [Representative] was behind me when we entered the room. He stated that he was going to ask me some questions and I said that was fine.

He proceeded to ask me some questions about [Sergeant B] and some of the discussions I had with him. I told him what I knew and [Representative] insisted to continue to ask me the same questions over

²⁶ DHRM § 1.60(V).

and over again. I answered them as I did before. Then this interview lasted almost an hour when I had to answer my home phone. The interview ended approximately 6:30 p.m. Then shortly after we exited my office he and [Grievant] and family left my home. Later on that evening I received a call from the [Grievant] and they stated that some of the dispatcher's and officer's found out that their interviews were being taped. Then [Grievant] told me you didn't mind being taped did you? I stated that I minded but since they already had taped it, didn't matter now. I felt very violated that I was interrogated in my home and then on top of that I was taped without any knowledge of it.

On Thursday January 23, 2003 at approximately 9:30 p.m., [Representative] and [Grievant] began to call my home and hang up the phone when my voicemail system would answer this continued constantly until approximately 2:00 a.m. in the morning. I had to report to work at 6:00 a.m. on Friday morning [Representative] left me a message on my voicemail service telling me what kind of witness I was going to be called as and that Chief ... must have made me write a statement and that is why I wasn't talking to them anymore. On the same date Friday, January 24, 2003 I called Chief ... at approximately 3:00 a.m. and told him of the events that had transpired through the night and I was not coming in to work due to the fact they had kept me awake all night with their constant calling and I had not had any sleep in 24 hours.

On Friday January 24, 2003 I woke up at approximately 11:45 a.m. And I noticed [Grievant] had pulled up to my apartment and started to knock on my door. She continued to knock on my door and then started to say "... I know your home, open the door". I didn't open the door then she went down stairs to Dispatcher's ... home and started knocking on her door. [Grievant] then when upstairs to my other two neighbor's doors and knocked on them. On of my neighbors asked [Grievant] could she help her with something she asked her if she had seen me and my neighbor stated that she had the night before and then [Grievant] started asking her if I was with my fiancée and she said I don't know. Then at 12:30p.m, [Grievant] stopped knocking on my door and left the apartment complex.

On Friday, January 24, 2003 I called my phone company and got the [Grievant's] phone number blocked from my home phone line and then I write then a e-mail stating not to call me at work and to stop calling my fiancée's home and anyone else connected to me.

Grievant's Representative sought information from Ms. CS, one of Grievant's co-workers. Ms. CS described her interaction²⁷ with the Representative as follows:

²⁷ The Representative also interviewed Ms. LD after interviewing Ms. CS. Ms. LD was also offended by the way the Representative interviewed her.

On Saturday, January 18, 2003 [Grievant] and her husband ... came into the office where I was working. She said that her hearing was to be in #316 on Feb. 5th & 6th. She said her husband was acting as her representative and he needed to ask me a few questions – if I could step in the Range Briefing Room. I asked [Sergeant B] if he would watch the desk for me. He said he would be glad to do it.

[Representative] told me he was representing his wife and he would be asking me questions such as “Did I consider [Grievant] to be my supervisor!” “Did I ever hear [Sergeant B] yelling at [Grievant]? What action was taken against [Sergeant B] when I filed a formal complaint against him? He asked me again and again about Dec. 2001 when I filed my complaint against [Sergeant B]!! Even though I told him there had NOT been a complaint fled and that I had not talked to the Chief until after [Sergeant B] had talked to him. He seemed to think I was lying and he felt the need to remind me I would be under oath at the hearing.

I felt very intimidated by [Representative]. He upset me so much I could hardly speak and I was trembling so much I could not even type my journal. [Major W] tried to calm me down by insuring me that this would never happen again. He told me to call [Chief]. After talking to the Chief, I felt better about things. [Major W] would not let me drive home by myself, though. It was probably a good decision because when I got home my blood sugar was 450. (this is very dangerous and my blood pressure was also elevated. I was going to add that I am not exactly a young girl, but let’s face it – I am under such stress.

After my interview with [Representative] on Saturday, I was a bundle of nerves. Couldn’t sleep and I was sick on my stomach. On Sunday (19th) when I learned [Representative] and [Grievant] were on [Agency grounds], my thoughts were “Please God, don’t let him come out here.” I even locked the door to our office. I really do not know why I let him upset me so much. I do know I should not have to left my desk to talk to him. I only told him the truth. When I realized our interview was taped, I was so mad. He reached inside his jacket pocket to turn it on – then off. Had I known before I talked to him, I would not have answered my questions any differently – but I feel I should have been advised I was being taped. [Ms. LD] also noticed him taping her conversation.

After [Representative] had talked to me, he took [Ms. LD] in the Briefing Room. At this time [Grievant] came and told me to call Romeo 30 – tell him to come to the PD to see her. I did what she told me to do.

[Ms. LD] was suppose to be at work at 3:00, but she did not get into the office until 3:17. When she came in, I said “You’re late.” At that time

[Grievant] said to me that I did not have to stay late. When I told her there was no one to monitor the desk, she said why not get [Sergeant B] to do it! [Sergeant B] as doing his guard training on the 18th.

While Grievant was at the Facility on January 18, 2003, she attempted to investigate another employee rumored to have engaged in inappropriate behavior with another employee. She wanted to speak with a witness and had the dispatcher summons him to her location. The witness was so upset with Grievant's behavior that he filed the following complaint:

I, [SSG CR], want to make the following statement under oath: At approximately 1440 on 18 Jan 03 I was advised to call P.D. over motorola radio. I contacted P.D. @ approximately 14:45. I was requested to come to P.D. to talk with [Grievant]. I agreed because I thought it was important and [related] to my mission. I arrived @ P.D. approximately 1515 on this day. [Grievant] called me in to an office in the rear of the building and persisted to ask me question about an incident that did not [relate] to my mission. It did [relate] to an individual on my team. I explained to her that what they do on there own time is there business and if it was on my time then it would be my business. I thought of this as un-professional on her part, I thought of this as interruption to duty on her part. She explained to me that she was on leave also. I found this very confusing. I will file a complaint. Because of the following reasons.

1. Harassment to duty and interrupting my work schedule without going through my chain of command.
2. Informal and arrogant attitude toward an NCO
3. Asking questions that do not concern me and my mission while not on duty hours and I'm on mission time.
4. Putting me in a compromising position of being alone in her office with her without a witness.

I would have thought of better professionalism from an officer on or off duty. I believe if this is professionalism to her she should not even be an officer.

Grievant's Representative attempted to interview the Assistant Fire Chief working at the Facility. The Assistant Fire Chief described his interaction as follows:

On 19Jan03, I was reporting to work at 1630. After I was at work for about 30 minutes [Grievant] and her husband confronted me to ask questions. They walked into the fire station and straight back to my bunkroom where I was preparing for work.²⁸ They immediately started to question me on events that happened back in 1999. I did not have time to tell either party that I did not want to talk to them about this incident. I felt intimidated by

²⁸ The evidence showed that both Grievant and the Representative entered the fire station but only the Representative interviewed the Assistant Fire Chief in the back area of the station.

the couple and their child just coming straight into my place of work, and questioning me on events that happened 3 or more years ago. Into the questioning [Representative] attempted to sway my answers by putting words into my mouth about events that did not ever occur. This whole ordeal has upset me. I do not believe these people should not have harassed me at my work. I found this whole experience uncomfortable and would like to be left out of it. If I am summoned to be at a hearing I will do so. If at all possible I would like to not have this happen at my place of employment.

On January 19, 2003, Grievant and her husband visited Mr. RH. He described this interaction as follows:

On Sunday January 19, 2003 at 6:45 p.m. I received a visit from [Representative] and [Grievant]. [Representative] asked me several questions about some complaints that [Grievant] had filed against the department. After [Representative] hadn't received the answers he was searching for his attitude changed from calm to hostile. I felt [Representative]'s conduct was rude and insulting. I was informed that our entire conversation was recorded. I was not informed of any recording devices on [Representative]'s person. After several attempts to gain information [Representative] got upset and left.

On January 19 and 20, 2003, Grievant and her husband visited Ms. CH. She described her interaction as follows:

January 19, 2003, time approx. 1 p.m. They knocked on door, I did not answer it. They left and came back at 5 p.m. They knocked very hard and tried to turn door knob to open door but it was locked. They tried twice to open my door, then they left.

January 20, 2003. They came back and knocked on door waking me up. I had been working midnight shift. Time was about 12:30 p.m. They left and then returned about 45 minutes later. I then went to [my] living room and looked out. Someone was at the door but there was no car in driveway. I asked who was there and he said [Representative]. I asked what he wanted. He said he needed to talk to me. I told him I had nothing to say to him and if I talked to him that I would have a JAG officer present first. He then asked me if [Chief] had [gotten] to me and I repeated I told you I had nothing to say and will you please leave my house. He then left. I watched him walk up the street to where his car was hidden behind some trees, [Grievant] was in the car. Then they left.

Based on the complaints of employees and others interviewed by the Representative, on March 6, 2003, DMA issued to Grievant a Group III Written Notice

for “unacceptable behavior for which the disciplinary actions are taken has undermined the effectiveness of the agency activities....”

Discussion. The relationship between a grievance and his or her representative in grievance hearings is similar to the relationship between a client and an attorney in other civil disputes. Just as the client expects the attorney to make independent decisions that further the best interests of the client, a grievant expects the representative to do the same. When an attorney makes poor decisions that harm the client’s position, it is the attorney who is at fault and not the client, unless the client was the primary decision-maker behind the poor decision. In this grievance, Grievant is not responsible for the actions of her Representative unless the Agency can demonstrate that Grievant was the primary decision-maker regarding those actions.

There is little doubt that decisions regarding the selection of people to interview and how to conduct the interviews was made primarily or solely by the Representative.²⁹ Grievant trusted her representative to take actions necessary to further her best interests.

All of the individuals interviewed by the Representative felt intimidated by him.³⁰ Rather than telling the Representative that they did not wish to speak with him, the simply ignored him hoping that he would go away. When the Representative continue to pursue questioning the witnesses because they had not told him his company was not welcome, the witnesses complained of the Representative’s behavior. Although the Representative may have been overly persistent, the Agency has overlooked that few witnesses told him to leave them alone and the Representative stopped pursuing those witnesses who did tell him they did not wish to speak with him. Those witnesses who felt intimidated by the Representative should have told him to go away.

The Group III Written Notice for unacceptable behavior must be rescinded.

²⁹ One exception to this statement is that Grievant appears to have asked to speak with SSG CR. She did not realize the SSG CR was in the middle of a mission. SSG CR assumed he was being summonsed to the headquarters for some matter relating to his mission and was angered when he realized he was summonsed for another reason. Since Grievant was not on duty, she should not have summonsed SSG CR. Although her actions were not appropriate, the evidence is unclear what level, if any, of disciplinary action would otherwise have been appropriate. Given the absence of any evidentiary basis by which to judge the seriousness of Grievant’s behavior, the Hearing Officer cannot uphold any disciplinary action against Grievant for calling the SSG. At the discretion of the Agency, a counseling memorandum may be a more appropriate response.

³⁰ Because of the way several potential witnesses were interviewed by the Representative, the attitude of those witnesses changed from being open to providing assistance to Grievant to being reluctant to assist Grievant. For example, by secretly tape recording three of Grievant’s co-workers, the Representative angered these witnesses and caused them to view the Representative and Grievant as hostile parties. Grievant argues the Agency has put pressure on several witnesses to change their stories. There is no evidence to support this allegation. Indeed, it appears that the witnesses who most closely worked with Grievant were the most offended by the Representative’s actions.

DECISION

Grievant's request for relief from alleged retaliation is **denied**.

Grievant's request to rescind a memorandum dated January 21, 2003 is **denied**.

Grievant's request to order revision of her evaluation is **denied**.

Grievant's request to rescind a letter of caution given to her is **denied**.

The Agency is ordered to **rescind** the memorandum dated February 19, 2003 from the Chief to Grievant discussing pre-disciplinary suspension. The Agency is ordered to amend its records to show that Grievant was not suspended beginning February 19, 2003 and thereafter. The Agency is ordered to verify that Grievant was paid salary and benefits in accordance with State policy as if she had not been suspended on February 19, 2003.

Grievant's request for relief from alleged retaliation because the Agency refused to permit her to return to work is **denied**.

The Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal for behavior directed at the Chief is **upheld**.

The Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action for undermining the Agency's effectiveness is **rescinded**.³¹ The Agency is directed to remove the notice from Grievant's personnel file in accordance with State policy.

APPEAL RIGHTS

You may file an administrative review request within **10 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.

³¹ Grievant is not reinstated since the other Group III Written Notice is upheld.

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.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-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. 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.³²

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

³² 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: 5638 / 5695 / 5696 / 5697 / 5698 / 5699-R

Reconsideration Decision Issued: June 11, 2003

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

Grievant contends the Agency did not consider mitigating factors when attempting to determine whether to grant the relief Grievant requested. Grievant argues the Agency’s failure to mitigate would have been demonstrated through the testimony of Ms. MB. Grievant contends the Hearing Officer erred by permitting the Agency Party Designee, Lt. Col. M to cross-examine Ms. MB after Agency counsel had cross-examined her.

DHRM § 1.60(VII)(C) states that disciplinary action may be mitigated. Even if mitigating circumstances exist, an Agency is not obligated to mitigate disciplinary action. If the Hearing Officer assumes for the sake of argument that (1) Ms. MB’s testimony had established that the Agency intended to terminate Grievant immediately after her inappropriate behavior on January 23, 2003 and (2) mitigating circumstances existed and (3) the Agency disregarded those mitigating circumstances, the outcome of Grievant’s appeal is not changed.

The Hearing Officer has independent authority to determine whether mitigating circumstances exist and then reduce disciplinary action accordingly. The Hearing Officer finds that Grievant has not presented sufficient evidence to support mitigation of the Group III resulting in her removal.

Grievant contends the Agency did not timely issue the Written Notices to Grievant. Grievant's argument lacks merit because waiting approximately six weeks after an offense to issue a Written Notice is not an unreasonable period of time. Grievant has cited no policy requiring a specific number of days before which a Written Notice must be issued.

Grievant contends it is not harmless error for the Agency to have incorrectly selected its second step respondent. Grievant has not established that any aspect of her grievance would have changed had the Agency used the second step respondent originally designated. Grievant has not been denied procedural due process.

Grievant's Representative contends the Hearing Officer did not stop the Agency Party from staring him down and that the Hearing Officer and the Agency Party giggled over the Agency Party's actions. The Representative's perception of the hearing is nonsense. The Hearing Officer appropriately admonished both parties when they behaved inappropriately during the hearing. When Grievant's Representative repeatedly raised his voice and used an abrasive tone directed to witnesses, the Hearing Officer admonished the Representative. The Representative complains that the Agency Party stared him down, but the Representative repeatedly baited the Agency Party. When the Representative complained that the Agency Party was staring at him, the Hearing Officer admonished the parties to behave appropriately.³³

Grievant contends the Hearing Officer violated the Rules for Conducting Grievance Hearings regarding Ms. D who "cried and stated how stressful this was on the employees." Grievant is not able to cite a section of the Rule that was violated because the Hearing Officer did not act contrary to the Rules. It is unclear what relief Grievant seeks regarding Ms. B's testimony since it related to the Group III Written Notice that was reversed by the Hearing Officer.

Grievant contends the Hearing Officer was biased against her and in favor of the Agency. The fact that Grievant did not receive all of the relief she sought is not evidence of Hearing Officer bias.³⁴ Grievant has not presented any credible evidence of bias, since no such evidence exists.

Grievant objects to the Hearing Officer having a personal conversation with the Agency Party during a break and assumes there must be a personal relationship between the Hearing Officer and the Agency Party or the Agency. Grievance hearings are intended to be relaxed and informal since these hearings are not court proceedings. To further that atmosphere, the Hearing Officer will engage in pleasantries with all

³³ Grievant's Representative also alleges the Agency Party stared him down in the hallway during breaks. This allegation was not brought to the Hearing Officer's attention.

³⁴ Grievant seems to overlook the numerous documents the Hearing Officer ordered the Agency to produce against the Agency's adamant preference. At Grievant's request, the Hearing Officer allowed a total of three days to hear the evidence. It is unusual for a grievance hearing to extend beyond one or two days.

parties when appropriate.³⁵ Grievant describes the Hearing Officer's conversation as personal. By Grievant's own description, any personal conversation by the Hearing Officer did not relate to the grievance and could not form a basis to show bias.

Grievant contends she was cheated out of three days to file her request for appeal because the decision was originally mailed on a Saturday.³⁶ A request for administrative review must be filed within ten days of the date of the hearing decision. The hearing decision was mailed on the date shown on the decision. Grievant's receipt of the decision is not when the time period begins and, thus, she could not have been cheated out of any days to file her appeal. In any event, Grievant timely filed an administrative appeal.

Grievant objects to the Hearing Officer not reopening the hearing because of a written statement made by Ms. C in a VEC hearing. No basis exists to reopen the hearing as stated by the Hearing Officer in his May 23, 2003 letter. See also the discussion below regarding Va. Code § 60.2-623.

Grievant contends that the Hearing Officer erred when he said the State Police investigation concluded Sergeant B should have responded with a weapon. Grievant contends the comment was the opinion of the Chief. No error was made. The paragraph discussing the incident concludes, "Either way he [Sergeant B] should have had a weapon." Nothing in the paragraph suggests the comments are those of the Chief.³⁷

Grievant objects to the Hearing Officer's conclusion that Grievant was placed on the street at the direction of managers other than the Chief. Grievant simply reargues her position taken during the hearing. Based on the credibility of the witnesses, Grievant was placed on the street along with the other police officers at the direction of the Adjutant General.

Grievant contends the Chief lied under oath and was permitted by the Hearing Officer to change his testimony. The Hearing Officer fully assessed the Chief's credibility. Grievant does not cite what evidence she relies upon to conclude that the Hearing Officer permitted the Chief to change his testimony. No such evidence exists since the Hearing Officer does not dictate the testimony of witnesses.

³⁵ Since Grievant's Representative claims to be aware of a personal conversation between the Hearing Officer and the Agency Party, presumably he was present and able to join the conversation.

³⁶ Grievant objects to the decision being issued on Saturday. The Hearing Officer works on Saturday and if mail is accepted by the U.S. post office, decisions are mailed.

³⁷ Grievant's objective in arguing this point is unclear. Her position was that Sergeant B should have responded with his weapon. The Hearing Officer agrees that Sergeant B should have responded with his weapon.

Grievant contends the Chief could take disciplinary action against Sergeant B. The evidence, however, showed that Sergeant B was not a State employee and, thus, could not be given a Group Written Notice under the State Standards of Conduct.

Grievant disputes hearing decision footnote 16 which states, "The Adjutant General's conclusion is consistent with the information reported by the State Police." The Adjutant General concluded that the "investigation does not substantiate any allegations of illegal or improper conduct by [the Chief]. The State Police report did not find any illegal or improper conduct by the Chief. Footnote 16 is correct. Grievant's assertion is meritless.

Grievant contends her evaluation should not have changed from May 2002 to October 2002. When determining whether an evaluation is consistent with policy, the test is whether the evaluation is arbitrary or capricious. Grievant presented no credible evidence to support the conclusion that her October 2002 evaluation was arbitrary or capricious. Grievant's cites a favorable letter from the Adjutant General, however, he was not Grievant's immediate supervisor. The evidence showed that Grievant's work performance decreased after May 2002. Her performance decreased, in part, because of her fixation with discovering negative information about Sergeant B.

Grievant contends that Sergeant B's "going postal" threat was contrary to DRHM Policy 1.80. Based on the credibility of the witnesses, it is clear that Sergeant B's comment was not intended by Sergeant B to be taken seriously and the comment did not reflect any risk of danger to Grievant. Grievant overreacted thereby forming a basis for the Chief reasonably to question Grievant's judgment.

Grievant contends the Chief took over a month to begin investigating Grievant's charges. The evidence, however, showed that the Chief began speaking with staff as soon as possible after receiving Grievant's complaint, dated June 18, 2002. He spoke with numerous staff and filed a detailed, 15 page report on August 14, 2002. The Chief would have completed his report sooner except that Grievant continued to add allegations. The Chief timely and thoroughly investigated Grievant's allegations.

Grievant objects to the hearing decision regarding a January 21, 2003 memorandum excluding Grievant from the workplace and counseling her regarding contacting another employee. Grievant contends that under DHRM Policy 1.60 only suspended employees may be prohibited from entering the workplace. Grievant's interpretation of policy is incorrect. Agencies are like any other property owner and can control who may enter agency property. It was inappropriate for Grievant to have summoned Romeo 30 to the Police building. The Agency appropriately counseled her.

Grievant contends the letter of caution given to her should be rescinded. The evidence showed that the Agency followed all necessary procedures and properly issued the letter of caution.

Grievant contends the Agency has not met its burden of proof to show that she should be removed from employment. The evidence showed that Grievant's behavior was so egregious that removal was appropriate. Her behavior was inconsistent with that expected of a sworn law-enforcement officer. Her behavior was directed at the Chief of Police in a police building. Grievant points out that she was under a doctor's care for depression. Grievant traveled to the Agency's facility for the purpose of advising the agency that she intended to return to work shortly. It is inconsistent for Grievant to suggest she is ready to return to work but she is so depressed that she could not control her actions. No credible evidence was presented suggesting Grievant would have behaved differently had she not been suffering from depression.

Grievant contends she is willing to return to the Agency and begin rebuilding her relationship with the Chief. Even if the Hearing Officer assumes Grievant were able to rebuild her relationship with the Chief, Grievant and her Representative have so alienated nearly every other employee at her former workplace, that it would be impossible for Grievant to be an effective employee. Even Grievant's closest former co-worker and friend testified she would prefer that Grievant not return to the Agency. Grievant argues the Agency could transfer her to another position within the Agency. The Hearing Officer lacks the authority to order an agency to transfer an employee. No evidence was presented suggesting any other positions existed to which Grievant could be transferred.

Grievant argues that the Hearing Officer's decision is incorrect based on the decision of an Appeals Examiner with the Virginia Employment Commission. Va. Code § 60.2-623(B) states:

Information furnished the Commission under the provisions of this chapter shall not be published or be open to public inspection, other than to public employees in the performance of their public duties. Neither such information, nor any determination or decision rendered under the provisions of §§ 60.2-619, 60.2-620 or § 60.2-622, shall be used in any judicial or administrative proceeding other than one arising out of the provisions of this title; however, the Commission shall make its records about a claimant available to the Workers' Compensation Commission if it requests such records. The Commission may also, in its discretion, furnish copies of the transcript of hearings to any party. (Emphasis added).

The VEC decision does not form an evidentiary basis to change the grievance decision. A grievance decision is based on the evidence presented to the Hearing Officer and that evidence can be substantially different from the evidence presented to the VEC. For example, the Hearing Officer heard over 21 hours of testimony from 29 people. Only three people appeared before the Appeals Examiner. VEC evidentiary hearings rarely exceed a few hours. The Appeals Examiner's understanding of the dispute between the parties is not based on the same evidence presented to the Hearing Officer. Interpreting DHRM Standards of Conduct is outside of an Appeals Examiner's

expertise. In short, the outcome of a unemployment compensation hearing has no bearing on a grievance hearing.

In conclusion, Grievant's request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, 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 10 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. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Carl Wilson Schmidt, Esq.
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the matter of the
Department of Military Affairs
July 2, 2003

The grievant, through her representative, has appealed the hearing officer's May 23, 2003, decision in Case Nos. 5638/5695/5696/5697/5698/5699. The grievant is challenging the decision because she contends that it is inconsistent with state and agency policy as it relates to issuing disciplinary actions. The agency head, Ms. Sara Redding Wilson, has requested that I respond to this appeal.

FACTS

The Department of Military Affairs employed the grievant as a Law Enforcement Officer I until she was terminated. On March 6, 2003 she was issued a Group III Written Notice with removal for undermining the agency's effectiveness and another Group III Written Notice with removal for use of insulting and offensive language towards her supervisor, moving aggressively towards her supervisor, and disruptive conduct. She filed a grievance challenging both of the Group III Written Notices with removal. Prior to her termination, she had filed six other grievances (none related to discipline). The Department of Employment Dispute Resolution (EDR) consolidated those grievances and the grievance contesting her termination so the same hearing officer could hear them at the same time.

The hearing officer convened a three-day hearing during which he heard all the grievances. He issued his decision on all the grievances on May 24, 2003. In his decision the hearing officer rescinded one Group III Written Notice (undermining the agency's effectiveness). He upheld the other Group III Written Notice (use of insulting and offensive language towards her supervisor, aggressive movement towards her supervisor, disruptive conduct) with removal. In the decision, the hearing officer also denied the grievant's requests to rescind a January 21, 2003, memorandum and letter of caution, to order a revision of her performance evaluation, and for relief for her allegation of retaliation, all issues contained in the other grievances. In one appeal to the hearing after the decision was rendered, the grievant requested that the hearing officer reconsider the decision and in another to reopen the case based on the presentation of new evidence. The hearing officer neither changed his decision in the reconsideration response nor reopened the case. The grievant also submitted a request to the EDR for an administrative review. The ruling by the EDR issued in response to the grievant's request for an administrative review did not recommend that the hearing officer modify his decision.

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 material issues and grounds in the record for

those findings”.* In cases involving discipline, the hearing officer reviews the facts to determine if the cited actions constituted misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action. By statute, the Department of Human Resource Management (DHRM) has been given the authority to determine whether the hearing officer’s decision is consistent with policy as promulgated by the DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. The 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.

In the instant case, this Agency finds no evidence that the hearing officer’s decision in directing the rescission of one the Group III Written Notices and not granting any other relief violates any personnel policy promulgated by the DHRM or the Department of Military Affairs. While the grievant may not agree with the hearing officer’s decision, the Department of Human Resource Management has no authority to substitute its judgment for that of the hearing officer with respect to these findings. In light of this, there is no basis for this Department to interfere with the hearing officer’s decision.

If you have any questions regarding this correspondence, please call me at (804) 225-2136.

Sincerely,

Ernest G. Spratley, Manager
Employment Equity Services

* *Grievance Procedure Manual* § 5.9, p. 15.