Issue: Group III Written Notice with 5-day suspension, demotion and transfer (acts which undermine agency's effectiveness); Hearing Date: 06/10/03; Decision Issued: 06/12/03; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 5734; **Administrative Review: Hearing Officer Reconsideration Request received 06/20/03; Reconsideration Decision Date: 06/23/03; Outcome: No newly discovered evidence or incorrect legal conclusions. Request to reconsider denied. Administrative Review: EDR Ruling Request received 06/20/03; EDR Ruling dated 08/25/03; Outcome: HO neither abused his discretion nor exceeded his authority. Grievant has option to appeal to DHRM for issue regarding policy interpretation [Ruling No. 2003-123]. Administrative Review: DHRM Ruling Request received 09/04/03; DHRM Ruling dated 10/16/03; Outcome: HO's interpretation and application of DHRM Policy 1.60 is appropriate.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5734

Hearing Date: June 10, 2003
Decision Issued: June 12, 2003

APPEARANCES

Grievant
Representative for Grievant
Assistant Warden
Advocate for Agency
Six witnesses for Agency

ISSUES

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

FINDINGS OF FACT

The grievant filed a timely appeal from a Group III Written Notice issued for acts which seriously undermine the effectiveness of the agency's activities or the employee's performance.[1] As part of the disciplinary action, grievant was suspended for five days, demoted with a pay reduction of ten percent, and placed in a different position at another correctional facility. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[2]

The Department of Corrections (DOC) (Hereinafter referred to as "agency") has employed grievant for 20 years. He has been a corrections sergeant for the past five years.[3]

Grievant received a Group I Written Notice in 1994 for using abusive language.[4] He was counseled in October 1999 for demeaning the authority of the chain of command and warned that he could face disciplinary action in the future for a repetition of such behavior.[5] Grievant was counseled for being loud and disrespectful in July 2000.[6]

Grievant supervises five corrections officers. His subordinates and other officers wrote statements attesting to comments made by grievant in December 2002 and January 2003.[7] Grievant had requested the telephone number of one subordinate officer's girlfriend, humiliated him about the fact that his girlfriend had taken his furniture, and stated that the girlfriend had physically beaten the officer. These statements were made in front of other corrections officers. He also made a demeaning statement about the officer's work performance to his face in the presence of inmates when he said, "If you can't be an officer, get a job at Pizza Hut."

When the Chief of Security became aware of these comments, he met with the five officers supervised by grievant on February 7, 2003.[8] After the officers verbally related what they had heard grievant say, each was asked to write a statement repeating their concerns. Subsequently, grievant admitted to having made inappropriate comments to one particular officer.[9] Grievant's supervisor, a lieutenant, summarized the information gleaned from all corrections officers including grievant and filed his report with his direct supervisor and the

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[1] Exhibit 1. Written Notice, issued February 13, 2003.
[2] Exhibit 2. Grievance Form A, filed March 7, 2003.
[3] Exhibit 5. Grievant's Employee Work Profile, October 25, 2001 – November 24, 2002.
[4] Exhibit 4, p. 1. Written Notice, issued February 23, 1994.
[5] Exhibit 4, p. 14. Written Counseling memorandum to grievant, October 19, 1999.
[6] Exhibit 4, p. 5. Memorandum from Chief of Security to Warden, July 24, 2000.
[7] Exhibit 1. pp. 3-10. Written statements of corrections officers.
[8] Exhibit 1. pp. 11-12. Memorandum from Chief of Security to Warden, February 10, 2003.
[9] Exhibit 1, p. 2. Memorandum from grievant, February 7, 2003.

Chief of Security.[10] On February 13, 2003, the warden issued the disciplinary action demoting and transferring grievant.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.[11]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

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[10] Exhibit 3. Memorandum from lieutenant to captain and major, February 9, 2003.

[11] § 5.8 Department of Employment Dispute Resolution (EDR), *Grievance Procedure Manual*, effective July 1, 2001.

Section V.B.3 of the Standards of Conduct Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.[12] The Department of Corrections (DOC) has promulgated its own Standards of Conduct patterned on the state Standards, but tailored to the unique needs of the Department. Section 5-10.7 of the DOC Standards of Conduct addresses the general guideline regarding offenses and states:

> The offenses listed in this procedure are intended to be illustrative, not all-inclusive. Accordingly, an offense that in the judgment of the agency head, although not listed in the procedure, undermines the effectiveness of the agency's activities or the employee's performance, should be treated consistent with the provisions of this procedure.[13]

The agency has demonstrated, by a preponderance of evidence, that grievant inappropriately humiliated a subordinate about his personal domestic life, made demeaning statements to the same officer, and treated some subordinates in a manner that made them feel stressed. The weight of testimony from the four officers who testified, plus the written statements of four other officers, outweighs grievant's denial. Such behavior not only undermines the effectiveness of the agency's activities but diminishes grievant's own performance by causing corrections officers to have less respect for his authority.

Grievant contends that the agency incorrectly gave consideration to an inactive disciplinary action when determining the discipline in the instant case. The Standards of Conduct policy states:

> Written notices that are no longer active as stated in *Sections 5-10.19A-B* above shall not be taken into consideration in the accumulation of notices or the degree of discipline for a new offense.[14]

The agency did not consider grievant's inactive disciplinary action in the "accumulation of notices" or in determining the "degree of discipline." However, it is permissible for an agency to evaluate whether an employee has been previously counseled or disciplined for same or similar offenses as indicia of whether the employee is engaging in a repetitive pattern of similar behavior. It was therefore appropriate to review these past corrective actions to ascertain whether grievant had previously been warned about such behavior.

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[12] DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.
[13] Exhibit 7. Section 5-10.7C, DOC Procedure No. 5-10, *Standards of Conduct*, June 15, 2002.
[14] Exhibit 7. Section 5-10.19D, DOC Procedure No. 5-10, *Ibid.*

Grievant complained that the corrections officers' statements were "programmed written one-sided" and that this was not in compliance with "DOP 421."[15] However, grievant failed either to explain his complaint or to provide the hearing officer with a copy of "DOP 421." Therefore, it is not possible to respond to this complaint.

Grievant emphasized during the hearing that the language used in corrections facilities is often vulgar and profane. The hearing officer takes administrative notice that inmates frequently use such language and that it is not uncommon for corrections staff to use rough language at times. However, the issue in this case is not grievant's use of the term "whip your ass." Rather, the concern is that grievant made comments that were unprofessional, demeaning, and created an atmosphere that subordinates felt was unnecessarily stressful. It appears that grievant does not understand that the same banter that may be acceptable among peers is not acceptable when it is directed from a higher-ranking person to a subordinate.

Grievant objects that his subordinates had not initiated the written statements prepared at the February 7, 2003 meeting. Whether the corrections officers intiated the statements, or whether they wrote them at the request of management is not significant. What is significant is that each officer wrote his or her own statement, and related what they had personally observed and heard. Moreover, those officers who testified at the hearing affirmed their written statements and confirmed, under oath, that no one had told them what to write.

The Standards of Conduct do not list a specific example that incorporates grievant's offense. Therefore, the offense must be treated consistent with the provisions of Sections 5-10.7C and 5-10.13A. Accordingly, one must look to the seriousness of the offense. In this case, grievant's behavior was demeaning and contributed to an offensive work environment for corrections officers. Moreover, it was recurrent behavior over a period of time. The agency concluded that the offense was sufficiently serious that the grievant should not remain in a supervisory position. Grievant has not demonstrated any reason to dispute that assessment.

DECISION

The decision of the agency is hereby affirmed.

The Group III Written Notice issued on February 13, 2003, demotion and salary reduction, five-day suspension, and placement in a new position are UPHELD. The disciplinary action shall remain active for the period specified in Section 5-10.19.A of the Standards of Conduct.

[15] Exhibit 2, p. 5. Attachment to Grievance Form A.

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.

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.[16] 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.[17]

[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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David J. Latham, Esq.
Hearing Officer

[16] 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).

[17] 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: 5734

Hearing Date: June 10, 2003
Decision Issued: June 12, 2003
Reconsideration Received: June 20, 2003
Reconsideration Response: June 23, 2003

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 10 calendar days of the date of the original hearing decision. A request to reconsider a decision is made to the hearing officer. 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.[18]

OPINION

During the hearing, grievant objected to the agency's submission of an inactive disciplinary action. He has again raised the same objection in his request for reconsideration. Grievant's objection was addressed in the Decision issued on June 12,

[18] § 7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

2003.[19] Even though a disciplinary action is inactive, it constitutes permissible evidence if offered to demonstrate that grievant has been previously warned about *similar* unacceptable behavior. Abusive language toward coworkers (1994), and the conduct disciplined in the instant case are similar offenses.

Grievant offers commentary about his counseling of two subordinates in July 2000 but fails to demonstrate the relevance of such counseling to his own conduct.

Grievant objects that the agency's evidence included documentation he had not previously seen. In virtually every grievance hearing, agencies produce at least some evidence that grievants may not have seen previously. In order to give grievant an opportunity to properly prepare his case, the agency gave grievant a copy of all documents almost one week prior to the hearing.[20] Therefore, the agency was in compliance with the grievance procedure. Moreover, grievant has not shown that there would be any material difference in the outcome of this hearing if he had seen such documentation prior to qualification of his grievance for hearing.

Finally, grievant contends that the agency's first witness could not be properly questioned because his testimony was taken by telephone.[21] In fact, the witness was examined by the agency and hearing officer, and cross-examined by grievant's representative without difficulty. Grievant's representative did not object that he was unable to question the witness, and in fact, had unlimited opportunity to ask all questions he had.

DECISION

Grievant has not proffered any newly discovered evidence, or any evidence of incorrect legal conclusions. The hearing officer has carefully considered grievant's arguments and concludes that there is no basis to change the Decision issued on June 12, 2003.

APPEAL RIGHTS

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

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[19] Case No. 5734, p. 4. *Decision of Hearing Officer*, issued June 12, 2003.

[20] Pursuant to the EDR Rules for Conducting Grievance Hearings, effective July 1, 2001, hearing officers may issue orders for the production of documents. This Hearing Officer's policy and practice is to require both parties to provide each other (as well as the hearing officer) with a copy of all documents to be used in the hearing not later than four working days prior to the hearing. In this case, the agency provided grievant a copy of its exhibits on June 4, 2003 – six calendar days prior to the hearing.

[21] When it is impossible or impractical for a witness to attend a hearing in person, his or her testimony may be received by speakerphone.

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 HRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose.[22]

David J. Latham, Esq.
Hearing Officer

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