Issue: Group III Written Notice with termination (failure to physically intervene and use force to protect the safety of a ward and prevent commission of a crime); Hearing Date: 12/05/05; Decision Issued: 12/07/05; Agency: DJJ; AHO: David J. Latham, Esq.; Case No. 8213; Outcome: Employee granted partial relief; **Administrative Review: HO Reconsideration Request received 12/22/05; Reconsideration Decision issued 12/27/05; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 12/22/05; EDR Ruling No. 2006-1228 issued 02/02/06; Outcome: HO's decision affirmed; Administrative Review: DHRM Ruling Request received 12/22/05; DHRM Ruling issued 06/09/06; Outcome: HO's decision affirmed.**

# *COMMONWEALTH of VIRGINIA*

***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 8213

Hearing Date: December 5, 2005
Decision Issued: December 7, 2005

## PROCEDURAL ISSUE

Grievant requested as part of his relief that a "gag" order be issued. A hearing officer does not have authority to require an agency to restrict free speech.[1] Therefore, the hearing officer is without authority to direct this form of relief requested by grievant. Such decisions are internal management decisions made by each agency, pursuant to Va. Code § 2.2-3004.B, which states in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government." However, a grievance and the discipline that precipitated the grievance are confidential personnel matters. As such, agencies are expected to restrict discussion of this grievance only to those who have a business need to know.

## APPEARANCES

Grievant
Attorney for Grievant
Two witnesses for Grievant
Assistant Superintendent
Representative for Agency
Two witnesses for Agency

[1] § 5.9(b)8. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, August 30, 2004.

## ISSUES

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

## FINDINGS OF FACT

The grievant filed a timely grievance from a Group III Written Notice for failure to physically intervene and use proper force to protect the safety of wards and to prevent the commission of a crime.[2] As part of the disciplinary action, grievant was removed from state employment effective July 21, 2005. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing.[3]

The Department of Juvenile Justice (hereinafter referred to as "agency") has employed grievant as a juvenile correctional officer for ten years. Grievant has been rated Contributor on his three most recent performance evaluations.[4] He has no prior disciplinary actions.

During training of corrections officers, instructors advise that during an unsafe situation, officers are supposed to call for assistance and monitor the situation until help arrives.[5] However, even though an officer may be fearful for his own safety in a situation, the officer also has a responsibility to protect cadets who may be in danger. Agency policy provides that physical force is authorized in the defense of others and to prevent the commission of a crime.[6] The policy also states that physical force should only be used when other alternatives have failed or appear unsuitable.

At 6:50 p.m. on June 16, 2005, grievant and one other corrections officer were on duty in a pod with approximately 33 cadets.[7] Grievant was monitoring inmate showers in the shower room.[8] Suddenly, one cadet physically attacked another cadet who had been sitting and talking on the telephone. Almost immediately a second cadet joined in the attack. Grievant heard the noise and came out of the shower room. Within a second or two, a third cadet started

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[2] Agency Exhibit 7. Group III Written Notice, issued July 21, 2005.
[3] Agency Exhibit 7. *Grievance Form A*, filed August 19, 2005.
[4] Grievant Exhibit 9. Performance Evaluations, 2002, 2003 & 2004.
[5] Grievant Exhibit 2. Memorandum from training instructor, July 18, 2005.
[6] Grievant Exhibit 3. Institutional Operating Procedure (IOP) 218, *Use of Physical Force*. [NOTE: If the use of physical force is authorized, it is implicit that officers are *required* to use such force in appropriate circumstances.]
[7] Agency Exhibit 6. There are about 20 cadets visible on the videotape. Testimony established that others were in the showers and/or in their rooms for a total of about 33 in the pod.
[8] Agency Exhibit 8. Grievant's *Institutional Incident Report*, June 16, 2005.

toward the fracas to help defend the cadet who had been attacked.[9] Several other cadets then attacked the third cadet and the two beatings were taking place at the same time. Grievant called on his radio for assistance and stood back against the wall; he did not attempt to intervene to prevent the attacks. The other officer also called on her radio for help and was semi-trapped in a corner by the showers. During the next several seconds, one fight involved two cadets beating one cadet and in the second melee, seven cadets attacked another cadet. Just before other corrections officers arrived, grievant told inmates to stop and raised his hands to get them to disperse; some did back off at this point. Within a few more moments, other corrections officers responded to the call for help and entered the pod. The attacking cadets then immediately backed off and ceased fighting. The two cadets who had been attacked were taken to the infirmary and treated for scratches, bloody nose, lacerations, bruises, and a broken tooth.[10]

The surveillance tape of the incident consists of a series of still pictures taken approximately 3-4 times per second by a video system and recorded on a computer disc. The agency provided to the hearing officer and grievant's attorney a videotaped copy of the computer recording. The quality of the tape is poor because it cannot be played at real-time speed, the images are out of focus, the action took place on the side of the pod farthest away from the camera, and there is no audio track. Nonetheless, the tape is sufficient to verify the basic facts of the attacks and grievant's non-intervention during the attacks.

The second officer claims that both she and grievant attempted to break up the beatings[11] but the videotape does not reflect any physical intervention by either officer until other officers entered the building. The second officer who had been present at the beginning of the incident resigned her position during the interview conducted by the investigator.

The agency's investigation noted a concern about the cadet-to-staff ratio at the time of this incident.[12] Agency policy requires a cadet-to-staff ratio of 10:1 during waking hours.[13] This incident occurred in the early evening just after dinner and the ratio was about 17:1.

## 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

[9] Agency Exhibit 2. Sergeant's Investigation, June 16, 2005.
[10] Agency Exhibit 1. *Institutional Incident Reports* detailing medical treatment to the two attacked cadets, June 16, 2005.
[11] Agency Exhibit 5. Second officer's *Institutional Incident Report*, June 16, 2005.
[12] Grievant Exhibit 1. *Investigation*, June 23, 2005.
[13] A ratio of 16:1 is allowed during sleeping hours.

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. In all other actions the grievant must present his evidence first and prove his claim by a preponderance of the evidence.[14]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management (DHRM) promulgated *Standards of Conduct* Policy No. 1.60 effective September 16, 1993. The *Standards* provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Section V.B of Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.[15]

The agency asserts that grievant failed to physically intervene and use force to protect the safety of a ward and prevent commission of a crime. The agency concludes that grievant failed to comply with IOP-218 which authorizes the use of force in an incident such as occurred on June 16, 2005.

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[14] § 5.8, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

[15] Agency Exhibit 4. DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

The situation grievant faced was difficult at best. The evidence supports a conclusion that certain wards had conspired to attack two wards at the same time. When they did so, nine people almost immediately joined in the beatings of the two hapless cadets. At the time the attacks began, grievant was in the shower area. When he entered the pod area, the two attacks were already well under way. The situation, as evidenced by the videotape, was extremely fast-moving, volatile, and involved an attack by nine cadets. Grievant was aware of the policy authorizing the use of force but he was also mindful of the training he had received which states that staff safety is just as important as cadet safety. Grievant had to make a quick judgment call as to whether he should attempt the use of force or follow his training to call for help and monitor the situation until help arrived. Grievant opted to avoid the use of force because with the large number of cadets, he was concerned they could turn on him.

Grievant could not have prevented the start of the two attacks because they occurred when he was in the shower area. As the agency acknowledges, grievant also could not have prevented all the blows rained on the two cadets. However, as the agency points out, there was a brief lull in the attack on one cadet when grievant could have assisted him from the floor and locked him in a room to prevent further attacks. Accordingly, when grievant had the opportunity, he did not take action that might have prevented further injury to the cadet.

Grievant's decision not to intervene and assist one of the cadets was a serious offense. Grievant argues that the disciplinary action should be a Group II Written Notice because the offense was akin to a failure to comply with established written policy. However, grievant's failure to comply with policy was also equivalent to the violation of a safety rule where there is a threat of bodily harm – a Group III offense. Procedure IOP-218 addresses the safety of cadets and, to that extent, constitutes a type of safety rule. And, as the facts of this incident substantiate, there was not only a threat of bodily harm, but the cadets actually suffered injuries during the beatings. Therefore, it is concluded that grievant's offense was a Group III offense.

Mitigation

The normal disciplinary action for a Group III offense is removal from employment. The policy provides for the reduction of discipline if there are mitigating circumstances such as (1) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or (2) an employee's long service or otherwise satisfactory work performance. In this case, grievant has both long service and an otherwise satisfactory performance record. At the hearing, the assistant superintendent testified on cross-examination by grievant that grievant's length of service and past good record had been considered. However, on the written notice, the agency stated that mitigation was not an option.

A hearing officer is required to give an appropriate level of deference to actions by agency management. However, where discipline exceeds the limits of reasonableness, the discipline may be mitigated in appropriate circumstances. This case presents such circumstances. Grievant has 10 years of state service with this agency. His record is one of satisfactory or better performance. He has no record of any prior disciplinary actions. Although grievant should have responded differently during this incident, he did not *deliberately* violate agency procedure. In the chaotic situation he was suddenly confronted with, he followed the training admonition to call for assistance and monitor the situation. It is undisputed that such an instruction was part of the training he received. Unfortunately, this instruction conflicts with grievant's duty to take action to protect cadet safety. In hindsight, it is easy to conclude that grievant had an opportunity to take palliative action. Certainly, if grievant is confronted with a similar situation in the future, he now knows that he must take reasonable actions to protect cadet safety even if it might involve possible risk to himself. Finally, the unit was understaffed during this incident. Based on agency staffing requirements, there should have been at least one more corrections officer on duty in the pod. No evidence of any aggravating circumstances has been presented. The mitigating circumstances in this case are such that removal from employment exceeds the limits of reasonableness.

## DECISION

The disciplinary action of the agency is modified.

The Group III Written Notice issued on July 21, 2005 is hereby UPHELD.

Grievant's removal from employment is RESCINDED. In lieu of removal an unpaid suspension of 30 days is imposed. Grievant is reinstated to his position with back pay (from which any interim earnings must be deducted) from the date suspension ends until he is reinstated. He is also awarded full benefits and seniority.

Grievant is further entitled to recover a reasonable attorney's fee, which cost shall be borne by the agency.[16] Grievant's attorney is herewith informed of his obligation to timely submit a fee petition to the Hearing Officer for review.[17]

[16] Va. Code § 2.2-3005.1.A & B.

[17] *See* Section VI.D, *Rules for Conducting Grievance Hearings*, effective August 30, 2004. Counsel for the grievant shall ensure that the hearing officer *receives*, within 15 calendar days of the issuance of the hearing decision, counsel's petition for reasonable attorneys' fees.

## APPEAL RIGHTS

You may file an administrative review request within **15 calendar days** from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Address your request to:

> Director
> Department of Human Resource Management
> 101 N 14th St, 12th floor
> Richmond, VA 23219

3. If you believe the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Address your request to:

> Director
> Department of Employment Dispute Resolution
> 830 E Main St, Suite 400
> Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.[18] 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.[19]

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[18] 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).

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

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

*S/David J. Latham*

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David J. Latham, Esq.
Hearing Officer

## DECISION OF HEARING OFFICER

In re:

Case No: 8213

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| Hearing Date: | December 5, 2005 |
| Decision Issued: | December 7, 2005 |
| Reconsideration Request Received: | December 22, 2005 |
| Response to Reconsideration: | December 27, 2005 |

APPLICABLE LAW

A hearing officer's original decision is subject to administrative review. A request for review must be made in writing, and *received* by the administrative reviewer, within 15 calendar days of the date of the original hearing decision. A request to reconsider a decision is made to the hearing officer. A copy of all requests must be provided to the other party and to the EDR Director. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.[20]

**OPINION**

Grievant requests reconsideration of the Decision that reinstated him to employment, thereby reducing the discipline to a 30-day suspension in lieu of removal.

[20] § 7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

Grievant has not identified any constitutional provision, statute, regulation, or judicial decision as a basis to challenge the hearing officer's conclusions of law. Grievant takes issue with the hearing officer's Opinion. The grievant's disagreements, when examined, simply contest the weight and credibility that the hearing officer accorded to the testimony of the various witnesses at the hearing, the resulting inferences that he drew, or the characterizations that he made. Such determinations are entirely within the hearing officer's authority.

## DECISION

Grievant has not proffered either 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 December 7, 2005.

## APPEAL RIGHTS

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

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or HRM, the hearing officer has issued a revised decision.

### *Judicial Review of Final Hearing Decision*

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose.[21]

*S/David J. Latham*

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David J. Latham, Esq.
Hearing Officer

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

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Department of Juvenile Justice
June 9, 2006

The grievant, through his representative, has appealed the hearing officer's December 7, 2005, decision in Grievance No. 8213. The grievant is contesting the hearing officer's application of the Department of Human Resource Management's (DHRM) Policy No. 1.60, and his interpretation of policy. The agency head of DHRM has requested that I respond to this appeal.

## FACTS

The Department of Juvenile Justice employed the grievant as a Juvenile Corrections Officer until he was issued a Group III Written Notice and removed on July 21, 2005. On July 21, 2005, the grievant was issued a Group III Written Notice with termination for failure to intervene physically and use proper force to protect the safety of the wards and to prevent the commission of a crime in violation of IOP-218. The grievant filed a grievance and the hearing officer issued a decision dated December 7, 2005. In his decision the hearing officer upheld the issuance of the Group III Written Notice but reinstated the grievant with a 30-day suspension.

In response to a challenge by the grievant to the Department of Employment Dispute Resolution (EDR) that the hearing officer failed to require the agency to prove its case by a preponderance of the evidence, EDR concluded that the hearing officer's decision properly concluded that the agency proved, by the preponderance of the evidence, that the grievant committed the acts that he was accused of committing. The EDR deferred to the DHRM to determine whether the hearing officer properly determined that the grievant's behavior constituted misconduct and, if so, what is the proper level of discipline. That agency also requested that DHRM determine whether the hearing officer erred in his interpretation of state and agency policy.

The evidence reveals that the grievant and another corrections officer were on duty when several wards attacked a single ward and inflicted severe injuries on that individual. The evidence also indicates that while he called for backup help, neither the grievant nor the other corrections officer intervened until additional personnel arrived. While the grievant stated that he followed instructions he received during training, IOP-218 provides guidance as to when officers should intervene and the steps to be taken during intervention. In the present case, the grievant was charged

with not taking the necessary steps to protect the ward from injury when he was attacked. He was issued a Group III Written Notice with termination.

The relevant policy, the Department of Human Resource Management's Policy No. 1.60, states that it is the Commonwealth's objective to promote the well being of its employees in the workplace and to maintain high standards of professional conduct and work performance. This policy also sets forth (1) standards for professional conduct, (2) behavior that is unacceptable, and (3) corrective actions that agencies may impose to address behavior and employment problems. Section V, Unacceptable Standards of Conduct, of that policy sets forth examples of unacceptable behavior for which specific disciplinary action may be warranted. The examples serve as guides and are not all-inclusive. Also, DJJ IOP-218 provides guidance as to procedure that employees should take when faced with the circumstances that the grievant faced.

## DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found but the hearing officer determines that the disciplinary action is too severe, he may reduce the discipline. By statute, the Department of Human Resource Management has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by this Agency or the agency in which the grievance is filed. The challenges 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 present case, DHRM has been charged with determining whether the hearing officer properly determined that the grievant's behavior constituted misconduct and whether the discipline was consistent with policy. Concerning whether the grievant's behavior constituted misconduct, the evidence supports that the grievant did not follow the provisions of IOP-218 when dealing with the disturbance in the facility, even though testimony revealed that he had been trained to exercise caution regarding personal safety when dealing with disturbances. Given that this represents an evidentiary issue only, the DHRM has no authority to intervene in this matter.

Concerning whether the offense was properly classified as a Group III Written Notice, the Standards of Conduct Policy provides only a guide, not an all-inclusive list, of the kinds of violations that may warrant corrective action and the corresponding level of discipline action. Therefore, this Agency has no basis for interfering with the application of the hearing officer's decision.

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Ernest G. Spratley, Manager
Employment Equity Services