Issue: Group II Written Notice (inappropriate comments and physical gestures towards a ward); Hearing Date: 09/05/06; Decision Issued: 09/06/06; Agency: DJJ; AHO: David J. Latham, Esq.; Case No. 8416; Outcome: Agency upheld in full; **Administrative Review: HO Reconsideration Request received 09/14/06; Reconsideration Decision issued 09/18/06; Outcome: Original decision affirmed.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8416

Hearing Date: September 5, 2006
Decision Issued: September 6, 2006

APPEARANCES

Grievant
Attorney for Grievant
Superintendent
Three witnesses for Agency

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

Grievant filed a timely grievance from a Group II Written Notice for inappropriate comments and physical gestures towards a ward.[1] The second step respondent reduced the disciplinary action to a Group I Written Notice. The

[1] Exhibit 1. Group II Written Notice, issued April 4, 2006.

grievant continued to grieve the disciplinary action and, following failure of the parties to resolve the grievance at the third resolution step, the agency head reinstated the Group II Written Notice and qualified the grievance for hearing.[2] The Department of Juvenile Justice (hereinafter referred to as "agency") has employed grievant as a juvenile correctional officer for nine years. Grievant has one prior active disciplinary action – a Group II Written Notice for unsatisfactory work performance.[3]

On February 16, 2006, grievant was temporarily assigned to a different housing unit because of a staffing shortage on her shift. This particular unit houses sexual offenders. Cadets in that unit are prohibited from making sexual references. Cadet B used a telephone with permission but used profanity while speaking on the telephone. The senior corrections officer told him not to use profanity. Grievant then stated, "Don't worry about [cadet B]; he ain't but this big."[4] As she made the statement, she held her thumb and forefinger about an inch apart. The senior officer told grievant to leave cadet B alone.

About 20 minutes later, cadets were taking showers; each cadet was supposed to receive three minutes to shower. Grievant was controlling the water flow from a valve located in the sergeant's office. After cadet B took his shower, he complained that grievant had cut off the water in his shower after only one minute. Another cadet showering at the same time stated that grievant had turned off the water after about 90 seconds.[5] Grievant told cadet B that he had been beaten up at another facility and should not act out now. Cadet B said, "You're wrong, I went to [a different facility] and I got my rocks off."[6] The senior officer heard this statement, assumed the cadet was using the term as it is commonly used,[7] and told the cadet she would record what he said in the sexual misconduct behavioral logbook. The cadet became angrier and the senior officer tried to calm him down and escorted him to his cell. As cadet B walked down the hall away from grievant, grievant continued to laugh, stick out her tongue, and verbally taunt him. At cadet B's request, the senior officer called a sergeant to the building. The sergeant spoke with the cadet who complained that grievant had cheated him out of his shower.[8]

In April 2006, cadet B wrote a statement which was delivered to grievant by another correctional officer. He expressed his belief that grievant's comment about his small size was not a reference to his penis, and complimented her on

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[2] Exhibit 2. *Grievance Form A*, filed April 21, 2006.
[3] Exhibit 1. Group II Written Notice, issued September 30, 2004.
[4] Exhibit 3. Cadet B's witness statement, February 16, 2006.
[5] Exhibit 3. Witness statement of cadet who was showering at same time as cadet B, February 20, 2006.
[6] The cadet asserts that the expression "got my rocks off" refers to being the victor in a physical fight.
[7] The term "get your rocks off" is commonly used to mean having an orgasm or, having a really good time. *See*: http://www.urbandictionary.com/define.php?term=get+your+rocks+off.
[8] Exhibit 3. Sergeant's incident report, February 17, 2006.

her relationships with cadets.[9] However, in June 2006, cadet B wrote another letter to a corrections captain stating that he did not want to be placed in the same unit as grievant because he believed she was angry about being disciplined.

Grievant had previously worked at another juvenile correctional center. At that time, cadet B was also assigned to that facility. During his stay there, he had repeatedly "disrespected" grievant.[10] Cadet B believes grievant still harbors a grudge against him for his behavior toward her at that facility.

Grievant was absent from work from February 23 to March 8, 2006 alleging that she was ill. However, the agency subsequently learned that she had been working on a part-time job for a different employer.[11] She was counseled in writing that using sick leave to work a second job is prohibited and could result in disciplinary action.[12] During the last week of August 2006, grievant was again found to have used sick leave to work at her second job.

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.

[9] Exhibit 2. Cadet B's witness statement, April 20, 2006.
[10] Exhibit 3. Investigation Report, March 30, 2006.
[11] Exhibit 3. Id.
[12] Exhibit 4. Memorandum from lieutenant to grievant, April 4, 2006.

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 grievant must present her evidence first and prove her claim by a preponderance of the evidence.[13]

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 II offenses include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal from state employment. Failure to follow established written policy is an example of a Group II offense.[14]

Grievant denies making both the comment about size and the hand gesture to cadet B. However, both cadet B and the senior corrections officer heard grievant make the statement and saw her make the gesture. The cadet's credibility is slightly tainted because he wrote statements in April and June that are contradictory in some respects. In one statement he suggests that the size comment was a reference to his genitalia while in his later statement he denies such an inference. However, despite writing statements to advance his own self-interest at the times they were written, cadet B's statements are nonetheless consistent in affirming that grievant did make a comment about cadet B's size. The senior corrections officer corroborates the cadet's statements by affirming that she heard the comment and saw the gesture. Grievant acknowledged that she and the senior corrections officer get along fine and that the other officer has no reason to fabricate her testimony. Accordingly, a preponderance of evidence demonstrates that grievant made the comment and gesture.

In addition, grievant's credibility is significantly tainted by her dishonest behavior in reporting to the agency that she was too ill to work for a prolonged period of time while she was in fact working a second job for another employer. While this behavior is not included as part of the instant disciplinary action, this evidence is admissible to demonstrate grievant's propensity for being untruthful.

The agency has cited two policies as the basis for issuing a Group II Written Notice. First, it cites sections C & D of the agency's Code of Conduct but

[13] § 5.8, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.
[14] Exhibit 5. DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

does not identify which specific subsection(s) it believes were violated. The policy contains a Code of Ethics that requires employees to "treat all persons in an evenhanded and courteous manner, humanely, and with respect."[15] Grievant's actions included making a demeaning comment and gesture, and taunting the cadet by laughing at him, and by sticking her tongue out at him. These actions are not in compliance with the Code of Ethics. Second, the agency cites section "1.d.2a" of the Commonwealth's Standards of Conduct policy; however, no such section exists in that policy.[16] After review of the policy, it is concluded that grievant's actions violated subsection V.B.2.a, i.e., she failed to comply with established written policy (the aforementioned Code of Ethics). This constitutes a Group II offense.

Mitigation

The normal disciplinary action for a Group II offense is a Written Notice, or a Written Notice and up to 10 days suspension. The normal disciplinary action for a second active Group II notice is removal from state 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 long service. Her work performance was not addressed in this hearing, however, grievant has one prior active disciplinary action and she has been counseled on multiple occasions during the past three years.[17] As this was grievant's second active Group II Written Notice, the agency could have removed her from state employment. Instead it only issued the Written Notice with no additional disciplinary measures (such as termination, demotion, suspension, or transfer). Under these circumstances, the agency's decision to issue a Group II Written Notice is within the limits of reasonableness.

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice issued on April 4, 2006 is hereby UPHELD.

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:

[15] Exhibit 5. Agency Administrative Directive 05-009.2, *Staff Code of Conduct*, November 29, 2004.
[16] Exhibit 5. DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.
[17] Exhibit 4. Counseling documentation.

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 one copy of any appeal to the other party and one copy to the Director of the Department of Employment Dispute Resolution. 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] You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution.

[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

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8416

Hearing Date:	September 5, 2006
Decision Issued:	September 6, 2006
Reconsideration Request Received:	September 14, 2006
Response to Reconsideration:	September 18, 2006

PROCEDURAL ISSUE

Grievant was represented by an attorney during the hearing but has acted on a *pro se* basis in requesting reconsideration. Accordingly, it is presumed that grievant no longer retains the attorney's services and, therefore, this reconsideration decision will be sent directly to grievant.

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]

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

OPINION

In her request for reconsideration, grievant argues that her physician told her it was permissible to work at her part-time job while he certified her as unable to work at her primary job for the agency. Regardless of what her physician may have said, the fact remains that the agency paid grievant her full salary in order to take sick leave, recuperate, and return to work. Therefore, in this case, grievant was paid not only by the agency but by her second employer as well. The Commonwealth provides sick leave for "medical necessity during the employee's temporary incapacity due to illness or injury."[21] When grievant works at a second job, she is not fully utilizing the sick leave time to recuperate, thereby delaying her return to work for the agency. This constitutes abuse of sick leave.

Grievant also contends that some of the statements against her were false. Grievant takes issue with certain Findings of Fact, and 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, the characterizations that he made, or the facts he chose to include in his decision. Such determinations are entirely within the hearing officer's authority.

Finally, grievant attempts to submit what she characterizes as new evidence in the form of hearsay statements from three employees. Grievant did not call any of these employees as witnesses during the hearing. Grievant could have called these witnesses to testify so that their testimony could be subject to cross-examination. Since grievant did not exercise due diligence by calling these witnesses during the hearing, she is barred from now offering their purported hearsay statements. Grievant has failed to demonstrate that this is newly discovered evidence; therefore, the alleged hearsay evidence is inadmissible and will not be considered in this reconsideration decision.

In separate correspondence from the agency, the superintendent noted two inaccurate statements in the Findings of Fact. In the first full paragraph on page 3, the first two sentences are hereby corrected to read: "Grievant had previously worked in another *unit*; at that time, cadet B was also assigned to that *unit*." In the second full paragraph on the same page, the last sentence is hereby deleted. These two changes are hereby incorporated into the decision of September 6, 2006.

[21] DHRM Policy 4.55, *Traditional Sick Leave*, revised July 10, 2004.

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 September 6, 2006.

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.[22]

S/David J. Latham

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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).