Issue: Group III Written Notice with suspension, transfer, demotion and pay reduction (threatening or coercing another employee); Hearing Date: 11/13/06; Decision Issued: 12/01/06; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8422; Outcome: Agency upheld in full; **Administrative Review: HO Reconsideration Request received 12/15/06; Reconsideration Decision issued 12/22/06; Outcome: Original decision affirmed: Administrative Review: DHRM Ruling Request received 12/15/06; DHRM Ruling issued 04/27/07; Outcome: HO's decision affirmed.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8422

Hearing Date: November 13, 2006
Decision Issued: December 1, 2006

PROCEDURAL HISTORY

On June 12, 2006, Grievant was issued a Group III Written Notice of disciplinary action with suspension, disciplinary pay reduction, role change, and transfer for threatening or coercing another employee.

On June 26, 2006, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On October 17, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 13, 2006, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

1. Whether Grievant engaged in the behavior described in the Written Notice?

2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?

4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Corrections employed Grievant as a Corrections Sergeant at one of its Facilities. The purpose of her position was:

> Direct the work of Corrections Officers on assigned shifts, coordinates work schedules and duty rosters, and inspects facility to maintain security, safety, and sanitation.[1]

As part of the disciplinary action, Grievant was suspended from June 12, 2006 through June 16, 2006, demoted to a Corrections Officer Senior with a ten percent pay reduction, and transferred to another Facility. Grievant's work performance was satisfactory to the Agency prior to the events giving rise to this disciplinary action. No evidence of prior disciplinary action against Grievant was introduced during the hearing.

Officer K sometimes worked at the Facility the same time Grievant was working. On at least two occasions, Officer K bumped into Grievant. Each time, Officer K acted

---

[1] Agency Exhibit 3.

as if she did not realize she had bumped into Grievant. Grievant did not take any corrective action against Officer K such as giving Officer K a verbal or written counseling, or reporting Officer K so that formal disciplinary action could be taken.

On June 7, 2006, Grievant and several other employees were standing inside and near the “slider” area. This area is very small. Officer K tried to pass by Grievant but bumped into Grievant.[2] Officer K stood by Grievant after the physical contact. Grievant asked Officer K if she intended to say “excuse me.” Officer K said she would not apologize and asked sarcastically, “How old are you?” Grievant said “I am old enough to be your mother. This is the third time you have bumped me forcefully and if you do it again I’m going to kick your ass. Furthermore, you are rude!” Once one of the doors opened, Officer K and Grievant walked through the door into an area called the “Boulevard.” Officer K placed a bottle of water she was holding on top of a trash can and turned to face Grievant. Officer K asked Grievant what Grievant intended to do about Officer K bumping into Grievant. Officer K stepped towards Grievant in an aggressive threatening manner. Grievant stepped towards Officer K and repeated her threat to Officer K and said it would be in Officer K’s best interests not to bump Grievant again.

Officer A observed Grievant and Officer K facing each and separated by only a few inches. He concluded they were about to fight. He stepped in between them and told Officer K to leave.

Officer K received a Group I Written Notice for her involvement in the incident.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses “include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force.”[3] 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.”[4] Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”[5]

Workplace Violence

[2] Officer K testified she bumped into Grievant unintentionally. Her testimony lacked credibility.

[3] Virginia Department of Corrections Operating Procedure 135.1(X)(A).

[4] Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

[5] Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

Virginia Department of Corrections Operating Procedure 130.3 establishes rule of conduct prohibiting violence in the workplace. Workplace violence is defined as:

> Any physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties. It includes, but is not limited to beating, stabbing, suicide, shooting, rape, attempted suicide, attempted rape, psychological trauma such as threats, obscene phone calls, and/or electronic communications, an intimidating presence, and harassment of any nature such as stalking, shouting or abusive language.

"Threatening to injure an individual …" is prohibited conduct under the Workplace Violence policy.

Grievant threatened Officer K by saying, "if you do it again I'm going to kick your ass." Grievant confirmed the seriousness of her threat by aggressively positioning herself within inches of Officer K while poised to fight. Grievant acted contrary to the Agency's Workplace Violence Policy.[6]

Employees violating the Agency's Workplace Violence policy are "subject to disciplinary action under Department Standards of Conduct, up to and including termination …."[7] Group III offenses include, "threatening or coercing persons associated with any state agency …."[8] The Agency has presented sufficient evidence to support its issuance to Grievant of a Group III offense. Upon the issuance of a Group III Written Notice, the Agency may demote an employee, impose a disciplinary salary reduction, and suspend the employee. Accordingly, Grievant's demotion to a Corrections Officer Senior with ten percent pay reduction and suspension is upheld.

<u>Transfer</u>

Grievant was both demoted and transferred. The Agency's Standards of Conduct authorize either demotion or transfer. For example, Virginia Department of Corrections Operating Procedure 135.1(III) defines discipline action and states, "The disciplinary action also may include demotion **or** transfer in lieu of termination." (Emphasis added). Section (XII)(C)(1) states:

> NOTE: Mitigating circumstances may result in an employee's demotion **or** transfer and a disciplinary salary action as defined in this procedure, and/or suspension as an alternative to removal. (Emphasis added).

---

[6] Grievant was angry because this was the third time Officer K had bumped into Grievant. As a supervisor, Grievant should have taken corrective action sooner rather than threatening Officer K following the third bumping.

[7] Virginia Department of Corrections Operating Procedure 130.3(V)(A).

[8] Virginia Department of Corrections Operating Procedure 135.1(XII)(B)(12).

It is clear from the Agency's presentation that it believes demotion is of greater importance than transfer and if given a choice between demoting or transferring Grievant, the Agency would choose to demote her. The Hearing Officer could reverse the Agency's transfer in this case. Grievant testified, however, that she no longer sought as relief the reversal of her transfer. The Hearing Officer will not order the Agency to reverse its transfer of Grievant in light of Grievant's testimony.

Mitigation

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution…."[9] Under the EDR Director's *Rules for Conducting Grievance Hearings*, the Hearing Officer may mitigate based on considerations including whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action, and (3) the disciplinary action was free of improper motive. The *Rules* further require the Hearing Officer to "consider management's right to exercise its good faith business judgement in employee matters. The agency's right to manage its operations should be given due consideration when the contested management action is consistent with law and policy." In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Grievant contends the disciplinary action should be mitigated because it has inconsistently disciplined employees engaged in similar behavior.

In March 2003, an Assistant Warden worked at the Facility where Grievant worked. The Assistant Warden met with the Facility Warden[10] to discuss Agency business. Following the meeting, the Assistant Warden returned to his office and spoke with his Secretary. He told the Secretary that he wanted to "go to the armory, draw a weapon and blow the Warden's head off." The Secretary was so concerned about the Assistant Warden's comments that she reported the matter to the Warden.[11] The matter was investigated by the Agency's Inspector General. The Inspector General interviewed the Secretary who re-stated the Assistant Warden's threat. The Secretary also said that in her opinion, the Assistant Warden "was feeling a little 'boxed in' at the time he made the threatening remark." She thought the Assistant Warden "just used a poor choice of words." The Inspector General also interviewed the Assistant Warden. The Assistant Warden denied making the threat, he did not recall making any statement that could be interpreted as a threat, and denied being upset with the Facility Warden.[12]

[9] *Va. Code § 2.2-3005.*

[10] The Warden left the Facility in September 2005.

[11] The Secretary's testimony during the hearing was credible. She had no motive or reason to lie about the Assistant Warden.

[12] Grievant's Exhibit 29.

When the Facility Warden discussed the incident with the Regional Director, the Regional Director told the Facility Warden, "he did not believe that [the Assistant Warden] could have ever made this statement."[13] The Hearing Officer finds that in March 2003, the Assistant Warden threatened to injure the Facility Warden. The Agency did not issue the Assistant Warden a Written Notice for his comments.

Under the *Rules for Conducting Grievance Hearings,* the mere existence of inconsistent outcomes for similar cases is not sufficient to show mitigating circumstances. An employee must show that the Agency intended to treat similarly situated employees differently. The evidence that is missing from this grievance is the reason why Agency Executives failed to take disciplinary action against the Assistant Warden. The Inspector General found that Secretary and the Assistant Warden had different versions of what occurred. The Inspector General did not make a recommendation regarding who should be believed. No evidence was presented suggesting the Facility Warden attempted to issue a Written Notice to the Assistant Warden but Agency Executives refused to permit the discipline. No evidence was presented from the Regional Director regarding how he chose to treat the conflicting statements of the Secretary and the Assistant Warden. The only evidence presented from the Regional Director is that he did not believe the Assistant Warden could have made such a threat. This suggests the Regional Director did not believe the Assistant Warden engaged in inappropriate behavior.

Grievant contends that the Assistant Warden was not disciplined because of his position or for some other reason. This may be true. On the other hand, it may be true that Agency Executives could not resolve the conflict in statements between the Secretary and the Assistant Warden and felt that any discipline could not be upheld through the grievance process. Both scenarios are equally likely. Since Grievant has the burden of showing mitigating circumstances and Grievant has not done so by a preponderance of the evidence, the Hearing Officer finds that no mitigating circumstances exist in this case.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with demotion, disciplinary pay reduction, and suspension is **upheld**. Grievant's transfer is upheld because Grievant no longer seeks reversal of her transfer.

APPEAL RIGHTS

---

[13] Grievant's Exhibit 29.

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

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

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

   Director
   Department of Human Resource Management
   101 North 14th St., 12th Floor
   Richmond, VA 23219

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

   Director
   Department of Employment Dispute Resolution
   830 East Main St. STE 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 all of your appeals to the other party and to the EDR Director. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for 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.[14]

[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].

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

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8422-R

Reconsideration Decision Issued: December 22, 2006

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.

The Agency seeks reconsideration of the Hearing Decision to remove reference to a finding that the Assistant Warden threaten to kill the Warden. The Assistant Warden's Secretary testified that the Assistant Warden told the Secretary that he wanted to "go to the armory, draw a weapon and blow the Warden's head off." The Secretary was so concerned about the Assistant Warden's comments that she reported the matter to the Warden. The Secretary's testimony was credible. No motive was given to suggest she was untruthful or should not be believed. The Assistant Warden also testified during the hearing. He said he had no knowledge of why someone would accuse him of threatening the Warden. He denied making such a threat. Based on the demeanor of the Assistant Warden, the Hearing Officer concluded that the Assistant Warden's denial lacked credibility. Based on the evidence presented there is little doubt that the Assistant Warden told the Secretary that he wanted to "go to the armory, draw a weapon and blow the Warden's head off."

The Agency argues that the incident was investigated by the Regional Director and the Department's Internal Affairs Unit. The Agency contends the findings of these investigations do not support the allegation that the Assistant Warden threatened the Warden. No evidence was presented at the hearing to support this assertion. The Regional Director did not testify and the Internal Affairs report presented as evidence does not show the allegation against the Assistant Warden was unfounded.[15]

[15] See Grievant's Exhibit 30.

Disciplinary action against an employee may be reduced by the Hearing Officer if the Hearing Officer finds that the agency did not consistently apply disciplinary action. The EDR Director's *Rules for Conducting Grievance Hearings* do not provide a depth of discussion regarding how the Hearing Officer is to measure whether an Agency has failed to apply disciplinary action. For example, it could be the case that the *Rules* merely require a showing of one employee being treated differently from another employee regardless of the reason. If this were the standard, then Grievant would have established a basis to mitigate. On the other hand, if the standard requires a showing that the Agency intended to discipline inconsistently, then Grievant has not established a basis to mitigate.[16]

The Hearing Officer interpreted the *Rules* to require some degree of intent by the Agency to inconsistently discipline employees. The final authority regarding interpretation of the *Rules* is the EDR Director. In order to preserve the issue for proper decision by the EDR Director (or DHRM or the appropriate Circuit Court), the Hearing Officer must make findings of fact based on the evidence presented.

The Agency's request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, the Agency's request for reconsideration is **denied.**

APPEAL RIGHTS

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

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

<u>Judicial Review of Final Hearing Decision</u>

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.

[16] The *Rules* are also silent regarding whether a Grievant can establish causal intent using "pretext" analysis. For example, the EDR Director has ruled that a framework of analysis applies to allegations of retaliation and that if an employee meets his or her prima facie case, the Agency has the burden of showing its actions were not a pretext for retaliation. It could be the case that some pretext analysis is the most appropriate method of determining the inconsistent application of discipline.

S/Carl Wilson Schmidt

____

Carl Wilson Schmidt, Esq.
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Department of Corrections
April 27, 2007

The grievant has appealed the hearing officer's decision in Grievance Case No. 8422. The grievant is challenging the decision because she contends that it is not consistent with policies and procedures and the hearing officer did not take into consideration mitigating circumstances. For the reasons stated below, the decision by the hearing officer will not be disturbed. The agency head, Ms. Sara Redding Wilson, has requested that I respond to this appeal.

FACTS

The Department of Corrections (DOC) employed the grievant as a Corrections Sergeant. The purpose of the Corrections Sergeant position is as follows:

> Directs the work of Corrections Officers on assigned shifts, coordinates work schedules and duty rosters, and inspects facility to maintain security, safety, and sanitation.

On June 12, 2006, DOC issued to her a Group III Written Notice with suspension, demotion with pay reduction, and transfer to another facility. She was disciplined for threatening bodily harm to a subordinate employee with whom she had an altercation. She grieved the disciplinary actions and when she was not granted relief during the management steps she requested that her case to be heard by a hearing officer. In his decision, the hearing officer upheld the demotion with pay reduction and suspension and let the transfer stand because the grievant no longer pursued reversal of the transfer as part of her relief. In addition, the hearing officer concluded that the grievant did not show, by the preponderance of the evidence, that due to mitigating circumstances, the disciplinary action should have been reduced.

The relevant policies include the Department of Human Resource Management's Policy No.1.60, which states 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 are not all-inclusive. In addition, DHRM Policy No. 1.80 states as its purpose, "To establish a procedure that prohibits violence in the workplace." The policy prohibits "threatening to injure an individual or to damage property." Finally, DOC has its own Standard Operating Procedures and Workplace Violence policies that parallel those of the Department of Human Resource Management.

In the instant case, it is indisputable that the grievant committed a violation of the Workplace Violence Policy when she made the statement, "I am old enough to be your mother. This is the third time you have bumped into me forcibly and if you bump into me again I'm going to kick your ass." Based on the evidence, the hearing officer upheld the disciplinary actions.

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, this Department 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, the grievant raised concerns that the discipline was not consistent with law and policy. However, in her supporting documentation, the grievant failed to identify which law or policy was violated. Rather, the documentation the grievant provided suggested that the hearing officer did not assess properly the data before him. Whether or not the hearing officer did a proper assessment of the evidence is not within the authority of this Agency to determine. Rather, a hearing officer is authorized to make a finding of fact as to the material issues in the case and to determine the grievance based on the evidence. It was within his authority to decide the case and this Agency is not in a position to second-guess his decision. While there is an inference by the grievant that the hearing decision violated the Workplace Violence Policy, we have determined that the grievant's workplace behavior violated the Workplace Violence Policy and it was appropriate to apply the provisions of the Standards of Conduct to address that behavior.

In addressing the matter of mitigation, the hearing decision states, in part, "Under the Rules for Conducting Grievance Hearings, the mere existence of inconsistent outcomes for similar cases is not sufficient to show mitigating circumstances. An employee must show that the Agency intended to treat similarly situated employees differently…. Since Grievant has the

burden of showing mitigating circumstances and Grievant has not done so by a preponderance of the evidence, the Hearing Officer finds that no mitigating circumstances exist in this case." The issue she raised, evidentiary and/or procedural, is beyond the authority of DHRM either to remedy or to offer a recommendation for remedy. Because we cannot identify, nor did the grievant identify, any policy violation concerning the hearing officer using his discretion in determining whether the disciplinary action should stand, we have no basis to interfere with this decision.

____

Ernest G. Spratley, Manager
Employment Equity Services