Issues: Group III Written Notice with termination (physical violence against another employee); Hearing Date: 03/27/07; Decision Issued: 04/03/07; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 8538; Outcome: Employee granted Full Relief; **Administrative Review: DHRM Ruling Request received 04/11/07; DHRM Ruling issued 05/18/07; Outcome: HO's decision affirmed.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8538

Hearing Date: March 27, 2007
Decision Issued: April 3, 2007

APPEARANCES

Grievant
One witness for Grievant
Warden
Advocate for Agency
Three 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? May the agency discharge an employment subsequent to the employee's submission of a written resignation? Should grievant be reimbursed for her suspension?

FINDINGS OF FACT

Grievant filed a timely grievance from a Group III Written Notice for an act of physical violence against a fellow correctional officer.[1] As part of the

[1] Agency Exhibit 1. Group III Written Notice, issued December 14, 2006.

disciplinary action, grievant was removed from state employment effective December 8, 2006. The grievance proceeded through the resolution steps; when the parties failed to resolve the grievance at the third step, the agency head qualified the grievance for a hearing.[2] The Virginia Department of Corrections (Hereinafter referred to as agency) has employed grievant for three years as a corrections officer.[3]

In the afternoon of December 5, 2006, about 14 officers and supervisors from one shift gathered at a bowling alley for camaraderie and bowling. The gathering occurred while the shift was on a rest day. The gathering was not sponsored by the agency. However, one officer had made a reservation for lanes in the name of the correctional facility. Grievant and three or four other officers were sitting at one table when another officer with two young children (ages 3 & 4) arrived at the bowling alley.[4] While looking at that officer, grievant said words to the effect of, "Oh it's on now; she's going to get beat up here or outside." The officer with children (Hereinafter referred to as Officer A) sat at a table some distance from grievant's table. Grievant told the others at her table that she couldn't stand Officer A and had heard that Officer A said uncomplimentary things about her.[5] She also said she intended to confront Officer A before she left the bowling alley, stating, *inter alia*, "Let's go kick that bitch's ass."[6] A second officer also made negative comments about Officer A. As these comments were made, grievant and the others at her table were looking at Officer A. Officer A noticed that this group kept looking at her and making comments to each other.

About an hour later, one of the officers at grievant's table went to the lady's restroom. Officer A then took the two children to the restroom. Shortly after that, two officers from grievant's table and then grievant went to the restroom. One of the officers had her two-year-old child with her. Grievant and the two other officers walked up to Officer A and verbally confronted her asking why she had been talking to inmates and other officers about her. Officer A denied making statements. Grievant then grabbed Officer A around her neck and a fight ensued. At one point grievant knocked Officer A to the ground whereupon another officer kicked her. When the fight started, the officer who had entered the restroom before Officer A grabbed the three children and took them out of the restroom. Supervisors were told of the fight and went into the restroom to break it up. Grievant looked in the mirror and saw scratches on her face and then attacked Officer A again. When the fight was finally broken up, grievant and the others came out of the restroom and went outside the building to the parking lot. By that time, police had been called; grievant and the others waited until the police arrived and interviewed people.[7]

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[2] Agency Exhibit 2. Grievance Form A, filed January 5, 2006.
[3] Agency Exhibit 4. Grievant's Employee Work Profile Work Description, November 8, 2006.
[4] On December 5, 2006, Officer A was babysitting two young children of a friend.
[5] One witness offered unrebutted testimony that grievant and officer A were both interested in the same male corrections officer.
[6] Agency Exhibit 3. Witness statement, December 6, 2006.
[7] Agency Exhibit 3. Police Department offense report, December 5, 2006.

Officer A sustained scratches on her ear, a knot on her head, and two swollen fingers on her left hand. Grievant was placed on suspension beginning December 8, 2006. On December 12, 2006, the warden mailed grievant a letter scheduling her for a due process pre-disciplinary meeting on December 15, 2006 to give grievant an opportunity to present her version of the events of December 5, 2006.[8] The same letter specified that the follow up meeting (at which disciplinary action would be taken) was scheduled for December 19, 2006. The agency subsequently decided to change the pre-disciplinary meeting to December 14, 2006. A human resources employee contacted grievant by telephone and advised her to come in on December 14, 2006. On December 14, 2006, grievant came to the facility, turned in her uniform and gave a supervisor (lieutenant) her handwritten letter of resignation to be effective immediately - December 14, 2006.[9]

On the following day, December 15, 2006, the warden sent a certified letter to grievant advising that her resignation letter was not accepted and that the agency had decided to discipline grievant and remove her from state service retroactive to December 8, 2006.[10]

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.

[8] Agency Exhibit 2. Letter from warden to grievant, December 12, 2006.
[9] Agency Exhibit 2. Letter of resignation, December 14, 2006.
[10] Agency Exhibit 2. Letter from warden to grievant, December 15, 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, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.[11]

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. 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. 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.[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 XII of the DOC *Standards of Conduct* addresses Group III offenses, which are defined identically to the DHRM *Standards of Conduct*.[13] Acts of physical violence or fighting is one example of a Group III offense.

The agency has demonstrated that grievant intended to confront Officer A on December 5, 2006. While sitting with three other corrections officers, the discussion about Officer A was entirely negative. During the discussion, grievant threatened physical violence against Officer A. Moreover, Officer A had observed grievant and the others at grievant's table repeatedly looking toward her and making comments that she assumed were about her. When the verbal confrontation occurred in the restroom, grievant was the leader of the group of officers facing off against Officer A. This resulted in what the warden aptly characterized as a gang-like intimidation factor against officer A.

Grievant's incitement of others and provoking them into accompanying her to the restroom to confront officer A was totally inappropriate. However, when she physically attacked officer A, she engaged in an act of physical violence that is inexcusable, particularly for a corrections officer who is charged with protecting the public from inmates who have been convicted of violent crimes. Because the reservation at the bowling alley had been made in the name of the agency facility, the public became aware that the fight involved agency employees. As the agency correctly points out, officers working at the facility are sometimes

[11] § 5.8, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.
[12] Department of Human Resource Management (DHRM) Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.
[13] Agency Exhibit 5. Operating Procedure 135.1*, Standards of Conduct,* September 1, 2005.

called upon to back up and protect each other when inmates become disruptive. Even though this incident occurred away from the facility, one officer attacking another puts in jeopardy officers' ability and willingness to back each other up in the workplace. Accordingly, the agency has demonstrated, by a preponderance of evidence, that grievant's instigation of a physical attack on a fellow corrections officer was totally unacceptable, undermined her ability to perform as a corrections officer, and constituted a Group III offense.

Mitigation

The normal disciplinary action for a Group III offense is a Written Notice and removal from state employment. The policy provides for 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 state service and her work performance has been satisfactory. However, the egregiousness of her offense was such that the agency concluded that retention of grievant as a corrections officer would be impossible under the circumstances. Based on the totality of the evidence, the hearing officer concludes that removal of grievant would be within the tolerable limits of reasonableness.[14]

Resignation

In such a case, the normal disciplinary action would be a Group III Written Notice and removal from state employment. However, there is an intervening factor which prohibits the agency from issuing any disciplinary action. In this case, the uncontroverted evidence establishes that grievant resigned from employment *prior* to the issuance of disciplinary action. There is no policy or other basis to support the agency's decision to "not accept" the resignation. Once an employee has written and handed to a person of authority a resignation, the resignation becomes effective on the date stated in the resignation. In this case, grievant stated that her resignation became effective on December 14, 2006, the date on which she submitted her resignation. An employment relationship for which there is no contractual length of service (such as military service) is mutually severable at any time by either employer or employee. In this case, grievant acted unilaterally to sever the employment relationship on December 14, 2006.

This principle applies to both agency and grievant. For example, if the agency had formally notified grievant that her employment was terminated as of a certain date, the agency would not be obligated to accept a resignation submitted after the termination. Since the agency would have acted first in this

[14] *Cf.* Davis v. Dept. of Treasury, 8 M.S.P.R. 317, 1981 MSPB LEXIS 305, at 5-6 (1981) holding that the Board "will not freely substitute its judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"

example, the separation from employment would be a removal, not a resignation. However, in the instant case, the grievant acted first by submitting her resignation prior to not only official notice of termination but well before the agency had completed pre-disciplinary proceedings and before the December 19th date mentioned in the warden's letter of December 12, 2006.

In her second-step resolution response, the warden surmises, undoubtedly correctly, that it appeared that grievant "chose to quickly escape the situation by tendering her resignation."[15] Grievant likely knew that her actions constituted a grievous offense for which she had no defense, and which in all likelihood would probably result in her removal from employment. However, the fact remains that, in this case, grievant resigned before the disciplinary process had been completed and before the agency had taken formal action to remove her from employment. While the agency may have preferred to have this employment relationship end as a removal rather than resignation, grievant acted first and therefore, the separation from employment must be recorded as a resignation.

The agency also cites as a reason for "not accepting" grievant's resignation the fact that grievant did not give two weeks notice. There is no law, regulation, policy, or other requirement that a resigning employee give two weeks notice. Resigning employees are "asked" to give reasonable notice (preferably two weeks) but this is not a requirement.[16] Even if the agency had such a requirement it would be unenforceable because, as stated *supra*, an employment relationship is mutually severable at any time. Accordingly, grievant's failure to give two weeks notice does not permit the agency to ignore a valid resignation. Nonetheless, the agency may annotate grievant's record to reflect that she failed to give two weeks notice. Further, the agency may also annotate grievant's record to show that, although she resigned, she would have been terminated for a Group III offense had she not resigned.

Suspension

An agency may suspend employees pending completion of a misconduct investigation for up to ten days.[17] Suspensions are, by definition, unpaid leave. Since grievant was suspended without pay from December 8 to 14, 2006, the agency does not owe grievant pay for that period of time.

[15] Second resolution step response, January 10, 2007.
[16] Section II.A.2.a, DHRM Policy 1.70, *Termination/Separation from State Service*, revised May 2004.
[17] Agency Exhibit 5. Section XVI.A, Operating Procedure 135.1*, Standards of Conduct,* September 1, 2005

DECISION

The decision of the agency is reversed

The Group III Written Notice and removal from employment effective December 8 are hereby RESCINDED.

The agency shall change grievant's records to reflect that she resigned.

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 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.

[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

[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.

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Department of Corrections
May 18, 2007

The agency has requested an administrative review of the hearing officer's decision in Case No. 8538. The agency has requested the review because it contends that the decision is inconsistent with state and agency policy. This Agency will not interfere with the application of this decision for the reason(s) listed below. The agency head, Ms. Sara Redding Wilson, has requested that I respond to this appeal.

FACTS

The Department of Corrections employed the grievant as a Corrections Officer. On December 5, 2006, approximately 14 officers and supervisors, including the grievant, met at a non-agency sponsored event at a bowling alley. When another officer, identified as Officer A, went to the restroom, the grievant and friends of the grievant followed her into the restroom and initiated a physical altercation. This altercation apparently was based on bad feelings that were carried over from work or from another environment. As a result of the altercation, the grievant was suspended without pay for several days, beginning on December 8, 2006, while management officials conducted an investigation. The grievant was put on notice by mail dated December 12, 2006, to appear at the facility on December 19, 2006, for a due process pre-disciplinary hearing. The agency subsequently changed the pre-disciplinary hearing to December 14, 2006. On that date, the grievant appeared at the facility, turned in her uniform, and submitted her letter of resignation with an effective date of December 14, 2006. She did not have the pre-disciplinary hearing. On December 15, 2006, the warden sent the grievant a letter to inform the grievant that her resignation was not accepted. Rather, the agency issued to her a Group III Written Notice with removal from state service, retroactive to December 8, 2006, the date of the beginning of her suspension. The grievant filed a grievance on the basis that the agency chose to issue to her a Group III Written Notice with removal from state service rather than allow her to resign. In his decision, the hearing officer ordered that the agency rescind the disciplinary action and directed that the grievant be allowed to resign.

The relevant policy, the Department of Human Resource Management's Policy #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 are not all-inclusive. The Department of Corrections has its own Standards of Conduct policy whose provisions parallel those of DHRM Policy No. 1.60. In addition, DHRM Policy No. 1.70, Termination/Separation From State Service, applies here.

In the instant case, the fact that the grievant committed a violation of the Standards of Conduct is indisputable. Based on the evidence, the hearing officer determined that there were sufficient reasons to separate the grievant from state service. He upheld the separation but stated that the grievant's records should changed to reflect that she resigned.

DISCUSSION

A hearing officer is 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. Any challenge must refer to a particular mandate state or agency policy. The Department's authority, however, is limited to directing the hearing officer to revise the decision to conform it to written 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.

In the present case, the agency contends that the grievant was terminated on December 8, 2006, for an act of physical violence against a fellow correctional officer that occurred on December 5, 2006. The agency further contends that the agency has the authority to make the decision of whether or not to accept a resignation. While the agency did not specifically identify the policy that was violated by the hearing officer when he made his decision, the Termination/Separation From State Service policy applies here.

Concerning the violation that the grievant committed and the applicable policy, the hearing officer stated, in part, the following:

> In such a case, the normal disciplinary action would be a Group III Written Notice and removal from state employment. However, there is an intervening factor which prohibits the agency from issuing any disciplinary action. In this case, the uncontroverted evidence establishes that grievant resigned from employment *prior* to the issuance of disciplinary action. There is no policy or other basis to support the agency's decision to "not accept" the resignation. Once an employee has written and handed to a person of authority a resignation, the resignation becomes effective on the date stated in the resignation. In this case, grievant stated that her resignation became effective on December 14, 2006, the date on which she submitted her resignation. An employment relationship for which there is no contractual length of service (such as military service) is mutually severable at any time by either employer or employee. In this case, grievant acted unilaterally to sever the employment relationship on December 14, 2006.

In the present case, it is clear that the grievant submitted her resignation *before* the agency issued to her the Group III Written Notice with removal. Therefore, it is logical that, for

the record, the grievant's separation should be recorded as a resignation without prior notice. The end result is that the grievant is separated from the agency, and based on her record, probably will not be eligible for rehire. There is no evidence that permitting a resignation can be viewed by the public and other employees of the agency as undermining the Department's effectiveness, especially since personnel records are confidential. Thus, this Agency will not interfere with the execution of the hearing decision.

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Ernest G. Spratley, Manager
Employment Equity Services