Issues: Group III Written Notice (inappropriate use of force) and Demotion with Salary Reduction; Hearing Date: 04/05/07; Decision Issued: 05/07/07; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8561; Outcome: Written Notice: partial relief (reduced to Group II), Demotion with Salary Reduction: No Relief – Agency upheld; **Administrative Review: DHRM Ruling Request received 05/16/07; DHRM Ruling issued 05/22/07; Outcome: Appealed to wrong agency – forwarded to AHO; Reconsideration Decision issued 06/04/07; Outcome: Original decision affirmed.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8561

Hearing Date: April 5, 2007
Decision Issued: May 7, 2007

PROCEDURAL HISTORY

On December 11, 2006, Grievant was issued a Group III Written Notice of disciplinary action with demotion and ten percent salary reduction for inappropriate use of force.

On December 15, 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 he requested a hearing. On March 14, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 5, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
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 Institutions until his demotion to a Corrections Officer effective December 12, 2006. The purpose of his position was:

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

Grievant had been employed by the Agency for approximately 19 years. For approximately 15 years, he has worked in the Facility's special housing unit dealing with the Facility's most disruptive inmates. Grievant received prior active disciplinary action consisting of a Group II Written Notice for failure to follow a supervisor's instructions issued on October 24, 2005.[2]

[1] Agency Exhibit 6.

[2] Agency Exhibit 7.

On December 1, 2006, at approximately 10:07 a.m., Grievant and a Corrections Officer tried to move an Inmate from outside the recreation area to his cell. They were able to move the Inmate halfway, but the Inmate was struggling, kicking, and spitting at them. Grievant and the Corrections Officer put the inmate down on the ground. Grievant ordered the Inmate to get up and cease his resistance. The Inmate said "no" and was about to spit on them again.[3] Grievant advised the Corrections Officer to hold the Inmate's leg. Grievant grabbed the Inmate's other leg and they pulled the Inmate on his back to the Inmate's cell. There were two other officers in the area, but Grievant chose to proceed without asking for their assistance.[4] The Inmate was laughing while he was pulled to his cell. When they reached the Inmate's cell, the Inmate stood up and walked into the cell. He then said, "[t]hat's the way I like to be taken to the cell." The Inmate was not injured.[5]

Grievant wrote an incident report and informed the Watch Commander of what happened. He also advised the Corrections Officer to write an incident report.

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."[6] 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."[7] Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."[8]

The Agency contends Grievant should receive a Group III Written Notice for "physical abuse … which constitutes recognized maltreatment of offenders."[9] The Agency's standards of conduct does not define "physical abuse" or "maltreatment of offenders." Dragging an inmate on his back who does not wish to be dragged on his back is different from dragging an inmate on his back who desires to be dragged on his back. The former may rise to the level of physical abuse and maltreatment of offenders,

[3] In his report, the Inmate wrote that wanted to be dragged to his cell.

[4] In addition, Grievant could have used his radio to call for assistance.

[5] In his report, the Inmate wrote, "I sustain[ed] no injury. There was no [excessive] force used, and there was no wrong doing on the officers' part."

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

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

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

[9] Virginia Department of Corrections Operating Procedure 135.1(XII)(B)(17).

but surely the latter does not. The Inmate suffered no injuries. He did not perceive his treatment as maltreatment. Within the context of the facts of this case, Grievant's behavior does not rise to the level of a Group III offense.

Virginia Department of Corrections Operating Procedure 431 sets forth the Agency's policy governing the use of force by employees. The purpose of this policy is to:

> provide guidance in the use of lethal and non-lethal force by employees in the performance of their duties.
>
> Section 431(IV)(B) describes the amount of force employees may use:
>
> 1. [Correctional staff] are permitted to use as much force as they reasonably perceive necessary to perform their duties and to protect themselves and others from harm. The amount of force which is reasonable, depends upon the circumstance of the particular incident. The controlling factors are:
>
> a. The degree of force threatened or used by the aggressor, including whether she/he possesses a weapon, which could be used to cause physical injury.
> b. The correctional staff's reasonable perception of the danger of death or serious physical injury.
> c. Any alternatives available to control the situation without the use of force.
>
> 2. The appropriateness of the type and amount of force used by the correctional employee, e.g. the kind of weapon used, the area of the body struck, etc., will be examined using the preceding factors. Only force which is reasonably necessary to overtime resistance or gain control under the circumstances is permissible. Inmates will receive medical attention after all instances when force is used.

Grievant was authorized to use force to move the Inmate because force was necessary to perform his duties of having the Inmate return to a cell. The amount of force, however, was not reasonable under the circumstances.

Agency employees are taught how to move inmates who do not wish to be moved. One method is to have four corrections officers move the inmate by having each officer grab one of the inmate's limbs and lift the inmate off the ground. Grievant could have used this method to move the Inmate. Grievant's action was the unreasonable use of force because he had two other officers in the area available to assist him but he chose not to seek their assistance. Employees are not taught to move an inmate by dragging him across the floor.

"[F]ailure to …otherwise comply with applicable established written policy" is a Group II offense.[10] Grievant failed to comply with the Virginia Department of Corrections Policy 431 because his authorized use of physical force on the Inmate was unreasonable under the circumstances. The Agency has presented sufficient evidence to support its issuance to Grievant of a Group II Written Notice.

Upon the accumulation of a second active Group II Written Notice, the Agency may demote an employee and take a disciplinary salary action as an alternative to removal. Accordingly, the Agency's demotion of Grievant with a ten percent salary reduction must be upheld.

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…."[11] Under the *Rules for Conducting Grievance Hearings,* "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes 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 among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant contends the disciplinary action should be mitigated because the punishment is too severe. If an Agency meets its burden of proof to establish a certain level of disciplinary action, the Agency has the discretion to determine whether the punishment is too severe. Even if the Hearing Officer would have issued less severe punishment, the Agency has the discretion to determine what punishment is too severe once the Agency has met its burden of proof. In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **reduced** to a Group II Written Notice. Grievant's demotion and disciplinary salary action is **upheld** based on the accumulation of disciplinary action.

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[10] Virginia Department of Corrections Operating Procedure 135.1(XI)(B)(1).

[11] *Va. Code § 2.2-3005.*

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. 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.[12]

[12] 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/Carl Wilson Schmidt

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Carl Wilson Schmidt, Esq.
Hearing Officer

May 22, 2007

RE: **Grievant v. Department of Corrections**
Case No. 8561

Dear :

The Agency head, Ms. Sara Wilson, has asked that I respond to your request for an administrative review of the hearing officer's decision in the above referenced case. Please note that, as advised on page 6 of the hearing decision, an employee 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 (DHRM) to review the decision. You must refer to the specific policy and explain why you believe the decision is inconsistent with that policy.

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

In your appeal to the Department of Human Resource Management, you indicated that the decision contains an incorrect legal conclusion and that you desired the hearing officer to reopen the hearing. Please note that the authority of this Department is limited to conducting an administrative review based on the factors listed in item 2 above. This Agency has no authority to reopen the hearing or to determine whether the decision contains an incorrect legal conclusion. Therefore, we are submitting your appeal to the Director, Department of Employment Dispute Resolution and to the hearing officer to render their determinations. If there are outstanding policy issues after those two entities have completed their reviews, we will address those at that time.

Sincerely,

Ernest G. Spratley, Manager
Employment Equity Services

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8561-R

Reconsideration Decision Issued: June 4, 2007

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.[13]

Grievant argues he was not trained regarding how to carry the inmate by having one officer grab each of the inmate's limbs. He argues this procedure is not written in policy. This was not, however, the evidence presented to the Hearing Officer by the Agency. If the Hearing Officer assumes for the sake of argument that Grievant's assertions are true, it does not change the outcome of this case. Grievant held a supervisory position and had been employed by the Agency for approximately 19 years. He was expected to use his judgment to determine the appropriate course of action. Nothing in policy, training, or experience would justify pulling an inmate by his legs while his head drags across the floor. The inmate's head easily could have been injured from being banged against the hard floor. There were many options available to Grievant to move the inmate. He could have had four officers grab each of the inmate's limbs. He could have had two officers attempt a "fireman's carry" where one officer is on each side of the inmate and carries the inmate, or he could have done nothing and left the inmate on the floor while he sought assistance from other supervisors. Instead, Grievant chose to move the inmate using an unauthorized and dangerous method. His decision resulted in a violation of policy thereby justifying the issuance of disciplinary action.

Grievant points out that he had been assaulted many times by inmates in the performance of his duties. He has suffered psychological trauma from these assaults.

[13] Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended.

The EDR Director has not listed inmate assaults as a basis to mitigate disciplinary action. Grievant's ability to work in an extremely difficult job speaks well of his abilities and work ethic, but the Hearing Officer can only mitigate in accordance with the *Rules for Conducting Hearings.* No evidence was presented showing the level of Grievant's psychological trauma and whether that trauma caused him to make an erroneous judgment when moving an inmate.

Grievant contends his years of service should serve to mitigate the disciplinary action. The EDR Director has not defined mitigation to include an employee's years of service as the sole reason to mitigate.

Grievant's request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. Grievant simply restates the arguments and evidence presented at the hearing. For this reason, Grievant'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.

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. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

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Carl Wilson Schmidt, Esq.
Hearing Officer