Issues: Group III Written Notice with termination (threatening behavior, gross negligence, disruptive behavior); Hearing Date: 09/06/07; Decision Issued: 09/13/07; Agency: DOC; AHO: Lorin A. Costanzo, Esq.; Case No. 8669; Outcome: Partial Relief (gross negligence and disruptive behavior – Full Relief; threatening behavior and termination – No Relief, Agency Upheld); **Administrative Review: HO Reconsideration Request received 09/25/07; Reconsideration Decision issued 10/05/07; Outcome: Original decision affirmed; Administrative Review: EDR Admin Review Request received 09/25/07; EDR Ruling #2008-1829 issued 01/02/08; Outcome: AHO's decision affirmed; Administrative Review: DHRM Admin Review Request received 01/11/08; DHRM ruling issued 03/05/08; Outcome: AHO's decision affirmed.**

# Commonwealth of Virginia
## Department of Corrections

## DECISION OF HEARING OFFICER

**In the matter of: Case No: 8669**

Hearing Date: September 6, 2007
Decision Issued: September 13, 2007

## PROCEDURAL HISTORY

On August 2, 2007, Grievant's counsel requested this matter extend beyond the 35 day period for a decision to be rendered. Grievant's counsel raised issues including Grievant's medical condition and furnished written physician's recommendations. Upon finding just cause, and with agreement of both parties, the 35 day period was extended to September 13, 2007.

The hearing site was changed, with the agreement of both parties, due to mechanical problems at the original hearing site.

## APPEARANCES

Grievant's Attorney
Grievant (also testified as witness)
Oral Surgeon
Agency Party Representative, who also testified as a witness
Agency Advocate
Dental Assistant ("DA")

## ISSUES

Were the Grievant's actions such as to warrant disciplinary actions under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

## 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. A preponderance of the evidence is evidence which shows that what is intended to be proved is

more likely than not; evidence that is more convincing than the opposing evidence.[1]

## FINDINGS OF FACT

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

Grievant has been employed by the Virginia Department of Corrections ("D.O.C.") as a Dentist since August of 1997. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On March 9, 2007 Grievant was issued a Group III Written Notice with disciplinary action of termination (effective 3/9/07) for Threatening Behavior, Gross Negligence on the job causing serious injury, and Disruptive Behavior.[2] On April 4, 2007, Grievant timely filed a grievance to challenge the Written Notice and disciplinary action of termination. The grievance proceeded through the resolution steps and when the parties failed to resolve the grievance the agency head, on June 27, 2007, qualified the grievance for a hearing.[3] On July 30, 2007, the Department of Employment Dispute Resolution assigned this matter to the Hearing Officer.

On October 12, 2005 Grievant performed a dental extraction on SP, an inmate within D.O.C., removing one tooth (#32). On 10/26/05 an exposed bone was smoothed at the extraction site by Grievant. SP was admitted to a hospital on 10/29/05 and discharged on 10/31/05 with a diagnosis of dental infection and cervical cellulites. He returned to hospital on 11/1/05 and was discharged 11/06/05.[4]

On April 6, 2006 a dental peer review of Grievant's work was conducted and he was found to need improvement in four areas:

1. A complete treatment plan should be developed before start of routine dental treatment. 2. Surgical patients should be recalled within 6 days to assess post surgical healing. 3. Extraction technique should be modified to prevent crown fractures.
4. Appropriate pain medication should be prescribed for post surgical pain relief.[5]

On April 27, 2006 Grievant extracted 5 teeth (#14, 16, 17, 18, and 19) from inmate WC. Medical saw him on weekend of 4/30/06 and ordered Amoxicillin and Motrin due to swelling and a temperature of 98.1. On 5/1/06 Grievant saw him and ordered Tylenol #3 to take with Motrin for increased pain. On 5/02/06 he was seen at the Emergency Department and discharged that date with diagnosis of peritonsillar cellulites and uvulitis.[6]

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[1] Department of Employment Dispute Resolution, Grievance Procedure Manual, ("GPM") Section 5.8 and 9.
[2] Agency Exhibit Tab 1: Written Notice issued 3/9/07.
[3] Agency Exhibit Tab1: Grievance Form A.
[4] Agency Exhibit Tab 2.
[5] Agency Exhibit Tab 6 page 4.
[6] Agency Exhibit Tab 3.

On May 11, 2006 Agency instructed Grievant that he will cease to perform any oral surgery procedures until he has successfully completed a continuing education course on oral surgery. The course was required to be approved and was to be a course that provides oral surgery training for the general dentist.[7] On June 9, 2006 Grievant was instructed that a dentist was secured to provide oral surgery one day a week. Grievant was to refer oral surgery cases to him, schedule patients for him to see, and be present in the dental clinic when he is treating patients.[8]

On February 21, 2007 Grievant and DA had a disagreement concerning a number of issues. Grievant made statements to DA while maintaining a close, nose to nose, proximity to DA. Grievant came up to DA and got nose to nose with her. When, a number of times, she attempted to back away Grievant stepping forward to maintain the close proximity.

Grievant worked with two Agency dental assistants who have resigned. One indicated to Agency when she gave her two week notice (given on March 27, 2006) she was resigning as she no longer was feeling comfortable with the situation in the Dental Department of Correctional Center.

## APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code Section 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth of Virginia. This legislation includes provisions for a grievance procedure and 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 pursue legitimate grievances. Code Section 2.2-3000(A) sets forth the Virginia grievance procedure and provides, in 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 employee disputes which may arise between state agencies and those employees who have access to the procedure under Section 2.2-3001."

The Department of Corrections ("D.O.C."), pursuant to Va. Code §53.1-10, 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 D.O.C. Standards of Conduct addresses Group III offenses. These offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal. Group III offenses include, "threatening or coercing persons associated with any state agency, including but not limited to employees, supervisors, patients, visitors, and students" and "gross negligence on the job that results in the escape, death, or serious injury of a ward of the State or the death or serious injury of a State employee".[9]

[7] Agency Exhibit Tab 6 page 1.
[8] Agency Exhibit Tab 6 page 2.
[9] Agency Exhibit Tab 8. Section XII.(B)(12 and15) VDOC Standards of Conduct, No. 135.1, updated 8/29/06.

The Standards of Conduct provides, "The list of offenses in this procedure is illustrative, not all-inclusive. An action or event occurring either during or outside of work hours that, in the judgment of the agency head, undermines the effectiveness of the employee or of the agency may be considered a violation of these Standards of Conduct and may result in disciplinary action consistent with the provisions of this procedure based on the severity of the offense."[10]

The Group III Written Notice issued Grievant on 3/9/07 indicated three offenses therein:

1. ***Threatening Behavior.*** At "nose to nose" closeness, caused Dental Assistant to retreat while accusing her of "back biting statements".
2. ***Gross negligence on the job causing serious injury.*** During teeth extractions, intentionally broke off the crowns of teeth and then dug out the roots. This caused infections and subsequent hospitalization of two inmates. Continued to intentionally break off crowns of teeth after being told to stop the practice. Resulted in suspension of extraction privileges.
3. ***Disruptive Behavior.*** Caused resignation of two long term dental assistants by not permitting them to perform routine duties.

*Threatening Behavior: At "nose to nose" closeness, caused Dental Assistant to retreat while accusing her of "back biting statements"*

DA had worked with Grievant since September of 2006. She had been a certified dental assistance since 1976 and an LPN since 2004. On February 21, 2007 at approximately 8:30 A.M. while preparing to seat the first patient of the day for treatment an incident occurred at work between Grievant and DA. DA entered the Dental Clinic and observed Grievant in the tool area with drawers and cabinets standing open making hash marks on paper. She asked in he was ready to see his first patient and he replied he was trying to clear the count and that she had made it so complicated he didn't know what he was supposed to have anymore. DA stated she had cleared the tool count the previous day so unless he had reason to believe someone had come in to dental during the night to steal they were ready to go to work.

Grievant continued to accuse DA of confusing the way the tool inventory is counted and DA responded by asking how confusing is alphabetic order. Grievant moved towards DA and spoke of not being to trust her and of her having made a mess of the tools. She backed up as he moved forward towards her. They went nose to nose from the clinic area to the lab area with her backing up and him walking forward. During this time Grievant was telling her he couldn't work with someone he didn't trust and accusing her of making back biting comments. DA asked if Grievant was trying to run her off so he could sit on his butt and continue to get paid for doing nothing.[11] DA suggested they take it to the Warden's Office.

Grievant admitted to Chief Dentist of being within 16 inches of DA during their exchange when DA backed up with Grievant moving forward. Grievant contended he did not make remarks of the count being confusing, didn't say he would not work with someone he did

[10] Agency Exhibit Tab 8, Section IV. (C) VDOC Standards of Conduct No. 135.1, updated 8/29/06.
[11] Agency Exhibit Tab 4 page 2

not trust, and did not make the "back stabbing" accusations. Grievant also indicated if he did move towards DA while speaking, it was either so-as-to not shout above the noise of the machinery or to better hear as he had lost about 40% of hearing in one ear.[12]

In his written response to charges which was dated 3/9/07 Grievant wrote that he did tell DA that he could not work with someone that he could not trust and that he "placed my face close to her face" because he had a hearing problem and wanted to hear what she was saying. [13]

DA testified Grievant did not make any threatening statement or gesture to her that she felt placed her in fear for her physical safety. However, as far as physical threatening, this was indicated in the actions of Grievant who, when DA would attempt to back up, would move forward. This backing up by DA and Grievant stepping forwards toward DA was repeated a number of times with Grievant each time attempting to stay in close, nose to nose, proximity to her.

Chief Dentist considered the statements from DA, the fact that Warden felt Grievant presented a problem at institution, and the way he spoke in close proximity to DA. Chief felt Grievant's actions warranted a Group III after his investigation into matters.

While DA's version of matters appears to be consistent, Grievant version of matters which he has provided at different times, both in writing and orally, appear to vary.

Upon careful consideration of all the evidence, by a preponderance of the evidence, the Agency has met its burden as to allegations of "Threatening Behavior" - At "nose to nose" closeness, caused Dental Assistant to retreat while accusing her of "back biting statements".

Gross negligence on the job causing serious injury. *During teeth extractions, intentionally broke of the crowns of teeth and then dug out the roots. This caused infections and subsequent hospitalizations of two inmates. Continued to intentionally break off crowns of teeth after being told to stop the practice. Resulted in suspension of extraction privileges.*

Agency alleged that Grievant was grossly negligent on the job which caused serious injury. The offense specifically includes a component that the gross negligence causes serious injury. Gross negligence is defined as "that degree of negligence which shows indifference to others as constitutes an utter disregard of prudence amounting to a complete neglect of the safety of another. It must be such a degree of negligence as would shock fair-minded men although something less than willful recklessness." *Griffin v. Shively,* 227 Va. 321, 315 S.E.2d 213 (1984) quoting *Ferguson v. Ferguson,* 212 VA 86, 92, 181 S.E.2d 648, 653 (1971).

Agency alleges two instances occurred in which Grievant's gross negligence on the job caused serious injury. Grievant is alleged to have used a tooth extraction technique of intentionally fracturing off the crowns of teeth and then digging out the roots. The use of this

[12] Agency Exhibit Tab 4 page 3&4: Memo dated March 2, 2007.
[13] Agency Exhibit Tab 1 page 5.

technique is the gross negligence alleged to have caused the infections and subsequent hospitalization of two inmates, SP and WC. It is further alleged that because Grievant continued to use the technique after being advised not to the agency suspended his extraction privileges[14].

Chief Dentist, who supervised Grievant, reviewed hospital and other records of SP and WC and testified:

a. He observed Grievant in April of 2006 extract a tooth from a patient.
b. Records indicate that the extractions coincided with admission to the hospital for infection.
c. He believed the extractions caused the infection and there could be no other source of infection than Grievant's action.
d. Grievant's technique caused the infection or increased the chances of infection.
e. He opined the more tissue disruption the more the risk of infection and that Grievant had created an avenue for germs to get in due to his technique.
f. One patient had an infection of the uvula and the only way you can get an infection from a molar to uvula is to create a pathway from the soft tissue by relieving the soft tissue. It is very unusual to get this without a massive tissue disruption.

Grievant's presented an Oral Maxillfacial Surgeon who testified he also reviewed medical and other records furnished by Agency and that:

a. The ability to break off the crown of a tooth that is intact, no decay, no internal absorption, or pathology is virtually impossible.
b. In a certain percent of cases the crown will fraction off because the tooth is weaken so the technique is to break the tooth off then surgically remove the root. It is a standard normal procedure to break the tooth off.
c. As to the spread of infections there is no way that infection from extraction of upper or lower functionary teeth is going to get to the tonsillary area without involvement of multiple spaces in the head and neck.
d. According to the records reviewed and where the infections were located, considering ways dental infections are promulgated, where the incision is located, where the drainage was done it is an almost non-existent probability that Grievant's actions caused the infections that let to the hospitalizations.
e. Based on his record review, Oral Maxillfacial Surgeon opined Grievant did not utilize a different degree of skill and diligence than a reasonable, prudent, dentist in Virginia would use. Grievant used normal care in what he did and the infections did not appear to have any relation to the dental extractions.
f. There are no statistics to back up allegations that there is increased risk of infection with more tissue being exposed.

Grievant testified that he saw SP on 10/12/05, advised him of the procedure, and had him sign the consent to extraction of a tooth (#32). He had no recollection of breakage. He testified he saw WC and on 4/27/06 and extracted 5 of his teeth which were in various states of breakdown. On 10/21/05 he saw WC on a complaint of a sharp piece of bone. The area was numbed and the exposed bone, the size of one or two grains of rice was bone removed/smoothed.

[14] Agency Exhibit Tab 1 page 4: Memo dated March 8, 2007.

Upon review of the evidence, the record indicates SP and CW had dental extractions done by Grievant nearly 18 months in one case and nearly 12 month in the other case prior to the date the Written Notice was issued. The evidence indicates that both did have an infection after the extractions. Counsel for Grievant and the evidence in this cause raise the issue of prompt issuance of disciplinary actions which is discussed below.

Consideration was given to the evidence received and to the burden being upon the Agency to show by a preponderance of the evidence (evidence which shows that what is intended to be proved is more likely than not; evidence that is more convincing then the opposing evidence) that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Consideration was given to the allegations that Grievant's actions were "gross negligence" and whether the actions of Grievant "caused serious injury".

The Agency opined that the extraction technique would increase the probability of infection. Agency had observed Grievant in April of 2006 conducting a dental extraction but there was not an observation of the extraction technique used with SP and WC and there is no evidence whether Grievant broke the crowns of teeth and dug out roots as alleged or not in these particular cases. There was contradictory evidence as to the probability that the extractions and dental procedure utilized were responsible for the infections of SP and WC. There was contradictory evidence presented as to whether Grievant's teeth extractions in the case of SP and WC amounted to gross negligence.

Upon careful consideration of all the evidence in this case it does not appear that, by a preponderance of the evidence that Grievant's actions as to SP and WC were gross negligence or that the actions of Grievant were the cause of serious injury. While infection was established the cause of the infection, by a preponderance of the evidence, was not. For the reasons stated above, the Agency has <u>failed to prove</u>, by a preponderance of the evidence, the allegations of gross negligence on the job causing serious injury.

<u>Disruptive Behavior</u>. *Caused resignation of two long term dental assistants by not permitting them to perform routine duties.*

Agency alleged that two long term dental assistants at Correctional Center resigned because Grievant did not permit them to perform their routine dental assistant duties of scheduling, taking x-rays, reviewing health questionnaires, sterilizing instruments, and maintaining equipment.[15]

Chief Dentist testified that Grievant had two dental assistants who resigned and they had trouble filling the position. A March 27, 2006 Agency memo indicated that a named dental assistant informed Agency she was resigning and gave her two week notice. The Memo noted her as no longer feeling comfortable with the situation in the Dental Department of Correctional

[15] Agency Exhibit Tab 1 page 4: Memo dated March 8, 2007.

Center.[16]

The Agency bears the burden of proof. Evidence indicated that two dental assistants have resigned and that one Dental Assistant indicated, in giving her two week notice, that she was no longer feeling comfortable with the situation in the Dental Department. Evidence did not address or establish the reason she was not feeling comfortable or that she resigned because Grievant did not permit her to perform routine dental assistant duties. Evidence was silent as to why either resigned other than the reference to "no longer was feeling comfortable with the situation". It is possible to speculate any number of reasons as to why the one dental assistance might no longer feel comfortable with the situation in the Dental Department. However, the Hearing Officer is to base his decision on the evidence admitted and not on assumptions or speculation. No evidence was presented as to what caused the resignations or what may have caused the one dental assistant to no longer feel comfortable with the situation in the Dental Department.

For the reasons stated above, the Agency has <u>failed to prove</u>, by a preponderance of the evidence, the allegations of "Disruptive Behavior. Caused resignation of two long term dental assistants by not permitting them to perform routine duties."

<u>Prompt Issuance of Disciplinary Actions</u>

The DOC *Standards of Conduct* are required to be consistent with Department of Human Resource Management's (DHRM) policy, which sets forth standards for professional conduct and behavior and corrective actions for unacceptable behavior.[17] One of the basic tenets of the *Standards of Conduct* is the requirement to promptly issue disciplinary action when an offense is committed. As soon as a supervisor becomes aware of an employee's unsatisfactory behavior or performance, or commission of an offense, the supervisor and/or management should use corrective action to address such behavior.[18] Management should issue a written notice as soon as possible after an employee's commission of an offense. [19] One purpose in acting promptly is to bring the offense to the employee's attention while it is still fresh in memory. A second purpose is to prevent a recurrence of the offense. Unless an extensive, detailed investigation is required, most disciplinary actions are issued within a few weeks after an offense.

The present Group III Written Notice addresses three offenses (Threatening Behavior, Gross Negligence on the job causing serious injury, and Disruptive Behavior) which are further discussed in relation to the prompt issuance of disciplinary action below:

*a. re: Threatening Behavior:* The threatening behavior issues raised in the Written Notice involve an incident occurring on February 21, 2007 and as to allegations of threatening

[16] Agency Exhibit Tab 5 page 2.
[17] Agency Exhibit Tab 8: VDOC Operating Procedure, Standards of Conduct< Number 135.1 Update 8/29/06.
[18] Grievant Exhibit Tab 11. Department of Human Resource Management ("DHRM") Policies and Procedures Manual, Policy 1.60 Effective Date 6/16/93, Section VI.A.
[19] Grievant Exhibit Tab 11. Section VII.B.1..

behavior the disciplinary action was timely and consistent with policy and regulations.

*b. re: Gross Negligence on the job causing serious injury:* Counsel for Grievant raised issues concerning prompt issuance of disciplinary action concerning the allegations of gross negligence on the job causing serious injury contained within the Group III Written Notice which was issued on March 9, 2007.

The gross negligence allegation raised in the Written Notice concerns Grievant's actions in dental procedures for two inmates which occurred in October of 2005 and in April of 2006. There are situations in which a delay between the agency receiving notice of an alleged offense and issuance of discipline can be justified by extenuating circumstances. Peer review and investigation occurred in April of 2006 and this led to suspension of Grievant's extraction privileges on May 11, 2006. Agency also did require Grievant to attend additional training and worked with Grievant in obtaining that training. The Agency charged Grievant with gross negligence on the job causing serious injury and further stated that during teeth extractions, intentionally broke off the crowns of teeth and then dug out the roots and that this caused infections and subsequent hospitalization of two inmates.

There is a near 18 month delay (October 2005 to March 9, 2007) and a near 12 months (April 2006 to March 9, 2007) between the dates of the dental procedures and the date of the issuance of the Written Notice. The dates of the hospital treatment lessen each period by approximately a month each. The Agency did have notice and conducted an investigation which led, on May 11, 2006 to their suspending Grievant's privileges to extract teeth. Thus, for approximately 10 months (from May 11, 2006 to March 9, 2007) prior to the filing of the Written Notice after a concluded investigation and peer review, while the Agency had suspended his teeth extraction privileges, Agency was aware of matters. Accordingly, as to Gross Negligence alleged it is concluded that the agency's delay in the imposition of disciplinary action is not prompt discipline as that term is used in DHRM Policy 1.60.

*c. re: Disruptive Behavior:* An Agency memo stated that one Dental Assistant, on 3/20/06, gave a two week notice that she was leaving. This is approximately 11 months prior to the date of the Group III Written Notice. Agency did not present reason for such a delay in issuing the disciplinary action. Accordingly, it is concluded that the Agency's delay in the imposition of disciplinary action as to allegations of Disruptive Behavior is not prompt discipline as that term is used in DHRM Policy 1.60.

Conclusions:

1. As to allegations in the Group III Written Notice of "Gross Negligence on the job causing serious injury" and "Disruptive Behavior" it is not determined that Grievant engaged in these behaviors described in the Written Notice.

2. As to the allegations in the Group III Written Notice of "**Threatening Behavior.** At "nose to nose" closeness, caused Dental Assistant to retreat while accusing her of "back biting statements".

Upon reviewing the facts de novo (afresh and independently, as if no determinations had yet been made) it is determined that (i) Grievant engaged in the behavior described in the Written Notice ; (ii) The behavior constituted misconduct; (iii) the Agency's discipline was consistent with law and policy; and (iv) the Agency's discipline did not exceed the limits of reasonableness.

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) and employees long service or otherwise satisfactory work performance. The agency's decision was within the limits of reasonableness. Under the *Rules for Conducting Grievance Hearings*, Section VI, B, 1, 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.

The Agency has proven by a preponderance of the evidence that the disciplinary action of issuing a Group III Written Notice and disciplinary action of termination was warranted and appropriate under the circumstances.

## DECISION

For the reasons stated above, the Agency's issuance of a Group III Written Notice with disciplinary action of termination is hereby UPHELD and the Agency is directed to modify and reissue the Group III Written Notice to reflect therein only the allegations of *Threatening Behavior: At "nose to nose" closeness, caused Dental Assistant to retreat while accusing her of "back biting statements.*

## APPEAL RIGHTS

You may file an Administrative review request within **15 calendar days** from the date the decision was issued.

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

**Administrative Review:**

This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

**1. A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence

or evidence of incorrect legal conclusions are the basis for such a request.

**2. A challenge that the hearing decision is inconsistent with State or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to: Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219.

**3. A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to: Director, Department of Employment Dispute Resolution, One Capitol Square, 830 East Main, Suite 400, Richmond, VA 23219.

A party may make more than one type of request for review. All requests 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. (Note: the 15-day period, in which the appeal must occur, begins with the date of issuance of the decision, not receipt of the decision. However, the date the decision is rendered does not count as one of the 15 day following the issuance of the decision is the first of the 15 days.) A copy of each appeal must be provided to the other party.

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. You must give a copy of your notice of appeal the Director of the Department of Employment Dispute Resolution.

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Lorin A. Costanzo
Hearing Officer

# Commonwealth of Virginia
## Department of Corrections

**Decision of Hearing Officer**
**In re: Case No: 8669-R**

Reconsideration Decision Issued: October 5, 2007

## RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. A request to reconsider a decision or reopen a hearing is made to the hearing officer. 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]

On September 13, 2007, the "Decision of Hearing Officer" in the above cause was issued. On September 25th, 2007 the Hearing Officer received "Grievant's Request for Administrative Reviews by both the Hearing Officer and the Director of EDR of the Hearing Decision issued on September 13, 2007 in the Above-Captioned Case".

Grievant indicates the basis for such request as, "Fundamental mistakes of evidence as pertains to the evidentiary record relied upon in the hearing decision and fundamental mistakes of law pertaining to relevant statutory provisions and to rules of EDR concerning the grievance procedure being contained in the Hearing Decision". Grievant contends it improper to find he engaged in threatening behavior or that the termination was warranted by the evidence. He contends the hearing officer does not address whether the wrongful behavior rose to a Group III level terminable offense and that it was improper not to mitigate.

Grievant contends the evidence indicates that DA was not threatened by words or behavior. DA did testified that she did not feel threatened by any statements or "gestures, like with his arm or fist". In response to the question of if she had psychological fear she indicated she had "concerns". The evidence did indicate that Grievant placed his face close to DA's face and told her he could not work with someone that he could not trust. DA testified "I backed up, he backed forward, he backed forward I backed up". This backing up went from the clinic to the dental lab area with the parties still nose to nose.

DA was an employee of the Agency and was on the job when the incident in question occurred. DA's job placed her in proximity to Grievant who she was required to work with. The evidence indicated Grievant's actions and words affected Grievant especially as he carried matters to DA. He admitted to being within 16 inches of her making certain statements and accusations. Not only did he moved into a nose to nose relationship with her he took action to maintaining this spatial relationship with her. He actively maintained the nose to nose relationship under these circumstances, with words being exchanged, as she backed up. She backed from the clinic into the lab room with him following. She was concerned enough to

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

attempt to retreat. She was concerned enough to tell Grievant matters needed to be addressed in front of the Warden and to take these matters to the Warden.

The totality of the evidence indicated that this was threatening behavior to an employee of the Agency by another employee and this was of a serious nature. Examples of Group III offenses include, "threatening or coercing persons associated with any state agency …" The evidence indicated Grievant engaged in this behavior which was described in the Written Notice; the behavior constituted misconduct; the Agency's discipline was consistent with law and policy; and the Agency's discipline did not exceed the limits of reasonableness. The normal disciplinary action for a Group III offense is a Written Notice and removal from state employment. 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) and employees long service or otherwise satisfactory work performance. The agency's decision was within the limits of reasonableness. Under the *Rules for Conducting Grievance Hearings*, Section VI, B, 1, 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.

Grievant's request for administrative review and reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For the reasons stated above, Grievant's request for reconsideration by the hearing officer is **denied**.

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## 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 request 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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Lorin A. Costanzo, Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of
Virginia Department of Corrections
March 5, 2008

The grievant, through his representative, has requested an administrative review of the hearing officer's decision in Case No. 8669. The grievant was issued a Group III Written Notice and separated from employment with the Department of Corrections. He filed a grievance to have the disciplinary action reversed. In his decision, the hearing officer upheld the Group III Written Notice and the termination. The grievant presented arguments in an attempt to support his claim that the discipline is not consistent with state policy pertaining to both the original and reconsidered grievance hearing decisions made to date by the hearing officer. The agency head of the Department of Human Resource Management has asked that I respond to this request for an administrative review.

## FACTS

The Virginia Department of Corrections employed the grievant as a Dentist at one of its institutions. On March 9, 2007, management officials issued to the grievant a Group III Written Notice with termination for "Threatening Behavior, Gross Negligence on the Job causing serious injury, and Disruptive Behavior. The grievant filed a grievance, and when he did not receive the relief he sought, he asked that the grievance be heard by a hearing officer.

According to the statement of facts in the hearing officer's original decision, "On October 12, 2005 Grievant performed a dental extraction on SP, an inmate within DOC, removing one tooth (#32). On 10/26/05 an exposed bone was smoothed at the extraction site by the Grievant. SP was admitted to a hospital on 1029/05 and discharged on 10/31/05 with a diagnosis of dental infection and cervical cellulites. He returned to the hospital on 11/1/05 and was discharged 11/06/05.

On April 6, 2006 a dental peer review of Grievant's work was conducted and he was found to need improvement in four areas:

1. A complete treatment plan should be developed before start of routine dental treatment.
2. Surgical patients should be recalled within 6 days to assess post surgical healing.
3. Extraction technique should be modified to prevent crown fractures.
4. Appropriate pain medication should be prescribed for post surgical pain relief.

On April 27, 2006, the Grievant extracted 5 teeth (#14,16,17,18, 19) from inmate WC. Medical saw him on 4/30/06 and ordered Amoxicillin and Motria due to swelling and a temperature of 98.1. On 5/1/06 Grievant saw him and ordered Tylenol #3 to take with Motrin for increased pain. On 5/2/06 he was seen at the Emergency Department and discharged that date with diagnosis of peritonsillar cellulites and uvulitis.

On May 11, 2006, the Agency instructed Grievant that he will cease to perform any oral surgery procedures until he has successfully completed a continuing education course on oral surgery. The course was required to be approved and was to be a course that provides oral surgery training for the general dentist. On June 9, 2006 Grievant was instructed that a dentist was secured to provide oral surgery one day a week. Grievant was to refer oral surgery cases to him, schedule patients for him to see, and be present in the dental clinic when he is treating patients.

On February 21, 2007, the Grievant and the dental assistant had a disagreement concerning a number of issues. Grievant made statements to DA while maintaining a close, nose to nose, proximity to DA. Grievant came up to DA and got nose to nose with her. When, a number of times, she attempted to back away Grievant stepping forward to maintain the close proximity.

Grievant worked with two Agency dental assistants who have resigned. One indicated to Agency when she gave her two week notice (given March 27, 2006) she was resigning as she no longer was feeling comfortable with the situation in the Dental Department of Correctional Center."

Based on testimony from the grievant and witnesses and through examining treatment records, management officials concluded that the grievant participated in threatening behavior toward the dental assistant (pursuit of the dental assistant through a nose to nose confrontation), gross negligence on the job causing serious injury (dental treatment of the inmates), and disruptive behavior (two other dental assistants resigned).

Management officials issued to the grievant a Group III Written Notice with termination. He filed a grievance, and when he did not get the relief he was seeking, he asked for a hearing by a hearing officer. In his decision, the hearing officer determined that the evidence did not support the gross negligence and disruptive behavior allegations. However, he did find that there was sufficient evidence to support that the grievant participated in threatening behavior and let stand the Group III Written Notice with termination.

The relevant policy, the Department of Human Resource Management's Policy No. 1.60 states as its objective, "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. These examples are not all-inclusive.

## DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found, but the hearing officer determines that the

disciplinary action is too severe, he may reduce the discipline. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This 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.

DHRM Policy No. 1.60, Standards of Conduct, provides guidance to agencies for handling workplace behavior and for taking corrective action. DHRM has the authority to address the hearing officer's interpretation and application of policy issues.

According to the hearing officer's reconsideration decision, " …The evidence indicated Grievant's actions and words affected Grievant especially as he carried matters to the DA. He admitted to being within 16 inches of her making certain statements and accusations. Not only did he move into a nose to nose relationship with her he took action to maintaining this spatial relationship with her. He actively maintained the nose to nose relationship under these circumstances, with words being exchanged, as she backed up. She backed from the clinic into the lab room with him following. She was concerned enough to attempt to retreat. She was concerned enough to tell Grievant matters needed to be addressed in front of the Warden and to take these matters to the Warden."

In his appeal, the grievant questioned whether state policy permits a reading of policy making it a disciplinary offense to engage in "workplace violence" such that a nonphysical contact act – unaccompanied by any weapon or any verbal threat of harm or a threatening gesture which inherently represents a threat of harm to another, such as a raised or pulled back arm with a clinched fist, witnessed only by the perpetrator of the act in question and the alleged victim of the act – that constitutes the alleged act of workplace violence in question in a given case is to be determined to constitute an act of punishable workplace violence by not only by an objective standard but by a subjective standard as well. In addition, the grievant contends that if his actions do not rise to the level of a threat of violence, then it should be deemed an act of disruptive behavior and punishable by a Group III Written Notice.

It is indisputable that the grievant and the DA had disagreements as to what the office procedures should be. Also, it is indisputable as that the grievant expressed his disagreements by pursuing the DA around the office complex while maintaining a distance of sixteen inches between their respective noses. His pursuit of her took them to the dental lab. As a result of this interaction, the DA reported the occurrence to the warden. After conducting a review, it was determined that the grievant's behavior constituted a threat.

The hearing officer determined that the evidence did not support that the grievant was guilty of Gross Negligence, or was Disruptive in the Workplace. Thus, those two charges were overturned. However, she maintained that the evidence supported Threatening Behavior, and thus upheld the Group III Written Notice and the dismissal.

It is the opinion of this Agency that Department of Corrections officials properly applied the provisions of the Standards of Conduct Policy 1.60 and the hearing officer properly interpreted that policy. Because it appears that the grievant is challenging the hearing officer's consideration of the evidence and her judgment as to what is a threat rather than identifying misapplication of policy, this Agency will not interfere with the application of the decision.

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