Issues: Group III Written Notice (engaging in conduct which undermines agency's effectiveness) and Termination; Hearing Date: 07/11/08; Decision Issued: 07/17/08; Agency: VSP; AHO: William S. Davidson, Esq.; Case No. 8891; Outcome: Full Relief; **Administrative Review: EDR Admin Review request received 07/31/08; Outcome pending.**

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 8891

Hearing Date: July 11, 2008
Decision Issued: July 17, 2008

PROCEDURAL HISTORY

The Grievant received a Group III Written Notice on January 11, 2008 for:

> Between September 25-27, 2007, but not limited to, you assaulted Ms. A and you were subsequently arrested on October 3, 2007, for assault and battery of Ms. A (cohabit/child in common), who is family or household member in violation of 18.2-57.2 of the Code of Virginia, a Class 1 misdemeanor. This is a violation of General Order 19, paragraph 14.b.(20), of the State Police Manual, to wit: Engaging in conduct, whether on or off the job, that undermines the effectiveness or efficiency of the Department's activities. This includes actions which might impair the Department's reputation or performance of its employees.

Pursuant to the Group III Written Notice, the Grievant was terminated on January 11, 2008. On February 7, 2008, the Grievant timely filed a grievance to challenge the Agency's actions. The outcome of the Second Resolution Step was not satisfactory to the Grievant and he requested a hearing. On June 16, 2008, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On July 11, 2008, a hearing was held at the Agency's location.

APPEARANCES

Grievant
Grievant's Attorney
Agency Party
Agency Representative
Witnesses

ISSUE

1. Whether the entry of an Expungement Order, where the Grievant was acquitted of the alleged assault would be grounds to bar the Hearing Officer from viewing and subsequently allow the Hearing Officer to exclude from the evidence in this hearing any Agency records relating to the criminal assault charge brought against the Grievant by the Agency , including but not limited to any photographs of the alleged assault victim and any investigative complaints or reports in documents, whether signed or unsigned.

2. Whether the description of the offense as set forth in Section 2 of the Written Notice provided the Grievant with adequate notice that his termination was based on something other than the mere issuance of an arrest warrant for assault and battery.

3. Whether the Grievant's actions justified the issuance of the Group III Written Notice and subsequent termination.

AUTHORITY OF HEARING OFFICER

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs*, 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

> While the Hearing Officer is not a "super personnel officer" and should give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

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.

PRELIMINARY MOTIONS

Prior to the commencement of evidence being taken before the Hearing Officer, the attorney for the Grievant made a Motion for the Hearing Officer to exclude all of the evidence under Tabs 1, 2, 4, 5, 6, 9, and 12 of Agency Exhibit 1. The basis for this Motion was that the Grievant was acquitted of the alleged assault and, pursuant thereto, filed a Petition for Expungement with the Circuit Court. Pursuant to a hearing on that matter, an Order was entered on February 4, 2008 that all police and Court records related to the charges set forth above are to be expunged.[1] Virginia Code Section 19.2-392.2(A) provides in part as follows:

> If a person is charged with the commission of a crime...and is acquitted...he may file a Petition setting forth the relevant facts and requesting expungement of the police records and the Court records relating to the charge.

Section 19.2-392.2(F) provides in part as follows:

> If the Court finds that the continued existence and possible dissemination of information relating to the arrest of the Petitioner causes or may cause circumstances which constitute a manifest in justice to the Petitioner, it shall enter an Order requiring the expungement of the police and Court records, including electronic, relating to the charge.

Section 19.2-392.1, which is the Statement of Policy for the Expungement of Criminal Records, states in part as follows:

> The General Assembly finds that arrest records can be a hindrance to an innocent citizen's ability to obtain employment, an education, and to obtain credit.

The attorney for the Grievant argued that everything contained under the aforesaid Tabs were part of the police or Court records and should not be allowed as evidence in this matter. Section 19.2-392.2(K) provides that the State Police shall, pursuant to rules and regulations adopted pursuant to Section 9.1-134, direct the manner by which the appropriate expungement or removal of such records shall be effected. The regulations governing the removal of these records are set forth at 6 Virginia Administrative Code 20.

6 VAC 20-120-20 defines criminal history record information as follows:

> Records and data collected by criminal justice agencies on adult

[1] Grievant Exhibit 1, Tab 8, Page 4

> individuals consist of identifiable descriptions and notations of arrest, detentions, indictments, informations, or other formal charges and any disposition arising therefrom. The term shall not include juvenile record information, which is controlled by Section 16.1-226 et seq of Title 16.1 of the Code of Virginia, **criminal justice investigation** or correctional status information.(emphasis added)

The Hearing Officer determined that, with the possible exception of the photographs contained at Tab 2 of Agency Exhibit 1, that the remaining information consisted of criminal investigative information. Tab 2 was excluded and the remaining Tabs were not excluded.

The attorney for the Grievant next argued that the Written Notice was fatally defective. The defect, according to the attorney for the Grievant, was that it did not properly give the Grievant adequate Notice as to the grounds for his termination. The attorney for the Grievant argued that the second sentence of the grounds used the language, "This is a violation of General Order 19." He argued that this indicated that there was one (1) charge and that charge was the Grievant's arrest for assault and battery. The Hearing Officer was provided a Virginia Court of Appeals case, which was decided on December 20, 2005. That case is *Virginia Department of Corrections v. Jeffrey Compton*. The Hearing Officer finds that the holding of this case is not dispositive of the matter before the Hearing Officer. The Written Notice stated that the Grievant assaulted the girlfriend and was subsequently arrested and this was a violation of General Order 19, Paragraph 14(b)(20). General Order 19, Paragraph 14(b)(20) states as follows:

> Engaging in conduct, whether on or off the job, that undermines the effectiveness or efficiency of the Department's activities. This includes actions which might impair the Department's reputation as well as the reputation or performance of the employee.

The Hearing Officer finds that the notice of assault of the girlfriend was the basis on which the Written Notice was issued and that the language used in the Written Notice was sufficient to inform the Grievant of a potential violation of General Order 19, Paragraph 14(b)(20).

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 Agency provided the Hearing Officer with a notebook containing fourteen (14) tabbed sections and that notebook was accepted in its entirety as Agency Exhibit 1, with the exception of Tab 2. The Grievant provided the Hearing Officer with a notebook containing nine (9) tabbed sections and that notebook was accepted in its entirety as Grievant's Exhibit 1.

The generic facts of this matter were largely undisputed. The Grievant was a Law Enforcement Officer for this Agency. On or about September 25th through September 27th of 2007, the Grievant and his live-in girlfriend had multiple altercations in the Grievant's home. Both the Grievant and the Agency's witnesses testified to this general fact pattern. The discrepancy, which led to this entire matter, is first of all whether or not the Grievant struck his girlfriend and secondly if, in striking her, it was done in self defense or in such a way as would justify an assault charge. The girlfriend did not testify. Accordingly, all of her allegations were presented through the various members of the Agency who spoke with her during their investigation of her allegations.

On September 27, 2007, the girlfriend entered Division 1 Headquarters and was crying and visibly upset. The Sergeant she met with questioned her and, while she would not identify to him exactly who she was upset with, he deemed it necessary to notify a Special Agent to assist him. [2] The Special Agent, who testified under oath before the Hearing Officer, questioned the girlfriend and determined that the Grievant had assaulted the girlfriend and the Special Agent signed a Complaint which resulted in a Misdemeanor Warrant being issued for the Grievant to appear in Court.

On November 30, 2007, the Grievant appeared in Court. After the presentation of evidence by both the original Sergeant who saw the girlfriend when she entered Division 1 Headquarters and the Special Agent who interrogated her and the girlfriend herself, the Judge in the Court dismissed the case against the Grievant because the girlfriend "was not candid with this Court." [3]

In the course of pursuing her investigation, the Special Agent saw to it that the girlfriend took a polygraph examination, which was given to her by the State Police. The results of that polygraph examination were "inconclusive." [4] In her testimony before the Hearing Officer, the Special Agent acknowledged that State Police Polygraph Examiners understand when and when not to give a polygraph examination based on lack of sleep or sickness or lack of food and that this polygraph test was given because pressure was placed upon the Polygraph Examiner from "higher ups."

Subsequent to the dismissal of this matter in the Court, this matter was assigned to a State Police Administrative Investigator and his report consists of thirty-six (36) pages of documentation which commences at Agency Exhibit 1, Tab 4, Page 19. That Administrative Investigator testified before the Hearing Officer and essentially restated what was found in his report. That report includes his interview with the Grievant. The Grievant, in that report and under oath, testified that the girlfriend was the instigator of any confrontations with him, that he retreated to his own bedroom and locked the door and she came through a locked door by popping the lock to confront him, and that he never struck her until and unless she had struck him and/or threatened him. [5] In his report, the Administrative Investigator has seven (7) pages of questions and answers where he asked the Grievant questions and the Grievant answered. These

[2] Agency Exhibit 1, Tab 4, Page 19
[3] Agency Exhibit 1, Tab 4, Page 24
[4] Agency Exhibit 1, Tab 4, Page 24
[5] Agency Exhibit 1, Tab 4, Page 29

questions and answers commence at Agency Exhibit 1, Tab 4, Page 30. In comparing these questions and answers with the answers that the Grievant gave under oath to the Hearing Officer, it is abundantly clear that the Hearing Officer cannot, even by a preponderance of the evidence, find that the Grievant initiated any assault on the girlfriend.

Lacking the ability to observe the girlfriend testify under oath and be subjected to cross examination, the Hearing Officer must rely heavily upon the sworn testimony of the Grievant. The Grievant testified before the Hearing Officer under oath. The girlfriend did not testify. The girlfriend testified under oath before a judge and was deemed to be "not candid." The girlfriend voluntarily took a polygraph examination, provided by the Agency, and the Agency's Polygraph Examiner deemed the results inconclusive. While that result clearly does not indicate that she failed to tell the truth to the polygraph examiner, it does indicate that he was concerned that she was not telling the truth. Said another way, the answers that he received left him in the position of not being able to opine whether the answers were truthful or not truthful. All of the evidence provided to the Hearing Officer by the Agency in its Exhibit Notebook sets forth a conflict as to who did what on the night and days in question. The sworn testimony of the Grievant is found to be believable by the Hearing Officer and the Hearing Officer is left with no choice but to find that the Agency has not proven, by a preponderance of the evidence, that the Grievant assaulted, in any way other than in self defense, the girlfriend.

The head of Human Resources for the Agency was called as an adverse witness. He testified that DHRM Policy 1.80 applied to this Agency and, to the extent that it and the Agency's corresponding policy differed, that DHRM Policy was controlling. Policy 1.80 is a Policy on workplace violence and Page 2 of that policy states as follows:

> Violent acts of employees occurring outside the workplace also may be grounds for disciplinary action up to and including dismissal. In these situations, the Agency must demonstrate in writing that the violent conduct committed has an adverse impact on the employee's ability to perform the assigned duties and responsibilities or that it undermines the effectiveness of the Agency's activities. [6]

The Agency provided no writing that demonstrated the alleged assault would have an adverse impact on the Grievant's ability to perform his duties or that it would undermine the effectiveness of the Agency's activities. The Agency seemed to try to cover this matter by stating that the Assistant Commonwealth's Attorney was aware that a State Trooper had been charged with a misdemeanor. The Agency further tries to cover this issue by stating that its investigators had talked to one or two other citizens for a short period of time to gather some tangential evidence in this matter. Other than that, there was no attempt to provide the required writing and the Agency simply continuously restated that language. The Hearing Officer has determined that there is not sufficient evidence of an assault in this case and the Agency has clearly not complied with Policy 1.80 in this matter.

Further, this witness acknowledged that DHRM Policy 1.60 applied to this Agency. Section VII(E)(1)(a) and (b) of Policy 1.60 states as follows:

> Role of Agency Human Resource Directors

[6] Grievant Exhibit 1, Tab 6, Page 2

> Prior to any action being taken, Agency Human Resource Directors, or their designees, are responsible for:
>
> (a) reviewing all disciplinary actions involving demotion *or* transfer *and disciplinary salary action...*suspension, or discharge to determine whether mitigating circumstances exist that warrant a modified disciplinary action and/or referral to *the employee assistance program*; and
>
> (b) making recommendations to the Agency head regarding the appropriate disciplinary action.

This witness testified that he took no part in this termination. He had no role whatsoever in this matter. Further, there was no evidence that he appointed a designee to serve in his place. The Hearing Officer has determined that there is not sufficient evidence of an assault in this case and it appears that the Agency has clearly not complied with Policy 1.60 in this matter.

MITIGATION

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the Agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution..." [7] 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.

The Agency called as a witness the employee who was responsible for actually terminating the Grievant. This witness testified that mitigating circumstances would be things such as term of service, quality of service, whether or not the Grievant had ever committed a similar act in the past, and was this embarrassing to the Agency. Further, this witness testified that he had not reviewed any facts or data for mitigating circumstances. He had relied exclusively on a letter from another Agency representative which stated, "I find no mitigating circumstances to alter the intended action." [8] This letter does not indicate what mitigating circumstances may have been considered. It simply states that there were none. The Hearing Officer can find no evidence that anyone at the Agency considered mitigating circumstances at any time, even though one of the Agency's witnesses testified that at each step of the review process, mitigating circumstances were considered. In the First Resolution Step Response, the Agency Representative made no reference to any consideration of mitigating circumstances. [9] In the Second Resolution Step response, the Agency Representative stated as follows:

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[7] Va. Code § 2.2-3005

[8] Agency Exhibit 1, Tab 4, Page 7

[9] Agency Exhibit 1, Tab 14, Page 7

> While I do not deny your previous years of satisfactory service with this Agency, there are specific actions that cannot be tolerated from sworn members because of the damage that it has done to the Department's Reputation and/or effectiveness. One time occurrences of these actions will and should result in termination. Certainly assault and battery is one of them. The serious nature of the action is such that mitigating circumstances, such as years of service, unfortunately cannot be taken into consideration.

The Agency Representative of the Second Resolution Step does not say that those mitigating circumstances are insufficient, rather he says they cannot even be considered. While the Hearing Officer does not need to reach mitigating circumstances because he has ruled against the Agency's basic premise that there was an assault, the Hearing Officer would point out that the Grievant has worked for this Agency for approximately eighteen (18) years, that he has an unblemished work record according to the evidence, and for the last several years has been ranked on his performance evaluation as either Major Contributor or Extraordinary Contributor.[10] These are the two (2) highest ratings of a five (5) step rating process. If the Hearing Officer had found that an assault, which was not justified by self defense, had taken place, then the Hearing Officer would have mitigated this matter to a ten (10) day suspension.

DECISION

For reasons stated herein, the Hearing Officer finds that the Grievant did not violate General Order 19, Paragraph 14(b)(20). The Hearing Officer orders that the disciplinary action be rescinded; that the Grievant be reinstated to his former position or, if occupied, to an objectively similar position; that the Grievant be paid full back pay from the date of his termination to the date of his reinstatement; that all of the Grievant's benefits and seniority be restored; and that the Agency pay reasonable attorney's fees to the Grievant's attorney for his representation of the Grievant in this matter.

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

[10] Grievant Exhibit 1, Tab 4

Department of Human Resource Management
101 North 14th Street, 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 Street, 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 a copy of your appeal 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 a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.[11] 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]

[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]

_____
William S. Davidson
Hearing Officer

[11]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).

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