Issue: Group I Written Notice (inappropriate conduct); Hearing Date: 01/05/09; Decision Issued: 01/06/09; Agency: DOC; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 8983; Outcome: Full Relief; **Administrative Review: AHO Reconsideration Request received 01/21/09; Reconsideration Decision issued 01/26/09; Outcome: Original decision affirmed.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 8983

Hearing Date: January 5, 2009
Decision Issued: January 6, 2009

PROCEDURAL HISTORY

On July 31, 2008, Grievant was issued a Group I Written Notice of disciplinary action. The offense was "conduct or behavior that is inconsistent with standards of the Commonwealth or [the Agency] for which specific corrective or disciplinary action is warranted." The offense code on the written notice was "99." Code 99 is identified as "Other (describe)." No other description was noted on the written notice.

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 November 13, 2008, the Hearing Officer received the appointment from the Department of Employment Dispute Resolution ("EDR"). A pre-hearing conference was held by telephone on November 24, 2008. The hearing was scheduled at the first date available between the parties and the hearing officer, January 5, 2009. The grievance hearing was held on January 5, 2009, at the Agency's regional office.

The Agency submitted documents for exhibits that were, without objection from the Grievant, admitted into the grievance record, and will be referred to as Agency's Exhibits. The Grievant submitted no additional documents. All evidence presented has been carefully considered by the hearing officer.

APPEARANCES

Grievant
Advocate for Grievant
One Witness for Grievant including Grievant
Representative for Agency
Advocate for Agency
One Witness for Agency including Representative

ISSUES

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?

The Grievant requests rescission of the Group I Written Notice.

BURDEN OF PROOF

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, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

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.

The Agency's Operating Procedure No. 135.1, Standards of Conduct, defines Group I offenses to include types of behavior less severe in nature, but require correction in the interest of maintaining a productive and well-managed work force. Group I offenses specifically include unsatisfactory attendance or excessive tardiness, abuse of state time, etc. Agency Exh. 3.

The Offense

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

The Agency employed Grievant as a correctional officer at one of its Facilities for at least five years prior to the date of the offense, identified in the Written Notice as sometime in April 2008. No other disciplinary actions or active written notices were identified as part of the Grievant's employment record.

The Agency's witness testified that from an internal investigation of alleged sexual harassment involving someone else and not the Grievant, the Grievant acknowledged that he participated in a meal outing at a restaurant that occurred prior to early April 2008. While off duty, the Grievant was present at the restaurant with three other co-workers who were also off duty. The Grievant had removed his uniform shirt, and he was wearing a black T-shirt with his uniform pants. One of the other three was wearing the Agency's uniform. Another was covering the uniform with her personal overcoat. The fourth was wearing normal street clothes. During the social meal, there was conversation of a sexually explicit nature and the viewing of a sexually explicit photograph on the Grievant's cell phone. Although the two co-workers involved in the alleged sexual harassment were present at this social outing in April 2008, the events of the outing were not part of the alleged sexual harassment. The Grievant was not implicated in the sexual harassment complaint.

The Agency's witness presented Agency Operating Procedure 105.1, Employee Uniforms. Agency Exh. 4. The policy states, among other things, that "[a]ll employees must be appropriately attired and well groomed whenever on duty or otherwise in uniform. All employees shall present a professional image to the public." The policy also states that "[w]hile in uniform, the purchasing or consumption of alcoholic beverages or engaging in other activities that might reflect negatively on the [Agency] is not permitted."

The Agency's witness also presented the internal investigation report of the alleged sexual harassment, in which the Grievant was interviewed. The Grievant's interview summary was consistent with the account of the restaurant outing preceding the April 2008 offense date. The Grievant's handwritten statement, dated April 3, 2008, also corroborated the restaurant incident. The date of the restaurant outing was not established.

The Grievant testified that he did not believe he did anything warranting discipline, and that he considered the restaurant outing an off duty activity in which he was not wearing his uniform. Additionally, the Grievant testified that no members of the public heard his conversation or viewed his cell phone picture. The Grievant testified that he was aware of no

complaints about his behavior. The Agency conceded there were no complaints about the Grievant's behavior, but asserted the public nature of the restaurant and the Grievant's partial wearing of his uniform made his conduct subject to discipline, particularly because of the potential liability to the Agency for sexual harassment.

Due Process

The Agency's Written Notice to Grievant only vaguely identifies the alleged offense. The reference code used was 99, "Other," without any further specific description. Among the list of written notice offense codes is 12, "Uniform violation/personal grooming"; 34, "Violation of Policy 2.30, Workplace Harassment"; and, 37, "Disruptive behavior." The focus at the grievance hearing was violation of the Agency's uniform policy.

The evidence and argument presented at the grievance hearing asserted the basis of the discipline to be putting the Agency in a poor light by the Grievant's off-duty conduct at a restaurant while wearing the Agency's uniform.

Procedural Due Process is inextricably intertwined with the grievance procedure. The Rules for Conducting Grievance Hearings state:

> In all circumstances, however, the employee must receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge.

In support of this principal, the Rules cite *O'Keefe v. USPS*, 318 F.3d 1310 (Fed. Cir. 2002). In *O'Keefe*, the agency removed an employee with the general charge of "improper conduct/fraudulent use of personal identifiers." The Court reversed the agency's action because the facts and reasons for the removal were not written in the Notice of Proposed Removal given to the employee.

To satisfy the requirements of procedural due process, an agency is required, at a minimum, to give the employee (1) notice of the charges against him or her, and (2) a meaningful opportunity to respond. Whether an agency has met this standard is often a matter of degree. Here, the Written Notice in no way describes the Grievant's conduct.

Under the *Rules for Conducting Grievance Hearings*, the first issue in every disciplinary grievance is:

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

Here, the Written Notice is for "conduct or behavior that is inconsistent with standards of the Commonwealth or [the Agency] for which specific corrective or disciplinary action is warranted." That statement, alone, is woefully inadequate in putting the employee on notice. The Grievant's initial grievance stated that he was not presented with what he had "supposedly done." While the Agency responded in later steps that the conduct at the restaurant provided the offense, the Agency did not identify the policy source of the discipline until the matter reached

the grievance hearing stage. Even then, prior to the hearing, the Uniform Policy was only identified as a policy to be relied upon. No explanation of the Written Notice, or any Amended Written Notice, was ever issued.

If the standard set forth in *O'Keefe* is to be applied meaningfully, careful review of the Written Notice is necessary when compared to the facts shown. The agency's Written Notice is at most vague and omits any articulation of the breach of policy or conduct. Based on the Written Notice and the evidence presented, I find that the Written Notice did not sufficiently detail the nature of the offense, and the agency, necessarily, did not present evidence to show the Grievant's conduct in April 2008 was inconsistent with standards of the Commonwealth or [the Agency]. Accordingly, the Agency's discipline fails.

It is possible for the agency to add other offenses to a Written Notice so long as there is sufficient notice to the Grievant. The agency ultimately articulated at the grievance hearing the specific nature of the alleged offense, and the applicable policy source. However, the non-specific and vague absence of facts alleged on the face of the Written Notice does not sufficiently raise the nature of the alleged offense. Additional charges outside the Written Notice cannot be considered as a valid reason for the discipline levied. While it is not unheard of to add additional offenses after the initial Written Notice, this too creates confusion and issues of notice. This Hearing Officer would recommend when additional charges are brought, an Amended Written Notice should be issued to the Grievant.

In making this finding, I recognize that the Agency has a legitimate interest in enforcing its Uniform Policy and policies against any potential harassment. However, that issue was not raised as an amendment to the Written Notice. Nor was it raised sufficiently as to cure the lack of specific notice in the Written Notice when the Written Notice itself lacked any specificity.

Based on the aforementioned, the Hearing Officer finds that the agency inadequately informed Grievant of the allegation that he violated specific policy.

Further, the Agency's Standards of Conduct policy provides that when issuing a Group I Written Notice, "management should issue such notice as soon as practical." Agency Exh. 3. The information of the restaurant outing came to management's attention during the harassment investigation in early April 2008, but the Written Notice was not issued until July 31, 2008. No explanation for this delay was offered by the Agency.

Because of the due process violation, and the unexplained delay of almost four months before issuing the Written Notice, I find the Agency's Written Notice flawed to the extent that it must be rescinded. While the Agency has full authority to enforce its policies, and protect and guard its reputation, it must also honor and follow applicable policy and procedures in disciplinary matters.

Because the initial issue is resolved in the claimant's favor, we do not reach the other issues.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **rescinded**.

APPEAL RIGHTS

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 is 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 the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804)371-7401.

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 the EDR Director, Main Street Centre, 600 East Main Street, Suite 301, Richmond, VA 23219 or faxed to (804)786-0111.

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 days; the 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.

I hereby certify that a copy of this decision was sent to the parties and their advocates by certified mail, return receipt requested.

Cecil H. Creasey, Jr.
Hearing Officer

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

RECONSIDERATION
DECISION OF HEARING OFFICER

In the matter of: Case No. 8983

Decision Issued: January 26, 2009

APPLICABLE LAW

A hearing officer's original decision is subject to administrative review. A request 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. A request to reconsider a decision is made to the hearing officer. A copy of all requests must be provided to the other party and to the EDR Director. 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.[1]

OPINION

The Agency timely requested reconsideration of the January 6, 2009, decision. The Agency asserts new evidence that explains the delay in issuing the written notice to the grievant, and details meetings had with the grievant. The Grievant, in his response to the request for reconsideration, asserts disagreement with the additional facts asserted by the Agency. Since the Grievant does not stipulate to the additional facts presented, I decline to consider the new facts. Regardless, the facts presented are not newly discovered evidence.

To establish that evidence is "newly discovered," the moving party must show

> (1) the evidence was first discovered after the hearing; (2) due diligence on the moving party's part to discover the new evidence had been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new

[1] § 7.2 Department of Employment Dispute Resolution (EDR) Grievance Procedure Manual, effective August 30, 2004.

> outcome if the case were reheard, or is such that would require the hearing decision to be amended.[2]

Here, there is no showing that the new facts presented satisfy the applicable standard for considering newly discovered evidence. The Agency has not borne its burden to show "newly discovered" evidence; thus, I am without the discretion to consider new information or to reopen the hearing. Accordingly, the hearing officer will consider only the Agency's assertion of incorrect legal conclusions.

The Agency asserts that the Grievant's specific behaviors that are considered inappropriate/against written policy were clearly and orally communicated to the Grievant. Further, the Agency contends that it had no control over the date it received the investigative report from the Office of the Inspector General which described and substantiated the Grievant's conduct (but absolved the Grievant of any unlawful activity).

Further, the Agency contends that its focus for this Written Notice was not so much the issue of the violation of the uniform policy, but, rather, on unacceptable off duty conduct in the restaurant for which disciplinary action was issued.

Upon consideration of the merits of the Written Notice, and the points raised by the Agency's reconsideration request, I reiterate my initial decision in this grievance. The Written Notice was rescinded primarily on the procedural due process grounds, and the Agency's assertion of incorrect legal conclusion does not present any authority that challenges the hearing officer's legal conclusion. The Agency's assertion that the Written Notice was not so much the issue of the violation of the uniform policy, but, rather, the off duty conduct serves to demonstrate the shifting sands presented by the Written Notice that did not sufficiently articulate the violation. The Written Notice itself lacked sufficient description of the alleged offense.

DECISION

The Agency has not established an incorrect legal conclusion. The hearing officer has carefully considered the Agency's arguments and concludes that there is no basis to change the Decision issued on January 6, 2009.

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] *See Boryan v. United States*, 884 F.2d 767, 771 (4th Cir. 1989) (*citing Taylor v. Texgas Corp.*, 831 F. 2d 255, 259 (11th Cir. 1987)). *See also* EDR Ruling No. 2007-1490 which adopted the *Texgas* standard.

2. All timely requests for administrative review have been decided and, if ordered by EDR or HRM, 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.[3]

I hereby certify that a copy of this decision was sent to the parties and their advocates by certified mail, return receipt requested.

Cecil H. Creasey, Jr.
Hearing Officer

[3] 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).