Issues: Group III Written Notice (actions which undermine agency's effectiveness), Demotion, and Retaliation (other protected right); Hearing Date: 02/23/09; Decision Issued: 03/05/09; Agency: DOC; AHO: John V. Robinson, Esq.; Case No. 9028; Outcome: No Relief – Agency Upheld in Full; **Administrative Review: EDR Ruling Request received 03/13/09; EDR Ruling #2009-2253 issued 06/10/09; Outcome: Remanded to AHO;**

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 9028

Hearing Officer Appointment: January 20, 2009
Hearing Date: February 23, 2009
Decision Issued: March 5, 2009

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge a Group III Written Notice issued on July 21, 2008 by Management of the Department of Corrections (the "Department" or "Agency"), as described in the Grievance Form A dated August 18, 2008.

The hearing officer was appointed on January 20, 2009. The hearing officer scheduled a pre-hearing telephone conference call at 4:00 p.m. on January 21, 2009. The Grievant's attorney (the "Attorney"), the Agency's advocate (the "Advocate") and the hearing officer participated in the pre-hearing conference call. During the call, the Grievant, by counsel, confirmed that she is challenging the issuance of the Group III Written Notice for the reasons provided in her Grievance Form A and is seeking the relief requested in her Grievance Form A, including expungement of the disciplinary action, the demotion that she suffered as a result of the Group III Written Notice to be overturned, to be restored to the position of employment with the Agency from which she was demoted and restoration of all salary and benefits.

Following the pre-hearing conference, the hearing officer issued a Scheduling Order entered on January 22, 2009 and a Decision Granting Continuance and First Amendment to Scheduling Order entered January 30, 2009, which are incorporated herein by this reference.

Other than concerning the Grievant's claim of retaliation, in which the Grievant bears the burden, in this proceeding the Agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances.

At the hearing, the Agency was represented by the Advocate. The Grievant was represented by the Attorney. Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the

hearing, namely all exhibits in the Agency's binder (1 through 8) and all of the exhibits in the Grievant's binder (1 through 4).[1]

At the request of the Grievant, the hearing officer issued three (3) orders for witnesses. No open issues concerning non-attendance of witnesses or non-production of documents remained by the conclusion of the hearing.

APPEARANCES

Representative for Agency
Grievant
Witnesses

FINDINGS OF FACT

1. During July 8-9, 2008, the Grievant was employed by the Agency at a maximum security facility (the "Facility") as a Treatment Program Supervisor ("TPS"). Under the Facility's Unit Management concept, the unit managers provide counselors the direct administrative supervision such as days off or vacation time, while the Grievant had supervisory authority regarding treatment aspects concerning how counselors should complete their annual reports or progress reports or deal with their treatment programs, such as substance abuse or therapeutic counseling. Tape 1, Side B.

2. The Grievant had accepted a promotion within the Department which would take her as a Computation Supervisor – Senior to the Courts and Legal Division of the Agency at the Department's headquarters in Richmond. However, because of the discipline at issue in this proceeding, Grievant's promotion was rescinded by management although Grievant did ultimately end up in the Courts and Legal Unit in the lower position of an auditor.

3. On the night of July 8, 2008, the Secretary of Public Safety at the Virginia Governor's Office contacted the Director of Corrections concerning a scheduled execution of inmate J ("J") on July 10, 2008. AE 3(A).

4. Counselor S from the Facility contacted the Governor's Office by telephone, admittedly at least in part in her official capacity as an employee of the Department (AE 3(C)), because of a concern that J's execution would thwart the

[1] References to the grievant's exhibits will be designated GE followed by the exhibit number. References to the agency's exhibits will be designated AE followed by the exhibit number.

exoneration of inmate D ("Inmate D") who is presently serving a sentence of 135 years.

5. Amongst other things, Counselor S informed the Governor's Office that J had previously signed a written statement which was notarized by a different counselor ("Counselor D") stating that J's co-defendant, Inmate D, was innocent of all charges for which he had previously been convicted. Counselor S informed the Governor's Office that the notarized letter was mailed to Inmate D's mother but she had lost the letter. Counselor S asked the Governor's Office to assist in obtaining a letter from J to exonerate Inmate D.

6. The Director of Corrections called the Regional Director of the Agency at approximately 8:00 p.m. on July 8, 2008, to enquire about the contact with the Governor's Office. In turn, the Regional Director called the Warden of the Facility who said she knew nothing about the matter but undertook to look into the matter. Because of the serious nature of the situation, in the context of an imminent capital murder execution, the Regional Director, who was scheduled to be somewhere else the next day, changed his plans, to travel to the Facility to arrive early the next day to get to the bottom of things.

7. In the meantime, in an effort to find out what was going on, the Warden first called the Housing Manager for Housing Unit 3 where death row inmates are housed. This Housing Manager informed the Warden that approximately two (2) weeks earlier he had seen Counselor S coming out of Housing Unit 3. This was unusual because Counselor S was assigned as a counselor to Housing Unit 2, not 3. Counselor D was the counselor assigned to Housing Unit 3. The Housing Manager asked Counselor S what she was doing and Counselor S responded that she was trying to get a letter from deathrow inmate J. The Housing Manager told Counselor S to leave it alone. Counselor S returned to her building, Unit 2, told her Housing Manager about it and was told by her own Housing Manager to leave it alone.

8. The Warden then called the Housing Manager for Housing Unit 2 who was the direct administrative supervisor of Counselor S and the Warden was informed again that this Housing Manager also told Counselor S to leave the matter of obtaining the letter from J alone.

9. The Warden next called the Grievant, Counselor S's treatment supervisor, and told the Grievant that the Warden had received a phone call about Counselor S emailing the Governor and the Warden asked the Grievant what she knew about the matter. In fact, Counselor S had telephoned and not emailed the Governor's Office but the Warden only finally understood this the next day, July 9, 2008. The Grievant said that Counselor S had been upset about the letter matter and the Grievant said she told Counselor S to leave it alone. The Grievant said she had no knowledge about Counselor S emailing to the Governor.

10. The Warden next called Counselor D to determine whether he had any involvement in the matter. Counselor D informed the Warden that approximately one (1) year ago, the Grievant instructed Counselor D to notarize a letter from J which allegedly contained the information exonerating Inmate D.

11. After his mother lost the letter, Inmate D had asked Counselor D to go to J and ask J to rewrite the letter. J advised Counselor D that he would not. Additional attempts by both Counselor D and Counselor S to get J to rewrite the letter proved unsuccessful.

12. Counselor D told the Warden that on July 8, 2008, while returning in the van from lunch, Counselor D overheard the Grievant tell Counselor S that the only person that could do something about the letter matter was the Governor.

13. During the phone call with the Warden, the Grievant expressed no knowledge concerning Counselor S's contact with the Governor's Office pertaining to the scheduled execution of J on July 10, 2008.

14. On July 9, 2008, the Regional Director arrived at the Facility at approximately 7:30 a.m. to, as he put it in the hearing, get to the bottom of the matter.

15. On July 9, 2008, when the Regional Director, Warden and Assistant Warden interviewed Counselor S, the Grievant was present when Counselor S stated that the Grievant responded on the van returning from lunch on July 8, 2008 that the Governor was the only person who could intervene on behalf of Inmate D when Counselor S asked at one point what could be done for Inmate D.

16. Counselor S also said, amongst other things, in the Grievant's presence, that the Grievant gave Counselor S the telephone number for the Governor's Office, assisted Counselor S in navigating the Governor's website and wished her "good luck". Counselor S had approached two (2) Housing Unit Managers concerning the Inmate D matter and was advised to drop the matter but took the Grievant's response, in her supervisory position as TPS, as approval from a superior to contact the Governor's Office.

17. After the Warden had heard Counselor S relay the information about the Grievant's role, the Warden asked the Grievant why the Grievant had not told the Warden about her role the previous night during the telephone call. The Grievant responded that she did not know and that she was sorry. Tape 1, Side B.

18. Counselor S stated that she first got involved in the exoneration of Inmate D matter about two (2) weeks before July 9, 2008.

19. The Warden and the Regional Director asked the Special Investigations Unit ("SIU") of the Office of the Inspector General ("OIG") within the Department to conduct a thorough investigation and to determine whether the potential disciplinary infraction "Undermining the effectiveness of the Agency" concerning the Virginia Department of Correction's Operating Procedure Number 135.1 Standards of Conduct was founded concerning the Grievant, Counselor S and Counselor D.

20. Four (4) special agents from SIU participated in a thorough, fair, independent investigation and concluded that the allegation "Undermining the effectiveness of the Agency" was founded concerning each of the three subjects.

21. The Warden explained that she had taken the Grievant to the lunch on July 8, 2008, that the Warden had been at the Facility over the prior two (2) week period and that the Grievant had undermined the effectiveness of the Agency by not following the chain of command, by not acting in the best interests of the Agency and the Facility in not reporting to the Warden the attempted exoneration effort throughout and, particularly, when questioned by the Warden on the night of July 8, 2008. Additionally, the Warden contends that the Grievant's assistance to and encouragement of Counselor S on how to contact the Governor's Office (with Counselor S's concomitant understanding of approval from a superior within the institution) also undermined the effectiveness of the Agency and precipitated the whole debacle.

22. In short, the Governor's Office received an emergency, official contact from the Facility in the context of an execution without even the knowledge of the Warden. The Grievant facilitated and encouraged this contact by Counselor S outside of any official chain of command and without even informing the Warden, even when given the specific opportunity on the night of July 8, 2008, when the Warden called her to enquire generally about the very subject.

23. Grievant's actions undermined the effectiveness of the Agency.

24. Despite Grievant's protestations that she received no specific training concerning permissible contacts with the Governor's Office, Grievant received significant education and training from the Agency about the chain of command, the mission of the Department and for her role as a supervisor. *See* AE 4 and 6. General precepts for EWP's reminded her, for example, that "when dealing with problems, use procedures, procedural intent, or the best interest of the institution in determining the appropriate course of action." AE 4, Paragraph 24(j).

25. The Department has fully accounted for all mitigating factors in determining the corrective action taken concerning the Grievant.

26. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.

27. The Department's actions concerning this grievance were reasonable and consistent with law and policy.

28. The testimony of the witnesses called by the Agency was both credible and consistent on the material issues before the hearing officer. The demeanor of such Agency witnesses at the hearing was candid and forthright. By contrast, positions taken by the Grievant conflict with documents she has signed and defy logic and common sense. The Grievant's testimony at the hearing was inconsistent.

APPLICABLE LAW, ANALYSIS AND DECISION

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).

Va. Code § 2.2-3000(A) 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.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The Department's Standards of Conduct (the "SOC") are contained in the Operating Procedure Number 135.1 (AE 6). The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating

unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Pursuant to the SOC, the Grievant's infraction can clearly constitute a Group III offense, as asserted by the Department.

Paragraph IV(C) of the Standards of Conduct provides:

> C. 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.

Paragraph XII of the Standards of Conduct provides in part:

> THIRD GROUP OFFENSES (GROUP III).
>
> A. These offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.
>
> B. *Group III* offenses include, but are not limited to: . . .

Department Operating Procedure Number 135.1.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline was warranted and appropriate under the circumstances.

While the specific infraction – "Undermining the effectiveness of the Agency" – is not specifically listed under XII(B), as the Agency argues, it is not required to be. The Agency did not seek to restrict the Grievant's or any other person's rights to express opinions to state or elected officials on matters of public concern in violation of *Va. Code* 2.2-2902.1, but rather to channel through the appropriate chain of command official contacts from the Facility and the Agency with the Governor's Office regarding a matter of vital public interest in the form of an imminent execution of a death row inmate. In short, neither the Facility nor the Agency, can afford to have unauthorized persons running their own agendas outside the chain of command to the total oblivion of those who rightfully should be in charge.

The Grievant has alleged retaliation but has failed to carry her burden of proof in this regard. An agency may not retaliate against its employees. To establish retaliation, a grievant must show he or she (1) engaged in a protected activity; *See Va. Code § 2.2-3004(A)(v) and (vi)*

(2) suffered a materially adverse action; *See EDR Ruling Nos. 2005-1064, 2006-1169* and *2006-1283* and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the grievant's evidence raises a sufficient question as to whether the agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual. *See, EDR Ruling No. 2007-1530, page 5* (Feb. 2, 2007) and *EDR Ruling No. 2007-1561* and 1587, page 5 (June 25, 2007). The Grievant steadfastly maintained at the hearing that she did nothing wrong and that the Agency retaliated against her because she had accepted the promotion to headquarters and because of the contact with the Governor's Office. However, the hearing officer finds that these two events did not cause the Agency to retaliate. The Warden testified that she was surprised by the whole episode as up until the incident the Grievant had been an "exemplary" employee.

In the hearing, the Warden exhibited no ill-will or malice toward the Grievant but rather exhibited the demeanor of a calm, composed professional who was forced to investigate a bad predicament in the wake of the call from the Regional Director after he himself had found himself in a difficult predicament following the call from the Director.

Additionally, concerning the Group III Written Notice, the Agency has articulated and proven by overwhelming evidence legitimate, non-retaliatory reasons for its actions necessary to maintain discipline and orderly operations.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to the Standards of Conduct, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

In this proceeding, the Department's actions were clearly consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer. *Id.*

The Grievant argues that the Agency has not properly considered mitigation and her past admittedly exemplary service. The agency argues that the action taken by Management was

entirely appropriate and that it has, in essence, already taken full account of any mitigating factors. The seriousness of the infraction for which the Grievant could have been terminated, the Grievant's apparent refusal to recognize and accept the seriousness of her violations of Agency policy and procedures preclude a lesser sanction. The hearing officer agrees.

The Grievant also complains that Counselor D only was informally counseled regarding his role in the matter and that Counselor S, a probationary employee, was not disciplined but only transferred to a different facility. The Grievant goes on to argue that this disparate treatment is evidence of overreaching by management and of a malicious intent on the management's part. However, the hearing officer finds the facts and circumstances concerning the subordinates very different from the Grievant in certain critical respects. The Grievant was a supervisor, did not fully reveal her involvement in the matter when asked about it and maintained at the hearing and steadfastly continues to maintain her blamelessness concerning the whole incident. This approach and attitude of the Grievant contrasts significantly with the approach and attitude of her two subordinates who willingly volunteered all the information concerning their roles. Counselor S did not seek to deflect total culpability in the matter but rather accepted responsibility, expressed remorse and apologized.

In her written statement to the SIU special agents, the Grievant admits that she read the phone number to the Governor's Office to Counselor S but at the hearing the Grievant denied that she "gave" the phone number to Counselor S. This distinction between "giving" and "reading" a phone number is wholly artificial and unconvincing and even during the hearing the Grievant could not maintain such an artifice. For example, on Tape 4, Side A almost right after the Grievant testifies that she did not give Counselor S the Governor's phone number, the following exchange takes place with her attorney:

<u>Attorney</u>: "I mean this information that you <u>gave</u> to [Counselor S], anybody could get it, right?"

<u>Grievant</u>: "Yes, sir."

<u>Attorney</u>: "It's public information isn't it?"

<u>Grievant</u>: "Yes, it is."

Tape 4, Side A (Emphasis added).

The Grievant also wrote and signed in her statement the following: "I do regret not having told the truth during the original questioning. I felt as though I needed to protect myself in some way" (AE 3(D), page 6); and "My career and time in the Department has been so important and meant so much it is difficult to see one mistake has so much weight on what I have tried to accomplish" (AE 3(d), page 6). When asked by the hearing officer during the hearing, the Grievant clarified to the hearing officer that although she had written "mistake", at the time of the hearing the Grievant did not consider she had made any mistake, alleging that the investigators tricked or coerced her into writing the statement where she accepted any blame. For their part, the two (2) Special Agents who testified at the hearing testified that the Grievant

was cooperative and gave her statement knowingly, voluntarily and intentionally, free of any duress or coercion. The hearing officer finds the testimony of the special agents credible and convincing and rejects the Grievant's claims of coercion, etc. as meritless.

Accordingly, while the Agency's decision not to discipline Counselor S, in particular, is somewhat problematic for the hearing officer, these differences in facts and circumstances militate against the hearing officer upsetting the Agency's personnel decisions concerning the three (3) subjects of the investigation. In short, the hearing officer finds that the different disciplinary outcomes are within the legitimate prerogative of the Agency and within a permissible zone of reasonableness given that the hearing officer is not a super-personnel officer who might have made a different personnel decision or decisions if faced with the same facts.

DECISION

The agency has sustained its burden of proof in this proceeding and the action of the agency in issuing the Group III Written Notice and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the agency's action concerning the grievant in this proceeding is hereby upheld, having been shown by the agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

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, Virginia 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 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.

ENTER:

John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).