Issues: Five Group II Written Notices (failure to follow policy), Group I Written Notice (unsatisfactory job performance), Termination and Retaliation; Hearing Date: 05/13/09; Decision Issued: 05/14/09; Agency: DMV; AHO: Carl Wilson Schmidt, Esq.; Case No. 9073; Outcome: Partial Relief; **Administrative Review: HO Reconsideration Request received 05/20/09; Reconsideration Decision issued 06/10/09; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 05/20/09; EDR Ruling #2009-2323 issued 07/29/09; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 05/22/09; DHRM Ruling issued 08/05/09; Outcome: AHO's decision affirmed.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9073

Hearing Date: May 13, 2009
Decision Issued: May 14, 2009

PROCEDURAL HISTORY

On February 24, 2009, Grievant was issued five Group II Written Notices of disciplinary action[1] for failure to follow written policy. He was also issued a Group I Written Notice for inadequate or unsatisfactory job performance.

On February 25, 2009, 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 April 13, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 13, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

[1] The Agency incorrectly drafted the written notices. Instead of issuing one Group II on a Written Notice form resulting in five Written Notice forms, the Agency used one Written Notice form and listed five Group II Written Notices on that form. Grievant recognized that the Agency was issuing five Group II Written Notices and not one Group II Written Notice.

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?

5. Whether the Agency retaliated against Grievant?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

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

The Department of Motor Vehicles employed Grievant as a Senior Special Agent at one of its Facilities. He had been employed by the agency for approximately four years prior to his removal effective February 24, 2009. Grievant had been a law enforcement officer for approximately 27 years.

When a Special Agent requests and receives an arrest warrant from a Local Magistrate, the warrant must be served within 72 hours otherwise it must be "pended". Pended means the warrant is recorded with the State Police and entered into the Virginia Criminal Information Network (VCIN). By entering the information into the VCIN, other law enforcement agencies become aware of the arrest warrant in the event they encounter a wanted suspect. A Special Agent can pend the arrest warrant immediately without waiting for the 72 hour time period to pass.

The Agency received information from a confidential informant regarding a 19 year old woman, Ms. T, who was falsifying licensure documents. Grievant and his

Supervisor discussed how to handle the case. During their discussions, Grievant understood the Supervisor to have stated that Grievant was instructed to have the arrest warrant for Ms. T served within 72 hours regardless of holidays or weekends.

On November 25, 2008, Grievant obtained an arrest warrant for Ms. T. Grievant had spoken with Ms. T and her Father and arranged for a time for Ms. T to meet Grievant at the Agency's Customer Service Center. On November 28, 2008, Grievant met Ms. T and the Father at the Agency's Customer Service Center approximately 70 hours after Grievant had obtained the arrest warrant for Ms. T. The Customer Service Center was closed that day as a State employee holiday. Grievant arrested Ms. T. He did not search her but asked her whether she was carrying any weapons. Grievant did not handcuff Ms. T because he observed scars on her right wrist and was concerned that handcuffs would cause injury to her requiring immediate medical attention. Grievant placed Ms. T in the front passenger seat of his vehicle. Grievant placed Ms. T's cell phone and purse in the trunk of his vehicle. Grievant drove Ms. T to the local jail and turned her over to the local law enforcement officers. Grievant left with Ms. T's cell phone and purse still in the trunk of his vehicle. Once Ms. T was released from the local jail, she called Grievant and asked for her belongings. Grievant took the cell phone and purse to the Father's home and gave them to Ms. T. Neither Ms. T, nor the Father complained about Grievant's arrest.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."[2] Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

Failure to comply with written policy is a Group II offense. Inadequate or unsatisfactory job performance is a Group I offense.[3]

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…."[4] 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

[2] The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

[3] See, Attachment A to the Standards of Conduct, DHRM Policy 1.60.

[4] *Va. Code § 2.2-3005.*

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 contends Grievant violated policy by not searching Ms. T before transporting her to jail. Agency Policy 2-8(III)(B)(1) provides:

> The transporting Special Agent shall always search a prisoner before placing him or her into the vehicle. Special Agents must never assume that a prisoner does not possess a weapon or contraband or that someone else has already searched the prisoner. The transporting Special Agent shall conduct a search of the prisoner each time the prisoner enters custody of the Special Agent.

Grievant failed to search Ms. T prior to placing her in his vehicle and in his custody. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failing to search a prisoner in his custody.

Grievant argues that he was justified in believing Ms. T did not pose a risk to him because of her age and demeanor. This argument fails. The Policy specifically states that Special Agents must never assume that a prisoner does not possess a weapon or contraband.

There are no circumstances that would make the Agency's issuance of this disciplinary action in excess of the limits of reasonableness.

The Agency contends Grievant failed to comply with written policy because he did not attempt to obtain a caged vehicle prior to transporting Ms. T. Agency Policy 2-8(III)(A)(1) provides:

> Unless no other type of vehicle is available, all prisoners shall be transported in secure, caged vehicles.

Grievant did not transport Ms. T in a caged vehicle. Caged vehicles are available from local law enforcement agencies. Grievant did not contact a local law enforcement agency to determine if a caged vehicle was available. Accordingly, the Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to transport Ms. T in a caged vehicle.

Grievant argued that neither his agency nor the State Police had caged vehicles available. This argument is untenable. The evidence showed that caged vehicles were

readily available from local law enforcement agencies. If Grievant had contacted a local law enforcement agency, he would likely have had access to a caged vehicle.

There are no circumstances that would make the Agency's issuance of this disciplinary action in excess of the limits of reasonableness.

The Agency contends Grievant should receive a Group II Written Notice because he did not handcuff Ms. T before transporting her to the jail. Agency Policy 2-8(III)(E)(1) provides, "Prisoners shall be handcuffed with their hands behind their backs, palms outward, except for pregnant, handicapped, or injured prisoners, as detailed in Policy 2-7."[5] Grievant chose not to handcuff up Ms. T because of the scars on her right wrist. He was concerned about injury to the prisoner. Grievant's decision was reasonable under the facts of this case and the applicable policy. Accordingly, the Agency's issuance to Grievant of a Group II Written Notice for failing to handcuff Ms. T must be reversed.

The Agency contends Grievant should receive a Group II Written Notice for failing to call the State Police Dispatcher at the beginning and end of his trip to log the time and odometer readings of his vehicle. Agency Policy 2-8(III)(H)(1) provides:

> a. When transporting a prisoner of one sex by a Special Agent of another sex, an additional Special Agent may be requested to accompany the transport.
>
> b. If using a second Special Agent is impractical, at a minimum the transporting Special Agent shall:
>
> > Contact the dispatcher by radio and request that the time and odometer mileage be logged.
> >
> > Go directly to the destination by using the shortest practical route.
> >
> > Upon arrival at the destination, contact the dispatcher by radio and request that the time and the odometer reading be logged.

Grievant is male and he was transporting a female prisoner. He did not request the assistance of a second Special Agent. He did not contact the dispatcher by radio at the beginning and end of his trip to record the times and odometer readings. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failing to call the dispatcher at the beginning and at the end of his trip.

[5] The Agency did not provide a copy of Agency Policy 2-7.

There are no circumstances that would make the Agency's issuance of this disciplinary action in excess of the limits of reasonableness.

The Agency contends Grievant did not obtain his Supervisor's approval before working five hours of overtime on November 28, 2008. Grievant is a Non-Exempt employee under the Fair Labor Standards Act. The Agency requires him to obtain his supervisor's approval prior to working overtime. Grievant did not obtain the approval, and thus, acted contrary to the Agency's policy. Mitigating circumstances exist, however. Grievant believed that the Supervisor had instructed him to serve the warrant within 72 hours regardless of whether the 72 hours ended on a holiday. Grievant believed that instruction served as an authorization to work overtime. Grievant's objective was to comply with his supervisor's instructions and not to work overtime without authorization. Grievant's understanding of the Supervisor's comments and the 72 hour time period were reasonable. Accordingly, the Group II Written Notice for working overtime without authorization must be reversed.

The Agency contends Grievant should receive a Group I Written Notice for retaining the personal property of the prisoner after delivering her to the jail. The evidence showed the Agency's practice was for Special Agents to give a prisoner's personal property to the employees at the jail when the prisoner was transferred to the jail. Because Grievant failed to comply with this practice, Ms. T did not have her belongings immediately upon her release and Grievant had to make a special trip to deliver them to Ms. T. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for inadequate or unsatisfactory job performance.

There are no circumstances that would make the Agency's issuance of this disciplinary action in excess of the limits of reasonableness.

Upon the accumulation of two or more Group II Written Notices of disciplinary action, the Agency may remove Grievant from employment. Grievant has now received more than two Group II Written Notices and, thus, his removal must be upheld.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;[6] (2) suffered a materially adverse action[7]; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the

[6] *See* Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

[7] On July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, the EDR Director adopted the "materially adverse" standard for qualification decisions based on retaliation. A materially adverse action is, an action which well might have dissuaded a reasonable worker from engaging in a protected activity.

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 shows by a preponderance of the evidence that 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.[8]

Grievant contends that the Agency retaliated against him by stacking the written notices. Grievant has not presented any evidence that he had engaged in a protected activity. In the absence of engaging in a protected activity, Grievant's claim of retaliation fails.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for failing to search the prisoner is **upheld**.

The Group II Written Notice of disciplinary action for failing to attempt to obtain a caged vehicle to transport the prisoner is **upheld**.

The Group II Written Notice of disciplinary action for failing to handcuff the prisoner is **reversed**.

The Group II Written Notice of disciplinary action for failing to call the dispatcher at the beginning and the end of the transport is **upheld**.

The Group II Written Notice of disciplinary action for working overtime without a supervisor's approval is **reversed**.

The Group I Written Notice of disciplinary action for inadequate or unsatisfactory job performance is **upheld**.

Grievant's removal based upon the accumulation of disciplinary action is **upheld**.

Grievant's request for relief from retaliation is **denied**.

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:

[8] This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

   Director
   Department of Human Resource Management
   101 North 14th St., 12th Floor
   Richmond, VA 23219

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

   Director
   Department of Employment Dispute Resolution
   600 East Main St. STE 301
   Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of all of your appeals to the other party and to the EDR Director. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[9]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 9073-R

Reconsideration Decision Issued: June 10, 2009

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. "[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis …" to grant the request.

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it "newly discovered." Rather, the party must show that:

> (1) the evidence is newly discovered since the date of the Hearing Decision; (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has 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 outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

Grievant contends the Agency failed to produce all of the documents ordered by the Hearing Officer to be produced. It is not clear whether the Agency actually failed to produce all of the documents ordered by the Hearing Officer. To the extent the Agency failed to comply with the Hearing Officer's order, the Hearing Officer might draw an adverse inference against the Agency regarding those documents. In this case, Grievant did not identify at the hearing or as part of his appeal which documents were not produced as ordered. Grievant did not identify during the hearing or as part of his appeal what adverse inference the Hearing Officer should make and apply to the Agency's evidence in this case. The discipline taken against Grievant was based

largely on his own statements and the statements of two citizens and Agency policy that was not in dispute. It is unclear how any missing documents would affect the outcome of the case regarding the Agency's case in chief.

Grievant objected to counseling memos presented by the Agency as exhibits. The Hearing Officer gave those documents little weight. Whether or not those documents were exhibits did not affect the outcome of the decision.

Grievant objects to the Agency's practice of issuing five written notices on one written notice form. The Agency's practice was unorthodox, but it is clear from the evidence that Grievant knew the Agency intended to issue him five separate written notices even though it used one form. Grievant was not confused by the Agency's mistake. That mistake was harmless error.

Grievant restates his position regarding the merits of each written notice. This is not new evidence and does not provide a basis to alter the original hearing decision.

Grievant contends he was obligated to avoid delay in executing lawful process under Va. Code § 18.2-469. This argument is untenable. Grievant was not disciplined for failing to timely issue process. Grievant was disciplined for how he conducted the arrest and transport of the prisoner.

Grievant argues the Agency inconsistently disciplined its employees. He offered the example of another DMV employee who made threats to a DMV customer. Grievant has not established that another DMV employee engaged in behavior sufficiently similar to his behavior and that other employee received lower discipline. Threatening a DMV customer is materially different from Grievant's behavior.

Grievant contends the Agency was at one time out of compliance with LES policy. This is the same argument Grievant made during the hearing. There is no evidence to suggest the Agency was upset about or adverse to complying with LES policies and having that issue brought to its attention.

As part of Grievant's request for reconsideration, he referred to certain attachments to his request. No documents were attached to that request and, thus, the Hearing Officer could not review them.

Hearing Officers are not "super-personnel officers". Hearing Officers cannot impose their preference for lower discipline under those circumstances in which the Agency has met its burden of proof. The Agency could have combined the offenses and reduced the level of discipline to something other than removal. The Agency has that discretion. The Hearing Officer has not been given the authority to exercise such discretion. Only if mitigating circumstances exist can the Hearing Officer reduce disciplinary action once the Agency has met its case-in-chief.

The request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, the request for reconsideration is **denied.**

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

S/Carl Wilson Schmidt

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Carl Wilson Schmidt, Esq.
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Department of Motor Vehicles

August 5, 2009

The grievant has requested an administrative review of the hearing officer's decision in Case No. 9073. The grievant was issued five separate Group II Written Notices and one Group I Written Notice and separated from employment with the Department of Motor Vehicles. He filed a grievance to have the disciplinary action reversed. When he did not get the relief he was seeking, he requested a hearing before an administrative hearing officer. In his decision, the hearing officer upheld three of the Group II Written Notices and the Group I Written Notice and the termination. For reasons stated below, this Agency will not disturb the hearing officer's decision. The agency head of the Department of Human Resource Management, Ms. Sara Redding Wilson, has asked that I respond to this request for an administrative review.

FACTS

The Department of Motor Vehicles employed the grievant as a Senior Special Agent. According to the hearing officer's Findings of Facts,

> He had been employed by State Agency for appropriately four years prior to his removal effective February 24, 2009. Grievant had been a law enforcement officer for appropriately 27 years." "When a Special Agent requests and receives an arrest warrant from a Local Magistrate, the warrant must be served within 72 hours otherwise it must be "pended". Pended means the warrant is recorded with State Police and entered into the Virginia Criminal Information Network (VCIN). By entering the information into the VCIN, other law enforcement agencies become aware of the arrest warrant in the event they encounter a wanted suspect. A Special Agent can pend the arrest warrant immediately without waiting for the 72 hour time period to pass….
>
> On November 25, 2008, Grievant obtained an arrest warrant for Ms. T. Grievant had spoken with Ms. T. and her Father and arranged for a time for Ms. T to meet Grievant at the Agency's Customer Service Center. On November 28, 2008, Grievant met Ms. T and the Father at the Agency's Customer Service Center approximately 70 hours after Grievant had obtained the arrest warrant for Ms. T. The Customer Service Center was closed that day as a State employee holiday. Grievant arrested Ms. T. He did not search her but asked her whether she was carrying any weapons. Grievant did not handcuff Ms. T because he observed scars on her right wrist and was concerned that handcuffs would cause injury to her requiring immediate medical attention. Grievant placed Ms. T in the front passenger seat of his vehicle. Grievant placed Ms. T's cell phone and purse in the trunk of his vehicle. Once Ms. T was released from the local jail, she called Grievant and asked for her belongings. Grievant took the cell phone and the purse to the Father's home

and gave them to Ms. T. Neither Ms. T nor the Father complained about Grievant's arrest.

Based on the grievant's performance regarding this arrest and the handling of the suspect, management officials determined that he had violated procedures regarding arrest and transport of suspects. According to the hearing decision,

> The Agency contends Grievant violated policy by not searching Ms. T. before transporting her to jail. Agency Policy 2-8(III)(B)(1) provides: The transporting Special Agent shall always search a prisoner before placing him or her into the vehicle. Special Agents must never assume that a prisoner does not possess a weapon or contraband or that someone else has already searched the prisoner. The transporting Special Agent shall conduct a search of the prisoner each time the prisoner enters custody of the Special Agent.
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> Grievant failed to search Ms. T. prior to placing her in his vehicle and in his custody. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failing to search a prisoner in his custody.
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> Grievant argues that he was justified in believing Ms. T. did not pose a risk to him because of her age and demeanor. This argument fails. The Policy specifically states that Special Agents never assume that a prisoner does not possess a weapon or contraband.
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> There are no circumstances that would make the Agency's issuance of this disciplinary action in excess of the limits of reasonableness.
>
> The Agency contends that Grievant failed to comply with written policy because he did not attempt to obtain a caged vehicle prior to transporting Ms. T. Agency Policy 2-8(III)(A)(1) provides:
>
> > Unless no other type of vehicle is available, all prisoners shall be transported in secure, caged vehicles.
>
> Grievant did not transport Ms. T in a caged vehicle. Caged vehicles are available from local law enforcement agencies. Grievant did not contact a local law enforcement agency to determine if a caged vehicle was available. Accordingly, the Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to transport Ms. T in a caged vehicle.
>
> Grievant argued that neither his agency nor the State Police had caged vehicles available. This argument is untenable. The evidence showed that caged vehicles were readily available from local law enforcement agencies. If Grievant had contacted a local law enforcement agency, he would likely have had access to a caged vehicle.

There are no circumstances that would make the Agency's issuance of this disciplinary action in excess of the limits of reasonableness.

The Agency contends Grievant should receive a Group II Written Notice because he did not handcuff Ms. T before transporting her to the jail. Agency Policy 2-8(III)(E)(1) provides, "Prisoners shall be handcuffed with their hands behind their backs, palms outward, except for pregnant, handicapped, or injured prisoners, as detailed in Policy 2-7." Grievant chose not to handcuff up Ms. T because of the scars on her right wrist. He was concerned about injury to the prisoner. Grievant's decision was reasonable under the facts of this case and the applicable policy. Accordingly, the Agency's issuance to Grievant of a Group II Written Notice for failing to handcuff to handcuff Ms. T must be reversed.

The Agency contends Grievant should receive a Group II Written Notice for failing to call the State Police Dispatcher at the beginning and end of his trip to log the time and odometer readings of his vehicle. Agency Policy 2-8(III)(H)(1) provides:

a. When transporting a prisoner of one sex by a Special Agent of another sex, an additional Special Agent may be requested to accompany the transport.

b. If using a second Special Agent is impractical, at a minimum the transporting Special Agent shall:

Contact the dispatcher by radio and request that the time and odometer mileage be logged.
Go directly to the destination by using the shortest practical route.
Upon arrival at the destination, contact the dispatcher by radio and request that the time and odometer reading be logged.

Grievant is a male and he was transporting a female prisoner. He did not request the assistance of a second Special Agent. He did not contact the dispatcher by radio at the beginning and end of his trip to record the times and odometer readings. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failing to call the dispatcher at the beginning and at the end of his trip.

There are no circumstances that would make the Agency's issuance of this disciplinary action in excess of the limits of reasonableness.

The Agency contends Grievant did not obtain his Supervisor's approval before working five hours overtime on November 28, 2008. Grievant in a Non-exempt employee under the Fair Labor Standards Act. The Agency requires him to obtain his supervisor's approval prior to working overtime. Grievant did not obtain the approval, and thus, acted contrary to the Agency's policy. Mitigating circumstances exist, however. Grievant believed that the Supervisor had instructed him to serve the warrant within 72 hours regardless of whether the 72 hours ended on a holiday. Grievant believed that instruction served as an authorization to work overtime. Grievant's objective was to comply with his

supervisor's instructions and not to work overtime without authorization. Grievant's understanding of the Supervisor's comments and the 72 hour time period were reasonable. Accordingly, the Group II Written Notice for working overtime without authorization must be reversed.

The Agency contends Grievant should receive a Group I Written Notice for retaining the personal property of the prisoner after delivering her to jail. The evidence showed the Agency's practice was for Special Agents to give a prisoner's personal property to the employees at the jail when the prisoner was transferred to the jail. Because Grievant failed comply with this practice, Ms. T did not have her belongings immediately upon her release and Grievant had to make a special trip to deliver them to Ms. T. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for inadequate or unsatisfactory job performance.

There are no circumstances that would make the Agency's issuance of this disciplinary action in excess of the limits of reasonableness.

In summary, the hearing officer upheld three Group II Written Notices and one Group II Written Notices of disciplinary action and reversed two Group II Written Notices of disciplinary action. Based on his having at least two Group II Written Notices remaining, the dismissal was upheld.

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 beyond the limits of reasonableness, 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.

The relevant policy, the Department of Human Resource Management's Policy No. 1.60, Standards of Conduct, states, "It is the policy of the Commonwealth to promote the well-being of its employees in the workplace by maintaining high standards of work performance and professional conduct." The policy states as its purpose, "The purpose of the policy is to set forth the Commonwealth's Standards of Conduct and the disciplinary process that agencies must utilize to address unacceptable behavior, conduct, and related employment problems in the workplace, or outside the workplace when conduct impacts an employee's ability to do his/her job and/or influences the agency's overall effectiveness." Attachment A, 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.

The grievant has based his administrative review request on the hearing officer's decision being inconsistent with State and Agency Policy. While he did not identify a specific policy, based on the nature of his appeal it was clear that Grievant was referring to DHRM Policy 1.60, Standards of Conduct, as one policy with which he felt the hearing decision was inconsistent. Other agency internal policies, while not identified, were referred to by the hearing officer in his original decision.

For the record, the grievant requested that the Department of Employment Dispute Resolution (EDR) conduct an administrative review. Our review of EDR's decision reveals that, among other matters, EDR addressed all the policy-related issues raised by the grievant in his request to DHRM. The DHRM concurs with the EDR that the grievant is challenging the hearing officer's findings of fact, the weight and credibility that the hearing office accorded to the testimony of the witnesses, the resulting inferences that he drew, the characterizations that he made, and his resulting decision.

It is the opinion of this Agency that the grievant did not demonstrate that the hearing officer violated any DHRM or DMV human resource policy in making his decision. Thus, this Agency will not interfere with the application of the decision.

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Ernest G. Spratley