Issues: Group III Written Notice (making false statements & failure to take corrective action), Demotion and Salary Reduction; Hearing Date: 06/18/09; Decision Issued: 07/23/09; Agency: VSP; AHO: John V. Robinson, Esq.; Case No. 9102; Outcome: No Relief – Agency Upheld in Full; **Administrative Review: EDR Ruling Request received 08/06/09; EDR Ruling #2010-2399 issued 12/02/09; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 08/06/09; DHRM Ruling issued 12/15/09; Outcome: AHO's decision affirmed.**

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 9102

Hearing Officer Appointment: May 18, 2009
Hearing Date: June 18, 2009
Decision Issued: July 23, 2009

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge a Group III Written Notice issued on February 18, 2009 by Management of the Virginia State Police (the "Department" or "Agency"), as described in the Grievance Form A dated March 16, 2009. AE 1.[1]

The hearing officer was appointed on May 18, 2009. The hearing officer scheduled a pre-hearing telephone conference call at 2:00 p.m. on May 19, 2009. The Grievant's attorney (the "Attorney"), the legal advocate for the Agency (the "Advocate") and the hearing officer participated in the pre-hearing conference call. During the call, the Grievant, by counsel, confirmed that he is challenging the issuance of the Group III Written Notice for the reasons provided in his Grievance Form A and is seeking the relief requested in his Grievance Form A, including reinstatement to his former position as First Sergeant, expungement of the disciplinary action, with restoration of all salary and benefits. Following the pre-hearing conference, the hearing officer issued a Scheduling Order entered on May 19, 2009, which is incorporated herein by this reference.

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 his 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 Grievant's binder (1 through 8) and Agency Exhibits 1-6

[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.

(understanding that Exhibit 5 was missing its Attachment #1) and Exhibits 8-10 in the Agency's binder. Agency Exhibit 7 was not received into evidence.

No open issues concerning non-attendance of witnesses or non-production of documents remained by the conclusion of the hearing. The Attorney did assert in the hearing that the Agency did not produce Agency Exhibit No. 10 to the Grievant, but on closer examination of the record, it appears that this document is substantially the same as the Grievant's Exhibit GE 1(b).

APPEARANCES

Representative for Agency
Grievant
Witnesses

FINDINGS OF FACT

1. The Grievant has been an employee of the Department for approximately 38 years.

2. From approximately 1981 until approximately November 26, 2007, the Grievant was a sergeant in Area A (not identified for confidentiality reasons), where as part of his duties he weighed state troopers under his supervision pursuant to the Department's weight control program (the "Program"). AE 8, General Order No. 78, page 78-8 *et. seq.*

3. Grievant was promoted to First Sergeant or the Area Commander for Area B (again, not identified for confidentiality reasons) and moved to Area B on approximately November 26, 2007 to assume his new position.

4. When Grievant assumed his position as First Sergeant, he became responsible for weighing his immediate subordinates who were on the Department's weight program. These subordinates were all three (3) sergeants under his supervision in Area B, including Sergeant MX and Sergeant E.

5. The Grievant as First Sergeant was responsible for familiarizing himself with and implementing all Department practices, policies and procedures, including complying with the Program, in the new area to which he was assigned. GE 2, General Order No. 9, Field Operations: Organization and Duties.

6. The Grievant admits that he read all the applicable Department rules and regulations.

7. Before the discipline which is the subject of this proceeding, the Grievant has had no prior discipline while with the Department. Up until the discipline which is the subject of this proceeding, the Grievant has been an exemplary employee.

8. When the Grievant came to the Area B office out of which he functioned, he was assisted by a non-sworn Department secretary, an experienced clerical secretary ("Secretary O") who had also worked for the Grievant's predecessor.

9. Up until the Grievant came to Area B, Secretary O had assisted the previous First Sergeant with the Program by receiving from the Sergeants (who weighed the state troopers on the Program) and from the previous First Sergeant (who weighed the sergeants on the Program) the required Weight Control Program Progress Reports (Form SP-92-A) (the "Weight Reports").

10. Secretary O would then forward the Weight Reports to Division headquarters by e-mail or by house mail. AE 5, Attachment 11. Secretary O would also file the Area B office copy of the Weight Reports in the appropriate personnel file, replacing the previous report. AE 5, Attachment 11.

11. Secretary O, in an effort to assist the Grievant, prepared a system for the Grievant to use so he would not forget to weigh the sergeants monthly as required by policy.

12. As part of this system, Secretary O created a template form for Sergeant E, placed it on a clipboard and left the clipboard on the Grievant's desk. AE 5, Attachment 10.

13. Secretary O filled in all parts of the form (including the weigh dates) other than the column concerning "Weight" and "Pounds lost or gained."

14. Accordingly, the template form and clipboard left by Secretary O on the Grievant's desk served as a visual reminder to the Grievant to weigh Sergeant E monthly and when the Grievant weighed Sergeant E monthly, in accordance with policy, all the Sergeant would have to do is handwrite in the weight and the corresponding weight loss/gain.

15. Under the simple system devised by Secretary O to assist her boss, Secretary O would then type in what was handwritten and submit electronically to Division headquarters the Weight Report.

16. The scales were located close to the Grievant's office in a former evidence closet.

17. The Grievant saw the clipboard and form for Sergeant E on his desk.

18. During the Grievant's tenure as First Sergeant at Area B (the "Period"), the Weight Report for Sergeant E was electronically sent to Division headquarters after weights and weight calculations were handwritten on to the template form for Sergeant E on December 22, 2007, January 22, 2008 (the Weight Report states "01-22-07" but given the obvious date progression, this appears to be a typographical error) and February 14, 2008. AE 5, Attachment 10.

19. The Grievant admits that he never weighed Sergeant E.

20. Secretary O testified that the Grievant knew that Sergeant E was overweight. This is consistent with the Grievant's verbal response to Sergeant F of the Department's Professional Standards Unit, Internal Affairs Section ("IA"), which in turn is consistent with the Grievant's letter of response. AE 5, pages 5-7.

21. Secretary O testified that on occasions, when required by his immediate supervisor, Sergeant E would weigh himself and complete the Weight Report, handwriting in his weight and pounds lost or gained. This is consistent with Sergeant E's verbal response to Sergeant F of IA, which in turn is consistent with Sergeant E's letter of response. AE 5, page 5 and AE 5, Attachment 13.

22. Captain C is the division commander for Area B (the "Division Commander"). The Division Commander is the supervisor of Lieutenant B ("Lt. B"), who was the Grievant's immediate supervisor in Area B.

23. On Thursday, September 18, 2008, Lt. B met with the Grievant in Lt. B's office at Division B Headquarters.

24. The purpose of the meeting was for Lt. B to review all performance evaluations which the Grievant had prepared for his subordinates in Area B.

25. In reviewing Sergeant E's performance evaluation, Lt. B saw that the Grievant had rated Sergeant E as a "Marginal Contributor" in Core Responsibility "B." Lt. B had participated in field operations with Sergeant E and had seen Sergeant E perform well in the field.

26. Lt. B and the Grievant discussed the matter and it was determined based on the paucity of information on hand and the discussion that this rating should be changed to "Contributor."

27. Lt. B asked the Grievant whether Sergeant E was complying with the Program and losing the required two (2) pounds per month toward his target weight because this was a necessary component of receiving a "Contributor" rating under paragraph 32(B) Part VI of the Performance Evaluation. GE 3(a).

28. The Grievant replied, "I believe he is. He is to the best of my knowledge." AE 5, Attachment 4.

29. Lt. B specifically asked the Grievant to check whether Sergeant E was in compliance with the Program and to make the necessary corrections to the evaluations. Lt. B said they would meet the following week to finalize the evaluations.

30. As planned, the Grievant and Lt. B met the next week on Tuesday, September 23, 2008 in the front parking lot of the Department's Training Academy, after the Grievant informed Lt. B that the Grievant had finalized the evaluations and needed Lt. B's approval as the reviewer.

31. Lt. B saw that Sergeant E's rating had been changed to "Contributor" in Core Responsibility "B" and Lt. B again specifically asked the Grievant if Sergeant E was making satisfactory progress under the Program, as required by Department policy.

32. The Grievant answered Lt. B "He is."

33. The Grievant knowingly made a false official statement.

34. When the Grievant became the Area Commander of Area B, the Grievant knew it was his responsibility to determine who was on the Program. The Grievant knew that Sergeant E was on the Program and the Grievant knew that he himself had not been following the Department's policies and procedures concerning the Program, which policies and procedures the Grievant admits he had read and was familiar with. In his preceding position as a sergeant in Area A, the Grievant had been responsible for weighing state troopers for over two (2) decades.

35. Sergeant E was not in compliance with the Program. (*See, also* GE 6.) In his verbal response to Sergeant F of IA, the Grievant admitted words to the effect, "If you look at [Sergeant E], you know he does not meet the weight requirement." AE 5, page 7.

36. Lt. B testified that the performance evaluations provide a meaningful incentive for Department personnel to comply with the Program and if noncompliance presents a real issue, ultimately discipline under the Department's Standards of Conduct can ensue. AE 9.

37. The Grievant and Sergeant MX had a strained working relationship in Area B. As First Sergeant for Area B, the Grievant was Sergeant MX's direct supervisor and on July 9, 2008, the Department received a SP-103 Complaint filed by the Grievant against Sergeant MX raising various issues, including a time discrepancy

on a SP-106 filed by Sergeant MX, failing to file a SP-66 and failing to notify the Grievant that he was leaving the area. GE 8.

38. On approximately July 15, 2008, the Division Commander received an anonymous complaint letter which alleged, amongst other things, that the Grievant had caused Area B to be in a state of turmoil and listed certain specific items. *See, e.g.* AE 4, Attachment 45. Complaints, regardless of source, are required to be investigated by Department policy. GE 5, page 18-2, paragraph 7.

39. The specific allegations described below were referred to Sergeant M of IA for investigation:

> Specific Allegation(s):
>
> 1. Between November 28, 2007, and December 14, 2007, but not limited to, you failed to have a criminal offense investigated and failed to complete an SP-103, when [Sergeant MX] advised you of Standards of Conduct violations by [Trooper T], in that he did not conduct a thorough criminal investigation.
> 2. You failed to complete an SP-103, when [Sergeant MX] advised you of Standards of Conduct violations, in that on February 4, 2008, [Trooper L] was unprofessional, when he made negative comments about troopers to a General District Court Judge in open court.

GE 1(a).

40. By letter dated August 27, 2008, Captain P, acting for and on behalf of the Department, informed the Grievant that the allegations referenced in the above paragraph were being investigated. GE 1(a).

41. By letter dated November 10, 2008, Captain P advised the Grievant that two additional allegations would be investigated:

> 4) Between November 28, 2007 and December 14, 2007, after being advised of a Standards of Conduct violation, you failed to take appropriate action regarding a criminal investigation conducted by [Trooper T].
>
> 5) You failed to take proper action regarding an allegation of improper and unprofessional conduct by [Trooper L]. [Trooper L] was alleged to have conducted himself in an unprofessional and unacceptable manner when he made negative comments about Troopers to a General District Court Judge in open court.

GE 1(b); AE 10.

42. The above allegations are substantially the same as those in the Written Notice. AE 1.

43. The Division Commander personally hand-delivered AE 10/GE 1(b) to the Grievant on January 6, 2009. The letter on page 3 informed the Grievant that Major T and the Division Commander would meet with the Grievant at the Department's headquarters on January 23, 2009:

> The purpose of the meeting is to provide an explanation of the evidence supporting the charge against you and to allow you the opportunity to make an oral response. If you desire, you may also submit a written response prior to the meeting on January 23, 2009.
>
> You may review the reports concerning this matter in my office, after making an appointment to do so, at State Police Headquarters during normal business hours, prior to the scheduled meeting. Counsel may assist you at your own expense in reviewing the reports and making a response to the charges.
>
> Counsel may also be present during our meeting, but will not be permitted to examine any persons present.

AE 10; GE 1(b), page 3.

44. In fact, the parties rescheduled this due process meeting and held it on January 26, 2009. At the meeting, the Grievant was given oral notification of the offenses, an explanation of the Department's evidence in support of the charges and a reasonable opportunity to respond.

45. Subsequently, Major T appropriately decided to drop the allegations against the Grievant described in paragraph 39 of this hearing decision because there was no evidence that the Grievant was the Department employee who received the complaint and, accordingly, the Grievant has no corresponding obligation to file a SP-103. GE 1(c).

46. The Written Notice was issued by the Department to the Grievant on February 18, 2009. AE 1. The Written Notice combined all three (3) offenses into a single Group III Written Notice.

47. The Division Commander testified that each offense could in and of itself constitute a Group III violation because of the serious nature of each offense.

48. On approximately February 4, 2008, certain Department personnel including Trooper J and Sergeant MX (the "Court Detail") were travelling to Judge B's

courtroom when an officer requested assistance with a pursuit. The Court Detail responded to the emergency call for assistance.

49. The Court Detail responding to the emergency was late for court and Trooper L who was in open court made unprofessional negative comments concerning the absent Department personnel:

> ". . . [Trooper L], without being asked, took it upon himself to speak to the Judge about it. [Trooper L] recommended that the Judge should notify supervision that the troopers were not there, explaining that "it would mean something if it came from you." [Trooper L] went on to say "In my opinion, it's unprofessional to get involved in anything and leave the court when you have people waiting."

AE 3, page 5.

50. Trooper J was upset upon learning about Trooper L's comments and complained to Sergeant MX shortly afterwards on approximately February 6 or 7, 2008.

51. Before the anonymous SP-103 was received by the Department on approximately July 15, 2008, Secretary O heard Sergeant MX and the Grievant discussing the court incident involving Trooper L.

52. Secretary O testified that she attended a staff meeting where the Grievant told the troopers under his command that he did not want any SP-103 complaints to be filed out of Area B without his prior consent.

53. After talking to a number of persons who witnessed Trooper L's comments in open court, including Judge B and Deputy K, Sergeant MX wanted to file a SP-103 complaint against Trooper L for conduct that undermines the efficiency of the Department but the Grievant stated "that we just needed to talk to Trooper L." AE 3, page 5.

54. The Grievant has denied that he had any knowledge whatsoever about the Trooper L matter until he received his copy of the SP-103 anonymous complaint.

55. Sergeant M of IA investigated Sergeant MX's claim that in addition to discussing the Trooper L matter with the Grievant in person on at least two (2) occasions, Sergeant MX had also spoken by phone with the Grievant, such as immediately after speaking on the phone with Judge B on February 11, 2008.

56. An examination of Sergeant MX's cell phone bill and the Grievant's cell phone bill showed that Sergeant MX had called and spoken to the Grievant on February 11, 2008 for about 19 minutes. AE 4, Attachment 46.

57. Secretary O also testified that the Grievant himself mentioned the Trooper L incident to her before the anonymous complaint came in. AE 4, Attachment 41, page 4.

58. As part of his investigation, Sergeant M of IA also interviewed H, the Division's Executive Secretary (the "Executive Secretary").

59. In her verbal response to Sergeant M of IA (AE 4, page 3, *et. seq.*) and in her signed, corresponding written statement (AE 4, Attachment 42), the Executive Secretary stated approximately one week before the anonymous complaint was received, the Grievant informed her that "there had been some kind of complaint where [Trooper L] had made negative comments in court. [The Grievant] said [Sergeant MX] had brought it to his attention, but he wasn't going to do a SP-103, because no one in the court made a complaint. He didn't feel there was enough information to do a SP-103. He said the best way to handle it would be to talk to [Trooper L] about it. It was afterwards when I saw the anonymous complaint that I mentioned that [the Grievant] had already discussed this with me. He said he wasn't going to do a SP-103 that he was going to talk to [Trooper L]. He did tell me that he discussed this with Sergeant MX." AE 4, pages 3-4.

60. As part of his official investigation into the matter, Sergeant M of IA interviewed the Grievant on September 19, 2008.

61. Sergeant M of IA specifically asked the Grievant: "**Did you have a discussion with [the Executive Secretary] about [Trooper L], before you received the SP-103?"** The Grievant answered: "No, I don't recall that. It's a possibility, but I don't know how I would have known about it." GE 4, page 6.

62. A few questions later, Sergeant M pressed the matter further and the Grievant responded as follows:

> **"So, you don't remember going into [the Executive Secretary's] office, dropping off paperwork, and then discussing the [Trooper L] incident with [the Executive Secretary]?** 'No, I really don't. I'm serious.'
>
> **Are you saying you didn't or you don't recall?** 'I don't recall. I really don't. I can say beyond a reasonable doubt. [Sergeant MX] did not call me on the phone and I did not talk about it with him. That's a plain no; I stick by that one hundred percent. As far as [the Executive Secretary], I don't recall discussing it with her, I really don't. As far as [Sergeant MX], I did not, he did not contact me, he just did not, not by phone or verbally or any other way.'"

AE 4, page 6.

63. The Department issued a Written Notice against Trooper L but Trooper L prevailed in his grievance proceeding.

64. The Division Commander testified that a major reason why Trooper L won his grievance was because of the Department's delay in initiating the discipline. This delay was at least in part caused by the Grievant not sanctioning or ordering the SP-103 complaint which Sergeant MX wanted to file.

65. Rather than sanctioning or even ordering or encouraging the filing of the SP-103 complaint by Sergeant MX against Trooper L, the Grievant either blocked, hindered or at the very least dissuaded Sergeant MX from filing any complaint against Trooper L. This constituted the Grievant's failure to take appropriate corrective action, as described in the Written Notice. AE 1.

66. On approximately October 27, 2007, about one month before the Grievant arrived to assume his position as First Sergeant in Area B on November 26, 2007, there was a vehicle accident in Area B. A drunk driver hit another vehicle and three (3) occupants of the vehicle which had been hit assaulted the drunk driver.

67. Department personnel, including Trooper T and Trooper C, responded to the scene and arrested the drunk driver and the assault perpetrators.

68. Emergency fire and rescue personnel also responded to the scene and one of these individuals was a full time police officer ("MC") at a regional facility.

69. Trooper T was slow in completing the SP-102 and Sergeant MX began an administrative investigation concerning the tardiness. Trooper T finally completed the SP-102 concerning the accident and sent it to the Area B office for processing. Sergeant E approved the SP-102 on approximately November 28, 2007.

70. Trooper T subsequently resigned from the Department on December 7, 2007.

71. When Secretary O went to enter Trooper T's SP-102 report relating to the accident into the computer system, Secretary O noticed several errors and crucial parts which were missing. Accordingly, Secretary O took the SP-102 to Sergeant MX for his review.

72. The same day that Secretary O took Trooper T's SP-102 report to Sergeant MX, MC came into the Area B office with a copy of a warrant which had been served on him for assault.

73. Secretary O directed MC to Sergeant MX.

74. MC informed the Department that when the troopers arrested the suspects at the scene and began to take them to the police vehicles, a woman tried to assault the drunk driver. MC tried to stand between the drunk driver and the woman to prevent any more assaults and told the woman to back off. MC got into a struggle with the woman in his attempt to prevent her from assaulting the drunk driver.

75. MC escorted the woman to Trooper T and told Trooper T what had happened. Trooper T's SP-102 did not describe the incident between MC and the woman.

76. Sergeant MX reported the account of MC to the Grievant and wanted to process a SP-103 complaint against Trooper T for the new allegation.

77. Secretary O said she heard Sergeant MX discuss the Trooper T case with the Grievant.

78. Trooper C was assigned the case in Trooper T's absence and Trooper C was asked to submit a new SP-102 with a SP-110 as he had also been present at the scene of the accident.

79. Trooper C had some of the incident recorded on his in-car video camera. The tape exonerated MC and showed MC to be the victim and the woman to be the assault perpetrator.

80. After seeing the evidence, the Commonwealth's Attorney dropped the charge against MC and told Trooper C to obtain a warrant on the woman.

81. Sergeant MX was very upset that Sergeant's T's report was so poorly drafted and completely omitted the MC incident and Sergeant MX told the Grievant that he wanted to file an additional SP-103 complaint against Trooper T even though Trooper T was no longer with the Department.

82. The Grievant either blocked, hindered or at the very least dissuaded Sergeant MX from filing an additional SP-103 complaint against Trooper T.

83. On September 19, 2008, Sergeant M of IA interviewed the Grievant on the subject, as part of the official investigation:

> **"Didn't you discuss the SP-102 [Trooper T] submitted and concluded with [Sergeant MX] that it should be redone by [Trooper C]?** 'No. This thing occurred October 24, 2007. I knew about it, because [Sergeant MX] said [Trooper T] never done a SP-102 on it and he was investigating [Trooper T] for not doing the report. [Trooper T] did finally submit the SP-102 and this is what [Sergeant MX] was showing me. That's why the SP-102 was so late. [Trooper T] resigned from the Department December

> 7, 2007, and I told [Sergeant MX] he had to stop the administrative investigation, and send what he had done on over to Division . . ."

AE 4, page 8.

84. Rather than sanctioning or even ordering or encouraging the filing of the SP-103 complaint by Sergeant MX against Trooper T, the Grievant either blocked, hindered or at the very least dissuaded Sergeant MX from filing any complaint against Trooper T. This constituted the Grievant's failure to take appropriate corrective action, as described in the Written Notice. AE 1.

85. The Department is a major law enforcement agency with the awesome power and responsibility, in appropriate circumstances, to lawfully deprive citizens of their right to liberty and even life. The Department is strictly a rank, chain of command structured organization in which subordinates are normally and routinely expected to follow both the commands and advice of their supervisors and superiors.

86. The administrative investigations undertaken by the Department were thorough, unbiased and the two investigators acted reasonably and diligently in reaching their respective findings and conclusions. IA does not recommend or impose discipline.

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

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

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

90. 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.

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 General Order No. 19. AE 9. 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 knowing false statement to Lt. B concerning Sergeant E's compliance with the Program can clearly constitute a Group III offense, as asserted by the Department.

> 14. Third Group Offenses (Group III).
>
> a. These offenses include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.
>
> b. Group III offenses include, but are not limited to: . . .
>
> (5) Falsifying any records such as, but not limited to: vouchers, reports, insurance claims, time records, leave records, or other official state documents, **or knowingly making any false official statement**.

Department General Order No. 19; AE 9 (emphasis supplied).

Similarly, the SOC includes a specific Group III offense described as follows:

> c. Group III offenses include, but are not limited to: . . .
>
> (20) 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 its employees.

Department General Order No. 19; AE 9, pages 19-10 to 19-11.

The Department's SOC have already received a preliminary review from DHRM and are presumed to be valid. Accordingly, pursuant to the Department's SOC, the first two (2) offenses described by the Written Notice, if proven by the Department, can each constitute in and of themselves a Group III offense.

At the hearing, the Attorney for the first time raised the issues that the offense specified in General Order No. 19, paragraph 14(b)(20) is not appropriately named and cannot rise to the level of a Group III offense because despite the Department's writing out of the offense in full on the attachment, the Department provided the following in the Written Notice:

Section II – Offense

Type of Offense (Check one and include Offense Category (See Addendum for Written Notice Offense Codes/Categories)
__ Group I _____ __ Group II _____ X Group III 74 & 11

Nature of Offense and Evidence: Briefly describe the offense and give an explanation of the evidence. (Additional documentation may be attached.)
Documentation attached? Yes X # of pages _____ No ___

See attached information

The Written Notice Offense Codes attached as the third page of the Written Notice classify Code 11 as "unsatisfactory performance," typically a Group I offense. Presumably, while not stated, the Grievant's position would be that the Department should have written code 99 "Other (describe)."

In light of the Department's attachment to the Written Notice, adopting the technical position of the Grievant is antithetical to the more nimble, less rule-intensive character of administrative proceedings under the Rules and the Grievance Procedure Manual. However, the hearing officer did take this factor into account for his mitigation analysis, discussed in more detail below.

The Grievant, by counsel, also argued that the Department's SOC is in conflict with DHRM's Policy No. 1.60 (Effective Date: April 16, 2008). GE 7. The hearing officer sees no such conflict. This hearing officer is required to use the standards and policies of the employing agency. This hearing officer cannot substitute the standards of another agency when deciding a

case. This is not to say that only *agency* policy should be considered by this hearing officer because there is also state policy promulgated by DHRM. Agencies "are authorized to develop human resource policies that do not conflict with state policies or procedures." DHRM Policy 1.01. Such agency specific policies may be more restrictive than DHRM policy, so long as they do not conflict with DHRM policy. *See* DHRM Ruling re: Case # 5610. Furthermore, agencies are encouraged to seek guidance and assistance from DHRM when developing agency-specific policies or guidelines. DHRM Policy 1.01. Thus, while agency policies are generally presumed to comport with DHRM policy, if the hearing officer finds a conflict between DHRM and agency policy, the hearing officer must confine his policy deliberations to DHRM policy only.

Furthermore, EDR requires that an issue be raised on the Grievant's Form A in order for it to be qualified before the hearing officer for decision. Under the *Rules for Conducting Grievance Hearings* (the "Rules") § I, only issues qualified by the agency head, the EDR Director, or the Circuit Court may be decided by the hearing officer. "Any issue not qualified by the agency head, the EDR Director, or the Circuit Court **cannot be remedied through a hearing**." Rules § 1 (emphasis supplied).

In her Ruling Number 2007-1409 dated September 21, 2006, at page 7, the Director appropriately noted the correlation between the Written Notice and the Form A:

> (Only the charge and specifications set out in the Notice may be used to justify punishment because due process requires that an employee be given notice of the charges against him in sufficient detail to allow the employee to make an informed reply.) **This standard is complementary to the burden placed on grievants in that only those grounds asserted on a grievant's Form A will be permitted to proceed to hearing.** (Emphasis supplied.)

Accordingly, because the issues concerning the naming and level of the offenses and the asserted conflict with DHRM Policy No. 1.60 were not raised on the Form A, the hearing officer declines to take up these issues in any greater detail and will instead focus on the seven (7) issues actually raised by the Grievant on the Form A. AE 1. However, the hearing officer did take the Grievant's asserted positions into account for his mitigation analysis, discussed in greater detail below.

As previously stated, the Agency's burden is to show upon a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances and essentially the Grievant contests this determination by the Department in his Issue One in the Form A.

The hearing officer decides for each offense specified in the Written Notice (i) the Grievant engaged in the behavior described in the Written Notice; (ii) the behavior constituted serious misconduct; (iii) the Department's discipline was consistent with law and policy and that there are no mitigating circumstances justifying a further reduction or removal of the disciplinary action. The Grievant specifically raised mitigation as his Issue Seven in the Form A so the

hearing officer will undertake a more detailed analysis of this required component of his decision below.

In his second issue, the Grievant asserts that it was improper for the Department not to offer the Grievant the benefit of taking a polygraph examination.

Va. Code § 40.1-51.4:4(D) provides as follows:

> The analysis of any polygraph test charts produced during any polygraph examination administered to a party or witness shall not be submitted, referenced, referred to, offered or presented in any manner in any [grievance] proceeding . . . except as to disciplinary or other actions taken against a polygrapher.

Va. Code § 8.01-418.2 provides:

> The analysis of any polygraph test charts produced during any polygraph examination administered to a party or witness shall not be admissible in any [grievance] proceeding. . . over the objection of any party except as to disciplinary or other actions taken against a polygrapher.

The *Rules for Conducting Grievance Hearings* § IV(D) (citing only Va. Code § 8.01-418.2) essentially provide the same as Va. Code § 8.01-418.2. *See, also,* Administrative Review Ruling of Director, Ruling Number 2006-1119, September 26, 2005.

Accordingly, based on the applicable law, it would appear that it might be improper for the Department to offer the Grievant a polygraph examination and, in the best case analysis for the Grievant, it would be meaningless if the Grievant had availed himself of the opportunity to take a polygraph test offered by the Department because the hearing officer could not permit either side to introduce the results into evidence in a grievance proceeding in violation of the statutory prohibition in Va. Code § 40.1-51.4:4(D). Certainly, there is no duty under Virginia law pursuant to which the Department must afford the Grievant such an opportunity.

Concerning the third and fourth issues raised by the Grievant, the hearing officer finds that the Department did not misapply or unfairly apply policies or otherwise act in an arbitrary and capricious manner so as to punish the Grievant but rather acted in a measured, carefully considered manner in accordance with the SOC and applicable policies.

The Attorney did appropriately point out during the hearing and certain but not all Agency witnesses agreed, that Sergeant MX (despite the Grievant's telling him not to do it) still had the right and possibly even the obligation under General Order No. 18, paragraph 3, to file a SP-103 concerning the misconduct of Troopers T and L. However, this valid point misses the thrust of the Department's position that the Grievant independently, when asked by his subordinate, should have sanctioned, ordered or encouraged Sergeant MX to file the SP-103

complaints concerning both the Trooper T and the Trooper L matters. The hearing officer has considered this factor in his mitigation analysis below.

The hearing officer does not agree with the Grievant's position that General Order No. 18 (GE 5) only allows the Department to file SP-103 complaints against current active employees. The Division Commander testified that complaints can and do relate to persons who are not Department employees and the hearing officer finds that the wording of General Order No. 18, page 18-2, paragraph 3, supports the Division Commander's position (GE 5).

Additionally, the hearing officer does not read paragraph 1 on page 18-1 of General Order No. 18 the same way as the Attorney does. Rather than stating that continued active employment with the Department is a condition precedent to the viability of any complaint against any employee, the hearing officer reads the word "employee" to refer to a person who was an employee of the Department at the time of the improper action or improper conduct. This interpretation is consistent with the Division Commander's testimony that SP-103s are used for many different things, including criminal complaints. The interpretation advanced by the hearing officer would also advance the important societal benefit of allowing the public to at least make the Department aware of wrongdoing or even crimes by its present or former employees through the SP-103 complaint system developed in part for that very reason.

General Order No. 18, paragraph 2, on page 18-2 provides:

> Section 9.1-600 of the Code of Virginia requires the Department to provide the general public access to complaint forms and information concerning the submission of complaints. Each Department facility shall therefore maintain a supply of Citizen Complaint forms (SP-163) and the Department brochure "How the Complaint Process Works," which includes a brief description of our complaint procedures. If a citizen wishes to submit a written complaint, he/she shall be given a Citizen Complaint form (SP-163). The completed form may be turned in at any Department facility or mailed to the Professional Standards Unit. The brochure should be offered to any citizen making a complaint, whether oral or written.

GE 5.

The interpretation of "employee" advanced by the Grievant, by counsel, is artificially and unnecessarily strained and would thwart the important societal goals evident in the policy and in Va. Code § 9.1-600 of allowing members of the public to file SP-103 complaints against present and former employees and of allowing the Department to investigate and appropriately deal with such complaints.

Concerning the Grievant's Issue Five, the hearing officer decides based upon his findings of fact, that each offense could in and of itself have constituted a Level III offense. Of course,

the Department combined all three offenses into a single Group III offense, as reflected in the Written Notice. As previously stated, each of the offenses is specifically listed as a Group III offense in the SOC and concerning the seriousness of each offense, the hearing officer has the following additional comments. The testimony of the Division Commander concerning the seriousness of each offense was compelling.

Concerning the Trooper L offense, the Division Commander explained that Trooper L's comments to Judge B in open court discredited the Agency, whose reputation must be safeguarded because of its awesome law enforcement powers. The public trust is important to the Department and Trooper L's comments eroded that trust in the visible and important forum of an open courtroom.

The Grievant himself appeared at the hearing to acknowledge the seriousness of Trooper L's conduct when he testified that had he known at the relevant time about what Trooper L did (of course, the hearing officer has found that he did in fact know), he himself would have driven to see Judge B to address the matter. Accordingly, the Grievant should have sanctioned, ordered, encouraged or at the very least not dissuaded Sergeant MX from filing the SP-103 complaint against Trooper L, as Sergeant MX wanted to do.

Concerning the Trooper T offense, the Division Commander testified that one of the duties of the Grievant as First Sergeant was to review all criminal complaints which went through his office. Trooper T's investigation was incomplete and missing a lot of crucial information, such as all the evidence (including the tape) which exonerated MC, a fellow policeman. Again, the Grievant undermined the effectiveness of the Agency by not sanctioning, ordering, encouraging or at the very least not dissuading Sergeant MX from filing the SP-103 complaint against Trooper T, as Sergeant MX wanted to do.

Obviously, the Grievant's knowing making of a false official statement to Lt. B concerning the important Departmental function of the performance evaluation of Sergeant E was material and serious. The false statement rendered inaccurate the Contributor rating for Sergeant E which the Grievant said he had finalized and which he wanted Lt. B to sign off on as the reviewer for the Department.

Concerning Issue Six raised by the Grievant, the hearing officer finds that the investigations by IA were independent, thorough and fair.

The Grievant asserts in his Issue Seven that the Department failed to properly consider mitigating circumstances. DHRM has previously ruled that there is no requirement under an earlier version of DHRM Policy 1.60 that an agency even consider mitigating circumstances. DHRM Policy Ruling, Grievance No. 8636, September 19, 2007.

However, this DHRM ruling does not negatively impact the Grievant's position under the facts and circumstances of this proceeding because under Va. Code § 2.2-3005, this hearing officer is charged with the duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of

Employment Dispute Resolution". EDR's *Rules for Conducting Grievance Hearings* provide in part:

> The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances" such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance." 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. *Rules* § VI(B) (alteration in original).

If the Department does not consider mitigating factors, the hearing officer should not show any deference to the Department in his mitigation analysis. In this proceeding the Department did consider mitigating factors in disciplining the Grievant, including his long stellar and distinguished service to the Department over approximately 38 years.

The normal sanction for one (1) Group III violation is termination but the Department, based on its assessment of mitigating factors, decided not to end the Grievant's employment but only to demote him to sergeant at a ten percent (10%) lower pay band and to transfer him. AE 1.

Accordingly, because the Department assessed mitigating factors and in fact mitigated the discipline, the Rules only allow this hearing officer to mitigate the discipline further if this hearing officer upon consideration of the evidence finds that the Department's discipline exceeded the limits of reasonableness.

While the Grievant might not have specified all of the mitigating factors below, the hearing officer considered many factors including those specifically referenced above and all of those listed below in his analysis:

1. the absence of any prior discipline;

2. the Grievant's exemplary service to the Agency over 38 years;

3. concerning the Trooper T offense, the fact that the vehicle accident, which was the subject of the investigation, occurred about a month before the Grievant arrived in Area B;

4. concerning the Trooper T and Trooper L offenses, the strained working relationship between the Grievant and Sergeant MX;

5. concerning the Trooper T and Trooper L offenses, the fact that Sergeant MX did not testify at the hearing (neither the Department nor the Grievant named Sergeant MX as a witness);

6. the fact that certain other individuals referenced herein who are still Department employees did not testify at the hearing (none of these witnesses were sought by the Grievant);

7. concerning the Trooper T and Trooper L offenses, the fact that the complaint referred to in finding paragraph 38 was anonymous;

8. concerning the Trooper T and Trooper L offenses, the pre-disciplinary revision of the Department's allegations concerning Trooper T and Trooper L;

9. concerning the Trooper L offense, the fact that Trooper L prevailed in his grievance against the Department;

10. concerning the Trooper T offense, the fact that Sergeant E approved Trooper T's SP-102 on approximately November 28, 2007.

11. concerning the Trooper T offense, the fact that Sergeant MX apparently was the supervising officer at the Trooper T accident scene;

12. concerning the Trooper T offense, the resignation of Trooper T from the Department on December 7, 2007; and

13. the fact that AE 10/GE 1(b) is very confusing.

In EDR Case No. 8975 involving the University of Virginia ("UVA"), a grievant received a Group III Written Notice with removal for falsifying records on five (5) separate dates. Although the evidence supported only one of those instances, the hearing officer upheld the disciplinary action. The grievant appealed to EDR asserting that the disciplinary action was inappropriate in that the grievant did not engage in as much misconduct as alleged by UVA. The Director upheld the hearing officer's decision:

> The grievant's arguments essentially contest the hearing officer's determinations of fact as they relate to the proper sanction for the misconduct. Such determinations are within the hearing officer's authority as the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate. In this case, while it appears that the hearing officer did find that the grievant did not engage in as much misconduct as alleged by the University, it was still determined that the grievant had falsified a state record with the requisite intent, generally a Group III offense under the Standards of Conduct. [footnote omitted] Upon review

> of the record, there is no indication that the hearing officer abused his discretion in making these findings or that the facts were not supported by the hearing record. Consequently, this Department has no basis to disturb the hearing decision.

EDR Ruling Number 2009-2192; February 6, 2009.

Here, the Division Commander testified that each of the three (3) offenses could in and of itself constitute a Level III offense. The hearing officer agrees. Obviously, the Grievant was only charged and found liable for one Group III offense but the hearing officer nevertheless undertook his mitigation analysis both (1) separately for each of the potential offenses, and (2) for all of the combined offenses.

EDR has previously ruled that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. *Id.*

Here all three (3) offenses were very serious and could separately stand as Group III offenses. Even were this not the case, any one on its own, if proven, would be extremely serious. Clearly, the mitigation decision by the Department was within the permissible zone of reasonableness.

Concerning the Trooper T and Trooper L offenses, the Grievant also asserts that before he received the Written Notice, he never understood the charges and never had an opportunity to respond. Again this issue was not raised on the Form A and the hearing officer's findings of fact regarding the Grievant's pre-disciplinary notice and opportunity to be heard dispose of this matter, in any event. EDR has recognized that under the *Loudermill* standard only limited due process protections must be afforded an employee prior to the disciplinary action. EDR Ruling No. 2007-1481 at page 4 and EDR Ruling No. 2009-2231 at page 8. The Department clearly met such minimal pre-disciplinary due process standards.

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 DHRM Policy 1.60, Standards of Conduct, and the SOC, 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.*

DECISION

The Department has sustained its burden of proof in this proceeding and the action of the Department 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 Department's action concerning the Grievant is hereby upheld, having been shown by the Department, 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).

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Department of Virginia State Police

December 15, 2009

The grievant, through his representative, has requested an administrative review of the hearing officer's decision in Case No. 9102. The grievant was issued a Group III Written Notice and demoted for falsifying records and unsatisfactory performance. He challenged the disciplinary action by filing a grievance. When he did not get the relief he sought, he requested and received a hearing before an administrative hearing officer. In his decision, the hearing officer upheld the Group III Written Notice and demotion. 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 State Police employed the grievant as a First Sargeant in one of its districts until he was disciplined and demoted. The hearing officer's Findings of Facts are listed, in part, as follows:

> The Grievant has been an employee of the Department for approximately 38 years. From approximately 1981 until approximately November 26, 2007, the Grievant was a sergeant in Area A (not identified for confidentiality reasons), where as part of his duties he weighed state troopers under his supervision pursuant to the Department's weight control program….
>
> Grievant was promoted to First Sergeant or Area Commander for Area B (again, not identified for confidentiality reasons) and moved to Area B on approximately November 26, 2007 to assume his new position.
>
> When Grievant assumed his position as First Sergeant, he became responsible for weighing his immediate subordinates who were on the Department's weight program. These subordinates were all three (3) sergeants under his supervision in Area B, including Sergeant MX and Sergeant E.
>
> The Grievant as First Sergeant was responsible for familiarizing himself with and implementing all Department practices, policies and procedures, including complying with the Program, in the new area to which he was assigned….
>
> The Grievant admits that he read all the applicable Department rule and regulations.

Before the discipline which is the subject of this proceeding, the Grievant has had no prior discipline while with the Department. Up until the discipline which is the subject of this proceeding, the Grievant had been an exemplary employee.

When the Grievant came to the Area B office out of which he functioned, he was assisted by a no-sworn secretary, an experienced clerical secretary ("Secretary O") who had also worked for the Grievant's predecessor.

Up until the Grievant came to Area B, Secretary O had assisted the previous First Sergeant with the Program by receiving from the Sergeants (who weighed the state troopers on the Program) and from the previous First Sergeant (who weighed the sergeants on the Program) the required Weight Control Program Progress Reports (Form SP-92-A) (the "Weight Reports").

Secretary O would then forward the Weight Reports to Division headquarters by email or by house mail…. Secretary O would also file the Area B office copy of the Weight Reports in the appropriate personnel file, replacing the previous report….
Secretary O, in an effort to assist the Grievant, prepared a system for the Grievant to use so he would not forget to weigh the sergeants monthly as required by policy. As part of this system, Secretary O created a template form for Sergeant E, placed it on a clipboard and left the clipboard on the Grievant's desk….
Secretary O filled in all parts of the form (including the weigh dates) other than the column concerning "Weight" and "Pounds lost or gained."
Accordingly, the template form and clipboard left by Secretary O on the Grievant's desk served as a visual reminder to the Grievant to weigh Sergeant E monthly and when Grievant weighed Sergeant monthly, in accordance with policy, all the Sergeant would have to do is handwrite in the weight and the corresponding weight loss/gain.
Under the simple system devised by Secretary O to assist her boss, Secretary O would then type in what was handwritten and submit electronically to Division headquarters the Weight Report…

The grievant saw the clipboard and form for Sergeant E on his desk.
During the Grievant's tenure as First Sergeant at Area B (the "Period"), the Weight Report for Sergeant E was electronically sent to Division headquarters after weights and weight calculations were handwritten on the template form for Sergeant E on December 22, 2007, January 22, 2008 (the Weight Report states 01-22-07 but given the obvious date progression, this appears to be a typographical error) and February 14, 2008…

The Grievant admits that he never weighed Sergeant E.

Summarily, during the performance evaluation cycle, it was determined that the Grievant had falsified records by verifying that Sergeant E had met the standards of the weight control program when, in fact, he (Grievant) had not actually weighed Sergeant E. Thus, he was charged with falsifying records.

In addition, the grievant was charged with two additional violations: (1) failure to have a criminal offense investigated and failure to complete an SP-103, and (2) failure to complete an SP-103 when told by Sergeant MX that Trooper L was unprofessional when he made negative comments about troopers to a General District Judge in open court. On February 18, 2009, the VSP issued to the grievant a single Group lll Written Notice with demotion combining the two failure to act charges with the falsification charge.

In his August 7, 2009, request for review of the hearing decision, the grievant, through his representative, raised the following issues:

1. Whether failure to have a criminal offense investigated and failure to complete an SP-103 was a violation of the Standards of Conduct, and if so at what level of offense

2. Whether failure to complete an SP-103 when told by Sergeant MX that Trooper L was unprofessional when he made negative comments about troopers to a General District Judge in open court was a violation of the Standards of Conduct, and if so at what level of offense.

3. If it was appropriate to include all three violations on the same written and issue the disciplinary action in the form of a Group lll Written Notice with demotion.

The request dated August 7, 2009, met the requirements of timeliness, having been received by the Department of Human Resource Management within 15 calendar days of the date of the original hearing decision. In a ruling dated December 2, 2009, the Director of the Department of Employment Dispute Resolution declined to disturb the original hearing decision.

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 limit 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." *Examples of offenses, by group, are presented in Attachment A of this policy. These examples are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. Accordingly, any offense* ***not specifically enumerated****, that in the judgment of agency heads or their designees undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of this section.*

In addition, DHRM Policy No. 1.60 grants agencies the right to formulate additional policies related to work place behavior and expectations, to meet the special needs of their agencies as long as those policies do not contradict DHRM policy as related to work place behavior and performance.

We found that the issues raised before this Agency were raised simultaneously before the Department of Employment Dispute Resolution (EDR). In her ruling dated December 2, 2009, the Director of EDR stated, in part, the following:

> The first set of objections to the hearing decision relate to issues regarding the level of discipline and factual findings. In his decision, the hearing officer held that he was precluded from addressing the level of discipline assigned because the grievant had not expressly challenged the level of discipline on the Grievance Form A.[2] The grievant asserts that he fairly raised the issue but even if he had not, the hearing officer had an independent duty to determine whether the level of discipline issued comports with policy. We agree that the hearing officer had an independent duty to assess the level of discipline. *The Rules for Conducting Grievance Hearings ("Rules")* state that:
>
> The responsibility of the hearing officer is to determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. To do this, the hearing officer reviews the facts de novo (afresh and independently, as if no determinations had yet been made) to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct, (iii) <u>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)</u> and, finally, (iv) 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.[3]

[2] The hearing officer found that "because the issues concerning the naming and level of the offenses and the asserted conflict with DHRM Policy No. 1.60 were not raised on the Form A, the hearing officer declined to take up these issues in any greater detail." July 23, 2009 Decision of the Hearing Officer in Case 9102 ("Hearing Decision") at 15.

[3] *Rules* at VI(B), (emphasis added).

Thus, a hearing officer must always determine whether the level of discipline issued conforms to policy, that is, was properly characterized as a Group I, II or III.[4]

Here, despite his stated reluctance to decide whether the level of the offense was proper, the hearing officer nevertheless determined that the Group III Written Notice issued for three separate offenses was appropriate under the facts. The grievant asserts that the hearing officer did not independently determine the level of each offense contained on the Written Notice Form. In disciplinary actions, the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.[5] Here, the agency elected to charge the grievant with a single Group III. Accordingly, the hearing officer was required to determine whether any portion of the charged misconduct rose to the Group III level. The hearing officer did just that, finding the "Department has sustained its burden of proof in this proceeding and the action of the Department in issuing the Group III Written Notice and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances."[6] Thus, while the hearing officer erred when he asserted that he was not required to determine the level of offense because the grievant did not raise this concern on the Grievance Form A, the error was harmless as it is evident that he did consider whether the sustained charges supported the Group III Notice and demotion.

Finally, we find no merit in the grievant's assertion that the hearing officer erred by failing to recognize the Department of Human Resources Management's ("DHRM's") holding that under the Standards of Conduct ("SOC") an agency may not aggregate lesser level offenses into a single higher level offense. Here, the grievant was charged with making a false statement which, as the grievant appears to concede, is an offense that could support a Group III standing alone. Thus, it cannot be said that the agency combined lesser level offenses to yield a higher level offense, which we agree, based on DHRM administrative review language, would appear to be improper.

In sum, because the hearing officer did, in fact, determine the appropriate level of the discipline imposed against the grievant, this Department has no basis to disturb the decision.

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[4] The hearing officer's holding that he had no authority to examine the level of discipline is understandable but not reflective of the manner in which this Department views claims raised under the grievance procedure. In 2006, this Department modified its position regarding the requirement to list on the Grievance Form A all theories as to how a particular management action may have been deficient. In EDR Ruling 2007-1444, we held that a Form A need not expressly list each theory as to why a particular management action is improper. Rather, the "issue(s)" grieved are appropriately viewed as the particular management actions under challenge as opposed to any theories of how such actions may have been deficient or improper.

[5] *Grievance Procedure Manual* § 5.8.

[6] Hearing Decisions at 22. *See also* Hearing Decision at 21 ("Here, the Division Commander testified that each of the three (3) offenses could in and of itself constitute a Level III offense. The hearing officer agrees.")

This Agency has determined that the above ruling by EDR has addressed properly the issues raised before the DHRM. In conclusion, the hearing officer determined that the grievant's behavior constituted violations that supported the disciplinary action. It is the opinion of this Agency that the hearing officer's application and interpretation of the purpose and intent of DHRM Policy No. 1.60 are consistent with the policy. Thus, this Agency will not interfere with the application of the decision.

_____

Ernest G. Spratley