Issues: Group II Written Notice (failure to follow policy) and Termination (due to accumulation); Hearing Date: 11/10/09; Decision Issued: 11/16/09; Agency: DOC; AHO: William S. Davidson, Esq.; Case No. 9220; Outcome: No Relief – Agency Upheld in Full; **Administrative Review: AHO Reconsideration Request received 11/19/09; Reconsideration Decision issued 12/10/09; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 12/08/09; EDR Ruling #2010-2482 issued 01/22/10; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 11/30/09; DHRM Ruling issued 02/04/10; Outcome: AHO's decision affirmed.**

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 9220

Hearing Date: November 10, 2009
Decision Issued: November 16, 2009

PROCEDURAL HISTORY

The Grievant was issued a Group II Written Notice on September 11, 2009 for:

> Failure to comply with Department of Corrections Procedure Manual Policy Number 5-45.6(B) in that the grievant was charged with a criminal offense on or off the job and failed to inform her organizational unit head immediately of such charge. [1]

Pursuant to the Group II Written Notice, and a prior active Group I Written Notice and two (2) prior active Group II Written Notices, the Grievant was terminated on September 11, 2009. [2] On September 15, 2009, the Grievant timely filed a grievance to challenge the Agency's actions. [3] On October 16, 2009, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On November 10, 2009, a hearing was held at the Agency's location.

APPEARANCES

Agency Representative
Advocate for Agency
Grievant
Advocate for Grievant
Witnesses

ISSUE

1. Did the Grievant fail to report to her supervisors in a timely fashion the fact that she was charged with a criminal offense?
2. Can the Agency use the prior Group II Written Notices, which have not become final Decisions pursuant to the Grievant's appeal, as prior Written Notices for purposes of accumulation in order to terminate the Grievant?

[1] Agency Exhibit 1, Tab 1, Page 1 & 8
[2] Agency Exhibit 1, Tab 1, Page 1
[3] Agency Exhibit 1, Tab 2, Page 1

AUTHORITY OF HEARING OFFICER

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

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

BURDEN OF PROOF

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

FINDINGS OF FACT

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

The Agency provided the Hearing Officer with a notebook containing seven (7) tabbed sections and that notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant provided the Hearing Officer with a notebook containing twelve (12) tabbed sections. There was objection to the items located at Tab 8. During the course of the hearing the Advocate for the Grievant stated that the Grievant would no longer rely on any of the documents located at Tab 8 and therefore the Hearing Officer does not consider them to be a part of Grievant's exhibits. There was also an objection to the documents located at Tab 9 and the

documents at that Tab were accepted solely for purposes of proving that there were three (3) prior Written Notices (one Group I and two Group II) that had proceeded through a grievance hearing with a Hearing Officer who made rulings on those three (3). Finally, there was an objection to the document located at Tab 12 and that objection was sustained based on lack of relevance. Accordingly, Tabs 1, 2, 3, 4, 5, 6, 7, 10 and 11 of the Grievant's notebook were accepted as presented, Tab 8 was withdrawn by the Grievant, Tab 9 was accepted for a limited role and Tab 12 was removed pursuant to objection.

This grievance presents a mixed issue of fact and proper policy interpretation. The fact issue is relatively simple and straightforward. The Grievant was on short term disability from the Agency from March 10, 2009 through August 16, 2009. [4] On May 13, 2009, a misdemeanor arrest warrant was issued for the Grievant for petty larceny. [5] At the time of her arrest, the Grievant did not notify her superiors of her arrest.

Procedure 5-45.6(B) deals with what an employee of this Agency should do if arrested and states in part as follows:

> Employees charged with a criminal offense either on or off the job...shall inform their organizational unit head immediately if received during normal work hours or the next work day if received during non-working hours...[6]

The Grievant notified no one at the Agency of this arrest. The Grievant, through her testimony and the questioning of Agency witnesses by her advocate, argued that inasmuch as she was on short term disability, her next "work day" would not be until she was no longer on short term disability. That next work day would be on or about August 17, 2009. The Agency witness testified that the Agency was not notified in that time frame either. Indeed, the only time that the Grievant notified the Agency of the arrest was after the Agency had done a criminal records check on or about September 10, 2009. At that time, the Grievant provided the Agency with documentation indicating that she had been issued a misdemeanor arrest warrant and that an Order of *Nolle Prosequi* had been entered on August 12, 2009. [7] The Grievant subsequently provided the Agency with an Expungement Order dated September 29, 2009. [8]

The Grievant testified on her own behalf and stated that she felt that there was no need to notify the Agency of her arrest as the attorney that she hired for the criminal charge advised her that she did not need to notify the Agency. The Grievant testified that she was unaware that Procedure 5-45.6(B) existed and that she did not know that she had a duty to notify the Agency of an arrest. The Hearing Officer finds that statement wholly unconvincing as she seems to be relying upon the direction of her criminal attorney as to what she needed to do regarding her employment with the Agency. A reasonable inference is that she inquired of him as to what she

[4] Grievant Exhibit 1, Tab 4, Page 1
[5] Agency Exhibit 1, Tab 1, Page 3
[6] Agency Exhibit 1, Tab 4, Page 2
[7] Grievant Exhibit 1, Tab 3, Page 4
[8] Grievant Exhibit 1, Tab 3, Page 1

might need to do regarding her workplace and that would imply that she was aware of this rule. Regardless, the essence of her position is that she was ignorant of the rule and that is no defense to violating the rule.

It is relevant to consider this Grievant's position. She was a Probation Officer. Part of her job description was as follows:

> ...Working knowledge of...Court and Legal procedures; pertinent Virginia Code Sections...To interpret and explain policies and procedures...[9]

Further, regarding her case load, she was expected to:

> ...Investigate[s] alleged violations, determine[s] appropriate and available sanctions up to and including arrest... [10]

The Grievant was an officer of the Court. The Grievant cannot now feign ignorance of the rules as a reason for not being held subject to the rules. Accordingly, the Hearing Officer finds that the Grievant failed to follow the procedures set forth in Section 5-46.6(B) and failed to properly notify the Agency of her arrest.

The Standards of Conduct for this Agency are set forth at Virginia Department of Corrections Operating Procedures Policy Number 135.1. That policy at Page 8 sets forth examples of Group II offenses and, by way of example, states that "failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy," is a Group II offense. [11]

The more difficult aspect of this case is the fact that the Agency used this Group II offense which is before this Hearing Officer, combined with a Group I offense issued on September 30, 2008, a Group II offense issued on November 21, 2008 and another Group II offense issued on December 11, 2008, to justify termination. The Grievant testified that she had appealed both of the prior Group II Decisions to EDR. The Grievant introduced an exhibit which was a Notice of Receipt of Ruling Request, dated July 15, 2009, indicating that EDR received her Administrative Review Request on June 29, 2009 and that letter indicated that a ruling would be issued. To date, no ruling has been issued. [12] The Agency presented no evidence on the matter of whether or not both prior Group II offenses were involved in this Administrative Appeal. Operating Procedure 135.1(XII)(C)(2) states in part as follows:

> ...An additional *Group II* offense should normally result in removal... [13]

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[9] Agency Exhibit 1, Tab 3, Page 1
[10] Agency Exhibit 1, Tab 3, Page 2
[11] Agency Exhibit 1, Tab 7, Page 8 of 11
[12] Grievant Exhibit 1, Tab 9, Page 1
[13] Agency Exhibit 1, Tab 7, Page 9

Operating Procedure 135.1(XII)(C)(4) states as follows:

> ...A Group II Notice...in addition to another Group II, normally should result in termination... [14]

The Grievant contends that, because the prior Group II Written Notices have been appealed, they cannot be treated as final Decisions that can be used for the purpose of accumulating offenses.

The Rules for Conducting Grievance Hearings at VI(B)(2) states in part as follows:

> ...If a grievance involves an agency action based on accumulated active Written Notices, the hearing officer must ascertain from the agency whether any of the other Written Notices supporting the action are being grieved. If so, final disposition of the grievance before the hearing officer must wait until the grievances on the other Written Notices have been decided. The hearing officer should determine immediately the appropriate level of discipline (Group I, II, or III) for the grievance before him or her, but must await the outcome of the other grievances to determine whether there are sufficient cumulative active Written Notices to support the agency's disciplinary action.

The Rules for Conducting Grievance Hearings at VII(B) states in part as follows:

> A hearing officer's decision becomes a final hearing decision, with no further possibility of administrative review, when:
>
> 1. The 15 day calendar 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 the Department of Human Resource Management, the hearing officer has issued a revised decision.

Once the Hearing Officer's Decision becomes final, then either party may appeal the legitimacy of that Decision to the Circuit Court.

The Grievant's position is that until all possible forms of appeal have been taken, up to and through the Circuit Court and such further courts as may be available, then no grievance is concluded and accordingly cannot be used for purposes of accumulation. The Hearing Officer finds that this is a perverted application of the Rules for Conducting Grievance Hearings. This Hearing Officer merely needed to await, "the outcome of the other grievances," to determine whether there were sufficient cumulative active Written Notices to support the Agency's

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

disciplinary action. As used there, the outcome clearly means the finding of the Hearing Officer who handled the prior grievances.

Any other interpretation would lead to potentially absurd results. For example, if a Grievant had a prior Group II offense of any nature that was on appeal, this Grievant's argument is that that prior Group II offense could possibly not be used for at least several years until an appeal process was completed. A Group II Written Notice remains active for three (3) years from the date of its issuance. [15] Accordingly, it would be possible for the Agency to ultimately win on the appeal but find itself in a position where the Group II Written Notice was no longer active because of the lapse of time. In that event, the Agency would be prohibited from ever using that Group II Written Notice for purposes of accumulation. This clearly is not the intent of any of these policies.

Further, the Grievant has a remedy. If the Grievant is successful in her Administrative Review and/or appeal of the prior Group II Written Notices and they are dismissed, then the Grievant can seek reinstatement with back pay for the entirety of the time that she has been out of work. The Agency has no such similar remedy if it is forced to retain a Grievant who now has three (3) Group II offenses.

Finally, the Hearing Officer notes that Section VII(B)(2) of the Rules for Conducting Grievance Hearings merely mandates that the Hearing Officer wait until the prior grievances that are being used for accumulation purposes have been "decided." The rule does not require the Hearing Officer to wait until a "final Decision" has been rendered and it does not require that the Hearing Officer wait until all potential appeals have been exhausted. As stated above, this would lead to the unusual result of the Agency being forced to maintain employees, potentially for years, who had accumulated sufficient Written Notices to warrant earlier termination. If the Agency's position was upheld throughout the entirety of the appeals process, the Agency likely would have no redress against the employee for wages, pensions, sick leave, vacation(s), and any and all payments made to the employee during the appeals process.

MITIGATION

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the Agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution..." [16] Under the Rules for Conducting Grievance Hearings, "a Hearing Officer must give deference to the Agency's consideration and assessment of any mitigating and aggravating circumstances. Thus a Hearing Officer may mitigate the Agency's discipline only if, under the record evidence, the Agency's discipline exceeds the limits of reasonableness. If the Hearing Officer mitigates the Agency's discipline, the Hearing Officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the Agency has consistently applied disciplinary action among similarly situated employees, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee

[15] Agency Exhibit 1, Tab 7, Page 9
[16] Va. Code § 2.2-3005

during the time of his/her employment at the Agency. The Hearing Officer has considered all of the delineated items in mitigation as set forth in this paragraph and, the Hearing Officer also considered any and all other possible sources of mitigation which were raised by the Grievant at the hearing and the Hearing Officer finds that there are no grounds for mitigation in this matter. The Hearing Officer notes that the Agency has already used mitigation regarding this Grievant when she remained employed after acquiring two (2) active Group II Written Notices along with an active Group I Written Notice. The Hearing Officer can find nothing in the Grievant's exhibits or testimony which would now justify the further mitigation of three (3) Group II Written Notices and one (1) Group I Written Notice such that she was not terminated.

DECISION

For reasons stated herein, the Hearing Officer finds that the Agency has bourne its burden of proof and that the Group II Written Notice was validly and properly issued and that termination, based on the accumulation of two (2) prior active Group II Written Notices and one (1) prior active Group I Written Notice, was proper.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar days** from the date the decision was issued, if any of the following apply:

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

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

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

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

Director
Department of Employment Dispute Resolution
600 East Main Street, Suite 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 your appeal to the other party and to the EDR Director. The Hearing Officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.[17] 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.[18]

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

_____

William S. Davidson
Hearing Officer

[17] An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, 39 Va. App. 439, 573 S.E.2d 319 (2002).

[18] 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: 9220

Hearing Date:	November 10, 2009
Decision Issued:	November 16, 2009
Reconsideration Request Received:	November 19, 2009
Response to Reconsideration:	December 10, 2009

APPLICABLE LAW

A Hearing Officer's original decision is subject to administrative review. A request for review must be made in writing, and *received* by the administrative reviewer, within 15 calendar days of the date of the original hearing decision. A request to reconsider a decision is made to the Hearing Officer. **A copy of all requests must be provided to the other party and to the EDR Director.** This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request. [19] (Emphasis added)

OPINION

The Grievant seeks reconsideration of the Hearing Officer's Decision based on the allegation that the Hearing Officer's Decision, "in part either overlooked or misapprehended Section VII(B)(2) of the Rules of Conduct and did render its decision in bad faith, pursuant to EDR 7.2."

The Hearing Officer assumes that, where the Grievant speaks of VII(B)(2) of the Rules of Conduct, that she is referring to the Rules for Conducting Grievance Hearings. It is clear that the Hearing Officer did not overlook this rule as the pertinent part is set forth at page 5 of his Decision. The Hearing Officer did not "misapprehend" this section and does not fully understand what the Grievant means by that phraseology.

The Grievant, in her Request for Reconsideration, concedes that the Agency correctly disciplined her with a Group II Written Notice for failure to report an arrest. [20]

The Grievant's next argument appears to be that the Agency should not have been allowed to use the prior grievances for accumulation purposes and thereby terminate the

[19] §7.2(a) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

[20] Grievant Emergency Petition for Reconsideration, Page 2

Grievant. In her argument, at page 3, the Grievant quotes a Finding of Fact from the Hearing Officer's Decision which is as follows:

> ...The Agency presented no evidence on the matter of whether or not both prior Group II offenses were involved in this administrative Appeal... [21]

The Grievant then indicates that statement of fact is:

> ...at odds with the issue presented to the Hearing Officer for a determination. [22]

In point of fact, that Statement of Fact is beneficial to the Grievant if beneficial to anyone. The Grievant introduced an exhibit indicating that EDR had received her Administrative Appeal for both of the prior Group II Written Notices. The Exhibit itself did not delineate clearly which Written Notices had been appealed. The Agency offered no evidence on this matter whatsoever and, accordingly, the Hearing Officer accepted the Grievant's statement that she had requested a review of both of the prior Group II Written Notices. That was merely a factual statement and had no bearing on any legal analysis in this matter.

At pages 3 and 4 of the Grievant's Emergency Petition for Reconsideration, the Grievant, while hard to fully understand, seems to argue that the Hearing Officer misinterpreted the appropriate Rules for Conducting Grievance Hearings regarding the accumulation of prior Written Notices. The Hearing Officer has reviewed his findings and has reviewed the Rules for Conducting Grievance Hearings and, considering the arguments made in the Grievant's Emergency Petition for Reconsideration, finds no reason to reconsider his Decision.

Further, the Hearing Officer points out that on page 5 of this Emergency Petition for Reconsideration, the Grievant states in part as follows:

> ...The Hearing Officer has abandoned his initial findings that he must await a final administrative review decision, pursuant to EDR 7.2D at 2. [23]

The Hearing Officer is unaware of any such finding.

DECISION

For the reasons stated herein, the Hearing Officer finds that the original Decision made in this matter was correct and does not find any reason upon reconsideration to change that Decision.

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[21] Grievant Emergency Petition for Reconsideration, Page 3
[22] Grievant Emergency Petition for Reconsideration, Page 3
[23] Grievant Emergency Petition for Reconsideration, Page 5

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. [24]

_____

William S. Davidson
Hearing Officer

[24] An appeal to circuit court may be made only on the basis that the decision was *contradictory to law*, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Department of Corrections
February 3, 2010

The grievant has requested an administrative review of the hearing officer's decision in Case Number 9220. The grievant objects to the hearing officer's decision on two bases – whether the grievant failed to report to her supervisors in a timely fashion she had a criminal offense and if the Department of Corrections can use prior written notices, which have not become final decisions pursuant to the grievant's appeals, as prior written notices for purposes of accumulation in order to terminate the grievant. She also requested an administrative review from the Department of Employment Dispute Resolution (EDR) but was denied such a review because her request was determined to be untimely. For reasons listed below, this Agency will not disturb the hearing decision. The agency head of the Department of Human Resource Management (DHRM) has requested that I respond to this administrative review request.

FACTS

The hearing officer offered, in part, the following findings of fact:

> The fact issue is relatively simple and straightforward. The Grievant was on short term disability from the Agency from March 10, 2009 through August 16, 2009… On May 13, 2009, a misdemeanor arrest warrant was issued for the Grievant for petty larceny. At the time of her arrest, the Grievant did not notify her superiors of her arrest…
>
> Procedure 5-45.6(B) deals with what an employee of this Agency should do if arrested and states in part as follows:
>
> Employees charged with a criminal offense either on or off the job...shall inform their organizational unit head immediately if received during normal work hours or the next work day if received during non-working hours...
>
> The Grievant notified no one at the Agency of this arrest. The Grievant, through her testimony and the questioning of Agency witnesses by her advocate, argued that inasmuch as she was on short term disability, her next "work day" would not be until she was no longer on short term disability. That next work day would be on or about August 17, 2009. The Agency

witness testified that the Agency was not notified in that time frame either. Indeed, the only time that the Grievant notified the Agency of the arrest was after the Agency had done a criminal records check on or about September 10, 2009. At that time, the Grievant provided the Agency with documentation indicating that she had been issued a misdemeanor arrest warrant and that an Order of *Nolle Prosequi* had been entered on August 12, 2009… The Grievant subsequently provided the Agency with an Expungement Order dated September 29, 2009…

The Grievant testified on her own behalf and stated that she felt that there was no need to notify the Agency of her arrest as the attorney that she hired for the criminal charge advised her that she did not need to notify the Agency. The Grievant testified that she was unaware that Procedure 5-45.6(B) existed and that she did not know that she had a duty to notify the Agency of an arrest. The Hearing Officer finds that statement wholly unconvincing as she seems to be relying upon the direction of her criminal attorney as to what she needed to do regarding her employment with the Agency. A reasonable inference is that she inquired of him as to what she might need to do regarding her workplace and that would imply that she was aware of this rule. Regardless, the essence of her position is that she was ignorant of the rule and that is no defense to violating the rule.

It is relevant to consider this Grievant's position. She was a Probation Officer. Part of her job description was as follows:

...Working knowledge of...Court and Legal procedures; pertinent Virginia Code Sections...To interpret and explain policies and procedures...

Further, regarding her case load, she was expected to:
...Investigate[s] alleged violations, determine[s] appropriate and available sanctions up to and including arrest...

The Grievant was an officer of the Court. The Grievant cannot now feign ignorance of the rules as a reason for not being held subject to the rules. Accordingly, the Hearing Officer finds that the Grievant failed to follow the procedures set forth in Section 5-46.6(B) and failed to properly notify the Agency of her arrest.

The Standards of Conduct for this Agency are set forth at Virginia Department of Corrections Operating Procedures Policy Number 135.1. That policy at Page 8 sets forth examples of Group II offenses and, by way of example, states that "failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy," is a Group II offense…

The more difficult aspect of this case is the fact that the Agency used this Group II offense which is before this Hearing Officer, combined with a Group I offense issued on September 30, 2008, a Group II offense issued on November 21, 2008 and another Group II offense issued on December 11,

2008, to justify termination. The Grievant testified that she had appealed both of the prior Group II Decisions to EDR. The Grievant introduced an exhibit which was a Notice of Receipt of Ruling Request, dated July 15, 2009, indicating that EDR received her Administrative Review Request on June 29, 2009 and that letter indicated that a ruling would be issued. To date, no ruling has been issued… The Agency presented no evidence on the matter of whether or not both prior Group II offenses were involved in this Administrative Appeal.

Operating Procedure 135.1(XII) (C) (4) states as follows:

...A Group II Notice...in addition to another Group II, normally should result in termination...

The Grievant contends that, because the prior Group II Written Notices have been appealed, they cannot be treated as final Decisions that can be used for the purpose of accumulating offenses.

The Rules for Conducting Grievance Hearings at VI(B)(2) states in part as follows:

...If a grievance involves an agency action based on accumulated active Written Notices, the hearing officer must ascertain from the agency whether any of the other Written Notices supporting the action are being grieved. If so, final disposition of the grievance before the hearing officer must wait until the grievances on the other Written Notices have been decided. The hearing officer should determine immediately the appropriate level of discipline (Group I, II, or III) for the grievance before him or her, but must await the outcome of the other grievances to determine whether there are sufficient cumulative active Written Notices to support the agency's disciplinary action.

The Rules for Conducting Grievance Hearings at VII(B) states in part as follows:

A hearing officer's decision becomes a final hearing decision, with no further possibility of administrative review, when:
1. The 15 day calendar 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 the Department of Human Resource Management, the hearing officer has issued a revised decision.

Once the Hearing Officer's Decision becomes final, then either party may appeal the legitimacy of that Decision to the Circuit Court.

The Grievant's position is that until all possible forms of appeal have been taken, up to and through the Circuit Court and such further courts as may be available, then no grievance is concluded and accordingly cannot be used

> for purposes of accumulation. The Hearing Officer finds that this is a perverted application of the Rules for Conducting Grievance Hearings. This Hearing Officer merely needed to await, "the outcome of the other grievances," to determine whether there were sufficient cumulative active Written Notices to support the Agency's disciplinary action. As used there, the outcome clearly means the finding of the Hearing Officer who handled the prior grievances.
>
> Any other interpretation would lead to potentially absurd results. For example, if a Grievant had a prior Group II offense of any nature that was on appeal, this Grievant's argument is that that prior Group II offense could possibly not be used for at least several years until an appeal process was completed. A Group II Written Notice remains active for three (3) years from the date of its issuance. 15 Accordingly, it would be possible for the Agency to ultimately win on the appeal but find itself in a position where the Group II Written Notice was no longer active because of the lapse of time. In that event, the Agency would be prohibited from ever using that Group II Written Notice for purposes of accumulation. This clearly is not the intent of any of these policies.
>
> Further, the Grievant has a remedy. If the Grievant is successful in her Administrative Review and/or appeal of the prior Group II Written Notices and they are dismissed, then the Grievant can seek reinstatement with back pay for the entirety of the time that she has been out of work. The Agency has no such similar remedy if it is forced to retain a Grievant who now has three (3) Group II offenses.
>
> Finally, the Hearing Officer notes that Section VII(B)(2) of the Rules for Conducting Grievance Hearings merely mandates that the Hearing Officer wait until the prior grievances that are being used for accumulation purposes have been "decided." The rule does not require the Hearing Officer to wait until a "final Decision" has been rendered and it does not require that the Hearing Officer wait until all potential appeals have been exhausted. As stated above, this would lead to the unusual result of the Agency being forced to maintain employees, potentially for years, who had accumulated sufficient Written Notices to warrant earlier termination. If the Agency's position was upheld throughout the entirety of the appeals process, the Agency likely would have no redress against the employee for wages, pensions, sick leave, vacation(s), and any and all payments made to the employee during the appeals process.

The relevant policy, the Department of Human Resource Management's Policy No.1.60, states that it is the Commonwealth's objective to promote the well-being of its employees in the workplace and to maintain high standards of professional conduct and work performance. This policy also sets forth (1) standards for professional conduct, (2) behavior that is unacceptable, and (3) corrective actions that agencies may impose to address behavior and employment problems. Section V, Unacceptable Standards of Conduct, of that policy sets forth, but is not all-inclusive, examples of unacceptable behavior for which specific disciplinary action may be

warranted. Also, Section VIII (B) of DHRM's Policy No. 1.60 outlines the steps that agencies should take in suspending employees, including the length of suspensions. In addition, DHRM Policy No. 1.60 authorizes agencies to promulgate standards of conduct policies that are germane to carrying out the agencies' work as long as those policies do not conflict with DHRM's policy. In the instant case, DOC's Standard Operating Procedures 135.1 and 5-45.6(b) also apply here.

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 too severe, he may reduce the discipline. By statute, this Department 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.

Concerning whether the hearing officer's decision is consistent with the Rules for Conducting Grievance Hearings at VI (B)(2) and VII (B) as promulgated by the EDR, this Department does not have the authority to rule on this issue because the *Rules* is not a human resource management policy promulgated by either this Department or the DOC. The EDR is responsible for the administration of the grievance procedure. Thus, an assessment of the propriety of the hearing officer's decision in this matter appropriately falls under the purview of the EDR.

Concerning whether the grievant failed to report to her supervisors in a timely fashion the fact she was charged with a criminal offense is an evidentiary matter. This Agency has no authority to address evidentiary issues.

Therefore, this Agency has no authority to disturb the hearing decision.

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Ernest G. Spratley