

Issues: Group III Written Notice (failure to follow policy), Demotion and Pay Reduction;  
Hearing Date: 01/25/10; Decision Issued: 01/27/10; Agency: DOC; AHO: Carl  
Wilson Schmidt, Esq.; Case No. 9253; Outcome: No Relief – Agency Upheld;  
**Administrative Review: EDR Ruling Request received 02/11/10; EDR Ruling  
#2010-2538 issued 05/18/10; Outcome: AHO's decision affirmed;**  
**Administrative Review: DHRM Ruling Request received 02/11/10; DHRM Ruling  
issued 04/05/10; Outcome: AHO's decision affirmed.**



**COMMONWEALTH of VIRGINIA**  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9253**

Hearing Date: January 25, 2010  
Decision Issued: January 27, 2010

**PROCEDURAL HISTORY**

On September 15, 2009, Grievant was issued a Group III Written Notice of disciplinary action with demotion and disciplinary pay reduction for violation of DOC Policy 130.1.

On October 13, 2009, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On January 4, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 25, 2010, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee  
Agency Advocate  
Witnesses

**ISSUES**

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

2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

### **BURDEN OF PROOF**

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

### **FINDINGS OF FACT**

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

The Department of Corrections employed Grievant as a Corrections Lieutenant at one of its Facilities until her demotion to a Corrections Officer effective September 16, 2009. The purpose of Grievant's position as a Corrections Lieutenant was:

Monitor and guide the overall operations of the institution during shift to ensure that all policies and procedures [are] strictly followed. Ensure through personal observation that all staff are familiar with post-functions. Address employee/inmate problems promptly reporting same through chain of command when needed.

One of Grievant's performance expectations was that she "[d]isplays a calm professional demeanor in contact with supervisors, staff, inmates and the public."<sup>1</sup>

Grievant had been employed by the Agency for approximately 20 years. With the exception of her most recent evaluation, Grievant's work performance for the Agency was evaluated as satisfactory.

Grievant had prior active disciplinary action. On December 9, 2008, Grievant received a Group II Written Notice for violating DOC Policy 130.1 by displaying

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<sup>1</sup> Agency Exhibit 3.

disrespectful and aggressive behavior towards the Captain.<sup>2</sup> Following the issuance of this Written Notice, the Warden met with Grievant and emphasized the importance of communicating with the Captain in an appropriate manner.

On August 31, 2009, the Captain called Grievant into his office to discuss her leave reporting form. The Captain asked Grievant if she had turned in her leave form for the time period of July 25 to August 9, 2009. Grievant said she had worked enough hours to cover that time period. The Captain told her to re-check her calculations. Grievant did so a short time later and realized that she had not worked a sufficient number of hours during the period of July 25 through August 9, 2009. Grievant also realized that she had worked additional hours during the time period of August 10 through August 24, 2009. Grievant wanted to take the additional hours she worked in the August 10 through August 24 time period and apply those hours to the time period of July 25 through August 9, 2009. The Captain received Grievant's leave form but he did not turn it in for processing.

On September 1, 2009, the Captain called the Human Resource Officer to find out whether Grievant could move hours worked in one time period and report them as being worked in another time period. The Human Resource Officer told the Captain that Grievant could not move hours from one time period to another. After speaking with the Human Resource Officer, the Captain called Grievant into his office to discuss Grievant's leave. The Captain told Grievant what the Human Resource Officer had said about moving leave from one period to another period. Grievant immediately began yelling, "I am not giving the state nothing, I work my butt off." The Captain attempted to explain to Grievant that if she knew she was in jeopardy of going over her time for the pay period, she could have asked the Captain to relieve her. Grievant responded sharply, "you are the Captain, you have only three Lieutenant's time to track, you can't do that? On day shift, [Captain J] and [Lieutenant J] don't have this problem, they work as a team; the only teamwork on the shift is the lieutenant's." The Major is young but he needs to start doing his job, I have to work weekends to cover [two other employees] when they go on vacation, why can't you cover for them?" The Captain then explained to Grievant that she was the relief lieutenant and a relief lieutenant is responsible for covering the shift when the other lieutenants are scheduled off. Grievant's voice continued to elevate. The Captain instructed Grievant to lower her voice but Grievant disregarding that instruction. Grievant continued to yell, "I am not relieving anybody else again, I am going to work my required 88 hours and staying home, don't call me, I ain't coming, I am going to write a grievance, I am not going to give my time away." The Captain pointed to the policy for Exempt employees and explained to Grievant that she could not be paid overtime for the time worked and that she could not transfer hours from one pay period to another period. Grievant continued to yell, "I am going to meet with [the Human Resource Officer] and the Major in the morning, they need to move me, I am tired of you calling me down here, I am tired of you sending me messages to cover this lieutenant, that lieutenant, and I am tired that you went to [the Human Resource Officer] about this behind my back. You're never at work; I have to cover all

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<sup>2</sup> Agency Exhibit 6.

these weekends when the lieutenants are off." The Captain calmly stated that she should let him know if she needed him to cover the shift for her. Grievant stated, "I am tired of talking about this and walked away."

Lieutenant D was in the Shift Commander's office approximately 90 feet away from the Captain's office. Lieutenant D could hear Grievant talking and yelling for several minutes although he could not distinguish Grievant's words. Sergeant M was standing in the treatment area near the Captain's office and overheard Grievant speaking in a very loud voice and arguing with someone. Sergeant M quickly left the area. Sergeant R was walking in route to the break room when he overheard a conversation between the Captain and Grievant. He turned around and headed up the steps. While talking with Lieutenant D, Sergeant R could hear Grievant speaking loudly.

### CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses "include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force."<sup>3</sup> Group II offenses "include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal."<sup>4</sup> Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."<sup>5</sup>

DOC Policy 130.1 sets forth *Rules of Conduct Governing Employees Relationships with Offenders*. Section IV (B) addresses courtesy and respect. This section provides:

At all times, employees should be respectful, polite and courteous in their contact with offenders, as well as with the citizens and other employees. Such behavior is a primary factor in maintaining order, control, and good discipline, and in effectively and efficiently carrying out the mission of the Department. (Emphasis added).

During the shift beginning on September 1, 2009, Grievant was not courteous, respectful, or polite to the Captain. The Department of Corrections is a quasi-military organization where employees hold rank. Subordinate ranking employees are expected to show greater deference to employees holding superior rank than might be expected between superior and subordinate employees working in other State agencies. Grievant yelled at the Captain for several minutes. She ignored the Captain's instruction to calm down. Grievant's actions were contrary to DOC Policy 130.1.

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<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(X)(A).

<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

Group III offenses include, "violation of DOC Operating Procedure 130.1".<sup>6</sup> Because Grievant's actions were contrary to DOC Policy 130.1, the Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, the Agency may end an employee's employment with the Agency. In lieu of removal, the Agency may demote, transfer, and impose a disciplinary pay reduction. In this case, Grievant's demotion with a disciplinary pay reduction must be upheld.

Grievant argues that she was courteous and respectful to the Captain but was merely expressing her disagreement. Grievant was not disciplined for what she said; she was disciplined for how she said it. There is sufficient evidence to show that Grievant was loud, argumentative and disrespectful to the Captain. The Captain's testimony was credible.

Grievant argues that DOC Policy 130.1 does not govern interaction between employees -- it only governs interaction between employees and offenders. Grievant's argument fails. Although the primary purpose of DOC Policy 130.1 is to address employees' relationships with offenders, the Policy also specifically mentions interactions between employees.

*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..."<sup>7</sup> 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, and (3) the disciplinary action was free of improper motive.

Grievant contends the disciplinary action should be mitigated because the discipline is excessive. The Hearing Officer is not a "super personnel officer" who can impose his preference for the appropriate level of discipline as long as that level does not exceed the limits of reasonableness. In this case, the Agency's level of discipline does not exceed the limits of reasonableness. It is supported by the Agency's policies. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

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<sup>6</sup> Virginia Department of Corrections Operating Procedure 135.1(XII)(B)(25).

<sup>7</sup> *Va. Code § 2.2-3005.*

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with demotion and the disciplinary pay reduction is **upheld**.

## 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

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

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

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

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction

in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>8</sup>

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

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>8</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



POLICY RULING OF THE DEPARTMENT OF  
HUMAN RESOURCE MANAGEMENT

In the Matter of the  
Department of Corrections

April 5, 2010

The grievant has requested an administrative review of the hearing officer's decision in Case No. 9253. The grievant was issued a Group III Written Notice and demoted two ranks and two pay grades. The disciplinary action was based on the grievant having been charged with violating Department of Corrections Policy 130.1, Standards of Conduct. The grievant objects to the hearing officer's decision on the basis that the application of a Group III Offense for the specific behavior and the punishment based on that behavior is not consistent with the manner in which the Department of Corrections has dealt with similar types of behavior by other employees. For the reason stated below, this Agency will not interfere with the decision. The agency head, Ms. Sara Redding Wilson, has requested that I respond to this administrative review request.

FACTS

The hearing officer's **Findings of Fact**, in part, are as follows:

The Department of Corrections employed Grievant as a Corrections Lieutenant at one of its Facilities until her demotion to a Corrections Officer effective September 16, 2009. The purpose of Grievant's position as a Corrections Lieutenant was:

Monitor and guide the overall operations of the institution during shift to ensure that all policies and procedures [are] strictly followed. Ensure through personal observation that all staff are familiar with post-functions. Address employee/inmate problems promptly reporting same through chain of command when needed.

One of Grievant's performance expectations was that she "[d]isplays a calm professional demeanor in contact with supervisors, staff, inmates and the public." Grievant had been employed by the Agency for approximately 20 years. With the exception of her most recent evaluation, Grievant's work performance for the Agency was evaluated as satisfactory.

Grievant had prior active disciplinary action. On December 9, 2008, Grievant received a Group II Written Notice for violating DOC Policy 130.1 by displaying disrespectful and aggressive behavior towards the Captain. Following the issuance of this Written Notice, the Warden met with Grievant and emphasized the importance of communicating with the Captain in an appropriate manner.

On August 31, 2009, the Captain called Grievant into his office to discuss her leave reporting form. The Captain asked Grievant if she had turned in her leave form for the time period of July 25 to August 9, 2009. Grievant said she had worked enough hours to cover that time period. The Captain told her to re-check her calculations. Grievant did so a short time later and realized that she had not worked a sufficient number of hours during the period of July 25 through August 9, 2009. Grievant also realized that she had worked additional hours during the time period of August 10 through August 24, 2009. Grievant wanted to take the additional hours she worked in the August 10 through August 24 time period and apply those hours to the time period of July 25 through August 9, 2009. The Captain received Grievant's leave form but he did not turn it in for processing.

On September 1, 2009, the Captain called the Human Resource Officer to find out whether Grievant could move hours worked in one time period and report them as being worked in another time period. The Human Resource Officer told the Captain that Grievant could not move hours from one time period to another. After speaking with the Human Resource Officer, the Captain called Grievant into his office to discuss Grievant's leave. The Captain told Grievant what the Human Resource Officer had said about moving leave from one period to another period. Grievant immediately began yelling, "I am not giving the state nothing, I work my butt off." The Captain attempted to explain to Grievant that if she knew she was in jeopardy of going over her time for the pay period, she could have asked the Captain to relieve her. Grievant responded sharply, "you are the Captain, you have only three Lieutenant's time to track, you can't do that? On day shift, [Captain J] and [Lieutenant J] don't have this problem, they work as a team; the only teamwork on the shift is the lieutenant's." The Major is young but he needs to start doing his job, I have to work weekends to cover [two other employees] when they go on vacation, why can't you cover for them?" The Captain then explained to Grievant that she was the relief lieutenant and a relief lieutenant is responsible for covering the shift when the other lieutenants are scheduled off. Grievant's voice continued to elevate. The Captain instructed Grievant to lower her voice but Grievant disregarding that instruction. Grievant continued to yell, "I am not relieving anybody else again, I am going to work my required 88 hours and staying home, don't call me, I ain't coming, I am going to write a grievance, I am not going to give my time away." The Captain pointed to the policy for Exempt employees and explained to Grievant that she could not be paid overtime for the time worked and that she could not transfer hours from one pay period to another period. Grievant continued to yell, "I am going to meet with [the Human Resource Officer] and the Major in the morning, they need to move me, I am tired of you calling me down here, I am tired of you sending me messages to cover this lieutenant, that lieutenant, and I am tired that you went to [the Human Resource Officer] about this behind my back. You're never at work; I have to cover all these weekends when the lieutenants are off." The Captain calmly stated that she should let him know if she needed him to cover the shift for her. Grievant stated, "I am tired of talking about this and walked away."

Lieutenant D was in the Shift Commander's office approximately 90 feet away from the Captain's office. Lieutenant D could hear Grievant talking and yelling

for several minutes although he could not distinguish Grievant's words. Sergeant M was standing in the treatment area near the Captain's office and overheard Grievant speaking in a very loud voice and arguing with someone. Sergeant M quickly left the area. Sergeant R was walking in route to the break room when he overheard a conversation between the Captain and Grievant. He turned around and headed up the steps. While talking with Lieutenant D, Sergeant R could hear Grievant speaking loudly.

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. In addition, the DOC has promulgated Operating Procedure 130.1, *Standards of Conduct*, to supplement DHRM Policy No. 1.60 to fit its special needs. Operating Procedure 130.1 states, "At all times, employees should be respectful, polite and courteous in their contact with offenders, as well as with the citizens and other employees. Such behavior is a primary factor in maintaining order, control, and good discipline, and in effectively and efficiently carrying out the mission of the Department."

## 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 re, 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 this Agency or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. The 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.

In the present case, based on the evidence, the hearing officer determined the following:

During the shift beginning on September 1, 2009, Grievant was not courteous, respectful, or polite to the Captain. The Department of Corrections is a quasi-military organization where employees hold rank. Subordinate ranking employees are expected to show greater deference to employees holding superior rank than might be expected between superior and subordinate employees working in other State agencies. Grievant yelled at the Captain for several minutes. She ignored the

Captain's instruction to calm down. Grievant's actions were contrary to DOC Policy 130.1.

In arriving at his decision as to the credibility of the parties to the grievance, the hearing officer concluded the following:

Grievant argues that she was courteous and respectful to the Captain but was merely expressing her disagreement. Grievant was not disciplined for what she said; she was disciplined for how she said it. There is sufficient evidence to show that Grievant was loud, argumentative and disrespectful to the Captain. The Captain's testimony was credible.

In our opinion, while the grievant states that the application of the disciplinary action (Group Three Written Notice, reduction in pay and rank) is not consistent with how the Department of Corrections has dealt with similar behavior exhibited by other employees, it appears that the crux of her appeal is that she disagrees with the hearing officer's assessment of the evidence and the conclusions he drew as a result of the assessment of that evidence. Thus, we opine that the grievant's appeal to this Agency represents an evidentiary issue. As such, we have no authority to address this matter.

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Ernest Spratley