

Issues: Group II Written Notice (failure to follow instructions), Group III Written Notice (conduct unbecoming), Termination and Racial Stereotyping; Hearing Date: 04/09/10; Decision Issued: 04/19/10; Agency: Department of Corrections; AHO: Carl Wilson Schmidt, Esq.; Case No. 9291, 9292, 9293, 9294; Outcome: Partial Relief;  
**Administrative Review: AHO Reconsideration Request received 04/30/10; Reconsideration Decision issued 05/27/10; Outcome: Original decision affirmed;**  
**Administrative Review: EDR Ruling Request received 04/30/10; EDR Ruling #2010-2636 issued 06/30/10; Outcome: AHO's decision affirmed;**  
**Administrative Review: DHRM Ruling Request received 04/30/10; DHRM Ruling issued 07/23/10; Outcome: AHO's decision affirmed.**



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9291 / 9292 / 9293 /9294**

Hearing Date: April 9, 2010  
Decision Issued: April 19, 2010

**PROCEDURAL HISTORY**

On September 4, 2009, Grievant was issued a Group III Written Notice of disciplinary action for behavior unbecoming of a professional correctional officer. On September 8, 2009, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions. Grievant was removed from employment.

Grievant filed four grievances to challenge the Agency's actions. The outcome of the Third Resolution Steps of those grievances was not satisfactory to the Grievant and he requested a hearing. On March 1, 2010, the EDR Director issued Ruling No. 2010-2545, 2010-2546, 2010-2547, 2010-2548 consolidating the grievances for a single hearing. On March 15, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 9, 2010, a hearing was held at the Agency's regional location.

**APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee  
Agency Representative  
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 actions against the Grievant were warranted and appropriate under the circumstances. Grievant had the burden of proof with respect to the other allegations in this grievance. 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 Officer at one of its Facilities prior to his removal from employment. The purpose of Grievant's position was:

Maintain security, custody and control over inmates at the institution and while in transport, by observing and initiating corrective and/or disciplinary action for inappropriate behavior. Supervises inmates' daily activities and observes and records their behavior and movement to ensure their safe and secure confinement.<sup>1</sup>

Grievant had prior active disciplinary action. On January 30, 2008, Grievant received a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with applicable established written policy. On January 27, 2009, Grievant received a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions.

---

<sup>1</sup> Agency Exhibit 4.

The Agency's Intelligence Officer intercepted a letter from Ms. F to an inmate inside the Facility. The letter was postmarked August 18, 2009. Four pictures were included with the letter. One of the pictures showed seven African American men including Grievant posing as a group. Several of the men were holding a hand up in the air and displaying their fingers in a manner to show what appeared to be a gang sign. Agency employees were concerned as to the reason why Grievant would appear in a picture being sent to an inmate at the Facility. The Agency initiated an investigation. The Agency's Investigator interviewed Grievant who refused to provide the Investigator with a full explanation regarding the circumstances of the photo. The Investigator spoke with a local law enforcement officer who had experience with identifying members of gangs in his locality. The local law enforcement officer identified three of the seven men in the photo as being members of the gang named AB.<sup>2</sup> Several of the men in the photo including Grievant were holding a hand in the air to display their fingers in a manner that traced the pattern of the two letters of the gang's name. The Agency did not allege or establish that Grievant was a member of gang AB. The Facility Warden concluded it might be appropriate to issue Grievant a Written Notice of disciplinary action for conduct unbecoming a professional correctional officer.

Prior to the issuance of the Group III Written Notice for behavior unbecoming a professional correctional officer, the Warden conducted a due process fact-finding hearing to present the allegations to Grievant and to enable Grievant to present evidence showing why the disciplinary action should not be taken. On September 4, 2009, the Warden met with Grievant. Grievant said that he had been accused by the Investigator of being a member of the Cr gang and the Bl gang. The Warden asked Grievant if he was a member of those gangs. Grievant responded that he was not a member. The Warden said he would like for Grievant to write an incident report describing where he was when the picture was taken and the circumstances surrounding the picture. Grievant refused to write the report. Grievant said he did not wish to write the report in the event it might incriminate him. The Warden told Grievant that as an officer he was obligated to write a report of the incident giving an account of what happened. Grievant again refused to write the report. The Warden stopped the fact-finding hearing and said that "I am giving you an order to give a written account." Grievant said that he was not going to give a written account.

## **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

---

<sup>2</sup> The gang utilized two letters as part of its name. The Hearing Officer has substituted the letters AB for the gang's letters.

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

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>

The Agency alleged that Grievant engaged in behavior unbecoming of a professional correctional officer. The Agency did not charge Grievant with fraternization or creating the appearance of fraternization. The Agency did not present a policy defining "behavior unbecoming of a professional correctional officer". Although the list of offenses in the Agency's Standards of Conduct is not all-inclusive, the Agency must present evidence showing that an employee charged with a Group III offense knew or should have known that his behavior would result in disciplinary action up to and including removal. The Agency has not established that Grievant knew that three of the men in the photo were members of a gang and that Grievant knew he was displaying a gang sign.<sup>6</sup> Although Grievant received training informing him that his behavior outside of his work hours could be a basis to take disciplinary action against him, he did not receive training to inform him that that appearing in a photo and making a hand sign could result in disciplinary action resulting removal. In short, Grievant did not have adequate notice from the Agency that his behavior as displayed in the photo could result in his removal from employment. Accordingly, the Group III Written Notice must be reversed.

Failure to follow a supervisor's instruction is a Group II Written Notice.<sup>7</sup> On September 4, 2009, the Warden, a supervisor, gave Grievant a direct order to write an incident report regarding the circumstances surrounding the picture of Grievant. Grievant refused that order thereby justifying the issuance of a Group II Written Notice of disciplinary action.

Upon the accumulation of two or more Group II Written Notices of disciplinary action, an employee may be removed from employment. With the Group II Written Notice giving rise to this hearing, Grievant has accumulated more than two Group II Written Notices of disciplinary action. Accordingly, the Agency's removal is upheld.

Grievant argued that he had the right to refuse to comply with the Warden's order pursuant to the Fifth Amendment of the United States Constitution. Grievant argued that he cannot be subject to disciplinary action for exercising the rights afforded to him by the United States Constitution. Grievant's argument fails. Grievant's argument would have merit if the Agency were conducting a criminal investigation of him. In this case, the Agency's investigation was an administrative one. Grievant was obligated to comply with the instruction of a supervisor as part of an administrative investigation.

---

<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).

<sup>6</sup> Grievant argued as part of the Step Process that he was displaying a peace sign. Grievant did not testify during the hearing and the Hearing Officer could not determine whether Grievant's assertion during the Step Process was credible. The Agency's experts testified with credibility that the hand sign was not a peace sign but rather was a sign of the gang.

<sup>7</sup> Virginia Department of Corrections Operating Procedure 135.1(XI)(B)(1).

Grievant filed a third grievance and alleged that he was being stereotyped based on his race and physical appearance because the Agency took disciplinary action against him for appearing in the photo. Grievant claims that he was falsely accused of being a member of the Cr or the BI gangs. The evidence showed that the Agency did not accuse Grievant of being a member of these gangs but rather inquired of Grievant regarding whether he was a member of these gangs. The Agency's experts testified that individuals other than African Americans are members of the Cr and the BI gangs. Thus, the Agency's questioning of Grievant regarding whether he was a member of the two gangs was not racial stereotyping and was not inappropriate.

Grievant filed a fourth grievance restating many of his concerns expressed in the prior three grievances. Since those issues are addressed as part of the prior three grievances, there is no basis to grant Grievant relief.

*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>8</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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to further reduce the disciplinary action.

## DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action is **rescinded**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**. Grievant's removal is **upheld** based upon the accumulation of disciplinary action. Grievant's requests for relief for his third and fourth grievance are **denied**

## APPEAL RIGHTS

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

---

<sup>8</sup> *Va. Code § 2.2-3005.*

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>9</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*

---

Carl Wilson Schmidt, Esq.  
Hearing Officer

---

<sup>9</sup> 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: 9291 / 9292 / 9293 / 9294-R**

Reconsideration Decision Issued: May 27, 2010

**RECONSIDERATION DECISION**

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

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

- (1) the evidence is newly discovered since the date of the Hearing Decision;
- (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised;
- (3) the evidence is not merely cumulative or impeaching;
- (4) the evidence is material;
- and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

Grievant disputes the credibility of several witnesses for the Agency. The Hearing Officer determines credibility based on many factors contained in the record and in the testimony of witnesses. Grievant has not presented any evidence or arguments that would alter the Hearing Officer's assessment of witness credibility. In addition, several of Grievant's allegations regarding untruthfulness relate solely to the Group III Written Notice which was reversed by the Hearing Officer. For example, if the Hearing Officer were to assume for the sake of argument that the credibility of the Special Agent should be doubted, the outcome of this case would remain unchanged. Grievant was removed from employment because he failed to follow a supervisor's



instruction. That supervisor was the Warden. Grievant was removed based upon the accumulation of disciplinary action.

Grievant contends that the Agency failed to produce necessary documents. The Hearing Officer finds that the Agency materially complied with its obligation to produce documents to Grievant. Most of the documents Grievant contends he did not receive relate to the Group III Written Notice which was reversed by the Hearing Officer.

Grievant argues that the Agency removed him from employment because he was a member of a gang and it failed to establish that allegation. To the extent the Agency made this allegation as Grievant contends, the allegation relates to the Group III Written Notice which was reversed by the Hearing Officer.

Grievant argues that his right against self-incrimination was violated. He made this argument during the hearing. There is nothing new for the Hearing Officer to consider as part of Grievant's request for reconsideration.

Grievant argues that the Agency stereotyped him based upon his race and physical appearance. The essence of this allegation relates to the Group III Written Notice which was reversed by the Hearing Officer. The evidence showed that the gangs in question included members of several races not just Grievant's race. Grievant's argument is without merit. Even if the Hearing Officer were to assume for the sake of argument that the Agency stereotyped Grievant based on his race and physical appearance, the only relief available to him would be the reversal of the Group III Written Notice. Since Grievant was not reinstated, there would be no basis for an order prohibiting the Agency from continuing the behavior Grievant alleges.

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

## **APPEAL RIGHTS**

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

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

### Judicial Review of Final Hearing Decision

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

*S/Carl Wilson Schmidt*

---

Carl Wilson Schmidt, Esq.  
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF  
HUMAN RESOURCE MANAGEMENT

In the Matter of Virginia  
Department of Corrections

July 23, 2010

Case Number 9291/9292/9293/9294

The grievant has requested that the Department of Human Resource Management (DHRM) conduct an administrative review of the hearing decision in the above referenced case. For the reasons stated below, the DHRM will not disturb the hearing decision. The agency head of the DHRM, Ms. Sara Redding Wilson, has asked that I respond to this request for an administrative review.

**FACTS**

According to the hearing officer's report, "On September 4, 2009, Grievant was issued a Group III Written Notice of disciplinary action for behavior unbecoming of a professional correctional officer. On September 8, 2009, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions. Grievant was removed from employment." "Grievant filed four grievances to challenge the Agency's actions. The outcome of the Third Resolution Steps of those grievances was not satisfactory to the Grievant and he requested a hearing...."

The hearing officer, in part, listed the following in his Findings of Facts:

The Department of Corrections employed Grievant is a Corrections Officer at one of its Facilities prior to his removal from employment. The purpose of Grievant's position was:

Maintain security, custody and control over inmates at the institution and while in transport, by observing and initiating corrective and/or disciplinary action for inappropriate behavior. Supervises inmates' daily activities and observers and records their behavior and movement to ensure their safe and secure confinement.

Grievant had prior active disciplinary action. On January 30, 2008, Grievant received a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with applicable established written policy. On January 27, 2009, Grievant received a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions.

Agency's Intelligence Officer intercepted a letter from Ms. F to an inmate inside the Facility. The letter was postmarked August 18, 2009. Four pictures were

included with the letter. One of the pictures showed seven African American men including Grievant posing as a group. Several of the men were holding a hand up in the air and displaying their fingers in a manner to show what appeared to be a gang sign. Agency employees were concerned as to the reason why Grievant would appear in a picture being sent to an inmate at the Facility. The Agency initiated an investigation. The Agency's Investigator interviewed Grievant who refused to provide the Investigator with a full explanation regarding the circumstances of the photo. The Investigator spoke with a local law enforcement officer who had experience with identifying members of gangs in his locality. The local law enforcement officer identified three of the seven men in the photo as being members of the gang named AB. Several of the men in the photo including Grievant were holding a hand in the air to display their fingers in a manner that traced the pattern of the two letters of the gang's name. The Agency did not allege or establish that Grievant was a member of gang AB. The Facility Warden concluded it might be appropriate to issue Grievant a Written Notice of disciplinary action for conduct unbecoming a professional correctional officer.

Prior to the issuance of the Group III Written Notice for behavior unbecoming a professional correctional officer, the Warden conducted a due process fact-finding hearing to present the allegations to Grievant and to enable Grievant to present evidence showing why the disciplinary action should not be taken. On September 4, 2009, the Warden met with Grievant. Grievant said that he had been accused by the Investigator of being a member of the Cr gang and the Bl gang. The Warden asked Grievant if he was a member of those gangs. Grievant responded that he was not a member. The Warden said he would like Grievant to write an incident report describing where he was when the picture was taken and the circumstances surrounding the picture. Grievant refused to write the report. Grievant said he did not wish to write the report in the event it might incriminate him. The Warden told Grievant that as an officer he was obligated to write a report of the incident giving an account of what happened. Grievant again refused to write the report. The Warden stopped the fact-finding hearing and said, "I am giving you an order to give a written account." Grievant said that he was not going to give a written account.

In his CONCLUSIONS OF POLICY, the hearing officer stated, in part, the following:

\*\*\*\*\*

The Agency alleged that Grievant engaged in behavior unbecoming of a professional correctional officer. The Agency did not charge Grievant with fraternization or creating the appearance of fraternization. The Agency did not present a policy defining "behavior unbecoming of a professional correctional officer". Although the list of offenses in the Agency's Standards of Conduct is not all-inclusive, the Agency must present evidence showing that an employee charged with a Group III offense knew or should have known that his behavior would result in disciplinary action up to and including removal. The Agency has not established that Grievant knew that three of the men in the photo were

members of a gang and that Grievant knew he was displaying a gang sign. Although Grievant received training informing him that his behavior outside of his work hours could be a basis to take disciplinary action against him, he did not receive training to inform him that that appearing in a photo and making a hand sign could result in disciplinary action resulting removal. In short, Grievant did not have adequate notice from the Agency that his behavior as displayed in the photo could result in his removal from employment. Accordingly, the Group III Written Notice must be reversed.

Failure to follow a supervisor's instruction is a Group II Written Notice. On September 4, 2009, the Warden, a supervisor, gave Grievant a direct order to write an incident report regarding the circumstances surrounding the picture of Grievant. Grievant refuse [sic] that order thereby justifying the issuance of a Group II Written Notice of disciplinary action.

Upon the accumulation of two or more Group II Written Notices of disciplinary action, an employee may be removed from employment. With the Group II Written Notice giving rise to this hearing, Grievant has accumulated more than two Group II Written Notices of disciplinary action. Accordingly, the Agency's removal is upheld.

Grievant argued that he had the right to refuse to comply with the Warden's order pursuant to the Fifth Amendment of the United States Constitution. Grievant argued that he cannot be subject to disciplinary action for exercising the rights afforded to him by the United States Constitution. Grievant's argument fails. Grievant's argument would have merit if the Agency were conducting a criminal investigation of him. In this case, the Agency's investigation was an administrative one. Grievant was obligation to comply with the instruction of a supervisor as part of an administrative investigation.

Grievant filed a third grievance and alleged that he was being stereotyped based on his race and physical appearance because the Agency took disciplinary action against him for appearing in the photo. Grievant claims that he was falsely accused of being a member of the Cr or the Bl gangs. The evidence showed that the Agency did not accuse Grievant of being a member of these gangs but rather inquired of Grievant regarding whether he was a member of these gangs. The Agency's experts testified that individuals other than African Americans are members of the Cr and the Bl gangs. Thus, the Agency's questioning of Grievant regarding whether he was a member of the two gangs was not racial stereotyping and was not inappropriate.

Grievant filed a fourth grievance restating many of his concerns expressed in the prior three grievances. Since those issues are addressed as part of the prior three grievances, there is no basis to grant Grievant relief.

*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>8</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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to further reduce the disciplinary action.

## DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action is **rescinded**. The Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**. Grievant’s removal is **upheld** based upon the accumulation of disciplinary action. Grievant’s requests for relief for his third and fourth grievance are **denied**.

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

unacceptable behavior for which specific disciplinary action may be warranted. These examples are not all-inclusive.

In his request for administrative review, the grievant identified a Department of Corrections Operating Procedure and offered his opinion as to how the DOC misapplied it. However, he made no allegation that the hearing officer either misapplied or misinterpreted that specific Operating Procedure. Therefore, this Agency will not address that issue.

In addition, he alleged that DOC's investigators violated sections of the Code of Virginia when investigating his case. The Department of Human Resource Management has no authority to review matters related to the application or interpretation of the Code.

Finally, the grievant alleged that he was not provided all the documents he requested in a timely fashion. That issue is beyond the purview of this Department to consider. In addition, we are aware that the Director of the Department of Employment Dispute addressed that issue, among other things, in her ruling dated June 30, 2010. Summarily, in our opinion the grievant is disagreeing with the hearing officer's analysis of the evidence, the weight he placed on the evidence and witnesses' testimony and the resulting hearing decision.

Thus, this Department will not interfere with the application of this decision.

---

Ernest G. Spratley