Issues: Group I Written Notice (insubordination) and Management Actions (assignment of duties); Hearing Date: 03/21/11; Decision Issued: 03/24/11; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9504, 9525; Outcome: Partial Relief; **Administrative Review: DHRM Ruling Request received 04/06/11; DHRM Ruling issued 05/16/11; Outcome: AHO's decision affirmed.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9504 / 9525

Hearing Date: March 21, 2011
Decision Issued: March 24, 2011

PROCEDURAL HISTORY

On August 24, 2010, Grievant was issued a Group I Written Notice of disciplinary action for insubordination. Grievant was also removed from the position of Institutional Investigator.

On September 15, 2010, Grievant timely filed a grievance to challenge the Agency's disciplinary action. On September 20, 2010, 10 Grievant timely filed a grievance alleging workplace harassment and seeking reinstatement of his position of institutional investigator. The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and he requested a hearing. On January 26, 2011, the EDR Director issued Ruling Number 2011–2874 denying a hearing regarding Grievant's claim for workplace harassment but permitting his other claims to be consolidated for hearing. On February 16, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 21, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
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?

5. Whether the Agency's removal of Grievant from the position of Institutional Investigator was consistent with Agency policy?

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 employs Grievant as a Sergeant at one of its Facilities. No evidence of prior active disciplinary action was introduced during the hearing.

An inmate had developed a pattern of failing to comply with the Facility's policy regarding making telephone calls. Grievant and another staff had attempted to correct her behavior but were unsuccessful. The inmate made 12 telephone calls contrary to policy. Grievant decided to issue the inmate 12 separate charges, one charge for each improper telephone call. By issuing 12 separate charges instead of one charge listing 12 examples of misbehavior, Grievant increased the odds that the inmate would suffer serious consequences including being placed in administrative segregation. The Warden learned of Grievant's action. On August 20, 2010, the Warden called Grievant over the telephone and questioned why he had issued 12 separate charges instead of one charge listing 12 examples. Grievant said that the inmate had a history of misbehavior and was arrogantly disregarding the policy. He told the Warden that he

wanted to make sure she got some charges. The Warden told Grievant that the determination of punishment was not within his purview as an investigator and his only function was to write the charge based upon the facts before him and that he should not be concerned about the penalty. The Warden told Grievant that she would not uphold the 12 charges. Grievant did not like the Warden's comments. His voice became elevated but he did not yell at the Warden. He expressed his objection to the Warden's decision and argued why his position was correct. Grievant asked the Warden what she wanted from him. He told her that that she "had it in for him from day one." The Warden construed Grievant's tone of voice and statements as insubordination. She determined that the issuance of a Written Notice was necessary.

In September 2005, Grievant was transferred into the position of Institutional Investigator at the Facility. His position reported directly to the Assistant Warden. Other sergeants at the facility reported to lieutenants or captains at the Facility. On August 23, 2010, the Warden sent Grievant a memorandum stating:

> The Institutional Investigator post is an important post within the operations of an institution. This assignment requires a trusted and close working relationship with the Warden and other upper management staff. Since assigned to [the Facility] I have held several meetings with you where your actions, behavior and conduct have been undermining, insubordinate, and not in line with the vision set by this management. I do not believe that you are effective in your current post, nor that you are interested in modifying your behaviors and/or performance to meet the expectations of the post. Therefore, effective immediately, you are no longer assigned to the Institutional Investigator's post and you will re-enter the security rotation. Please clear your office today and meet with [Major F] for your new post assignment.

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."[1] 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."[2] Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."[3]

---

[1] Virginia Department of Corrections Operating Procedure 135.1(X)(A).

[2] Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

[3] Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

The Agency contends the Grievant should receive a Group I Written Notice for insubordination during his telephone conference with the Warden on August 20, 2010. In EDR Ruling 2008-1964, 2008-1970, the Director addressed the following allegation:

> The grievant asserts that she asked her supervisor to reconsider her annual performance evaluation. When her supervisor refused to do so, the grievant asked her supervisor's supervisor (the reviewer) to reassess her evaluation. The grievant asserts that shortly after the reviewer modified her evaluation, her supervisor screamed at her on a number of occasions, called her a liar, and threatened to "write her up" (issue formal discipline).

Virginia Code § 2.2-3000(A) states:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management. To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes that may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The EDR director concluded:

> Under Virginia Code § 2.2-3000, "[i]t shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management." Thus, bringing a concern about an annual performance evaluation to a reviewer would appear to be an act "otherwise protected by law."

The EDR Director has broadly interpreted Virginia Code § 2.2.-3000 to define as protected activities (otherwise protected by law) attempts by employees to freely discuss their concerns with Agency management.

> In EDR Ruling 2009-2128, the EDR Director narrowed the protection as follows:
>
> This protection, however, is not without exception. For instance, an employee might still be disciplined for raising workplace concerns with management if the manner in which such concerns are expressed is unlawful (for instance, a threat of violence to life or property) or otherwise exceeds the limits of reasonableness.[4] The limited exceptions to the

[4] *Cf.* Equal Employment Opportunity Commission (EEOC) Compliance Manual, Section 8, "Retaliation," at 8-7, at http://www.eeoc.gov/policy/docs/retal.html (protected acts under Title VII must be "reasonable"

general protection of employees who raise workplace concerns can only be determined on a case-by-case basis.[5] Further, under analogous Title VII retaliation case law, it is important to note that:

> [a]lmost every form of 'opposition to an unlawful employment practice' [the "protected act" under Title VII] is in some sense 'disloyal' to the employer, since it entails a disagreement with the employer's views and a challenge to the employer's policies. Otherwise the conduct would not be 'opposition.' If discharge or other disciplinary sanctions may be imposed simply on 'disloyal' conduct, it is difficult to see what opposition would remain protected.[6]

The same can be said for the ability of an employee to raise their workplace concerns with management, which the General Assembly has protected in Virginia Code § 2.2-3000.

The Warden was criticizing Grievant's application of an Agency policy. Grievant disputed the criticism and believed that his actions were appropriate and authorized by the policy. Grievant was attempting to resolve a problem or complaint with the Warden and his speech was protected under State statute. Because Grievant's speech was protected, the question becomes whether his manner of expression was unlawful or exceeded the limits of reasonableness. Grievant's behavior was not unlawful. He did not yell or curse at the Warden. He did not make any threat. His behavior did not exceed the limits of reasonableness.

An agency may not discipline an employee for engaging in protected activity. Grievant's discussion with the Warden was protected activity. The Group I Written Notice of disciplinary action given to Grievant must be reversed.

Grievant seeks to be restored to his position of Sergeant Institutional Investigator. The Agency has discretion regarding the assignment of its employees to

---

for the anti-retaliation provisions to apply). While Title VII is not at issue in this case, its retaliation analysis is analogous to other "protected act" retaliation claims.

[5] The agency appears to argue that the Grievant's e-mail was misconduct because it circumvented a "communication protocol" by communicating directly with the Board. Regardless of whether this conduct was actually charged on the Written Notice, the hearing officer found that the Board was part of agency management. Consequently, communication to the Board is conduct generally protected by Va. Code § 2.2-3000 ("employees shall be able to discuss freely, and without retaliation, their concerns with . . . management"). As such, an employee's failure to comply with an agency "communication protocol" barring complaints to management does not constitute "misconduct" and thus would not justify discipline, unless the employee's communication was somehow unlawful or otherwise exceeded the limits of reasonableness.

[6] Dea v. Wash. Suburban Sanitary Comm'n, 11 F. App'x 352, 363 (4th Cir. 2001) (quoting EEOC v. Crown Zellerbach Corp., 720 F.2d 1008, 1014 (9th Cir. 1983)).

particular posts. Only if Grievant can show in this case that the Agency removed him from the position of Institutional Investigator as a form of punishment pursuant to the Written Notice must that decision be reversed. Even if the Group I Written Notice had been upheld, it would not form a basis for the Agency to transfer an employee.

Grievant has not established a basis to reverse the Agency's decision to remove him from the position of Sergeant, Institutional Investigator. The position of Institutional Investigator requires a close working relationship with the Warden. In May 2010, Grievant criticize the decision of the Warden to permit inmates to receive food left over from an Agency staff function. He did so in front of approximately 40 other Agency employees. In June 2010, the Warden spoke with Central Office staff regarding whether to move Grievant from his position of Institutional Investigator. She was advised that she should remove Grievant from that position based on her concerns. The Warden learned that on August 2, 2010, two of the Agency's Special Agents met with Grievant regarding whether under the Prison Rape Elimination Act an inmate could make a free call while held in isolation. Grievant held the view that the inmate could not make a call and if the inmate did so the action would be deemed an infraction. The Warden considered this to be contrary to her directive. The Special Agents indicated that they felt Grievant was biased against the offender. They discussed Grievant's role as an investigator and indicated he was responsible only for gathering facts and presenting them. Although Grievant's behavior on August 20, 2010 may have been a factor that the Warden considered when deciding to transfer Grievant, his status as having received a Group I Written Notice, however did not play a role in the decision to transfer. Accordingly, the Agency's decision to remove Grievant as the Institutional Investigator must be upheld.[7]

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **rescinded**. Grievant's request to be restored to the position of Institutional Investigator is **denied**.

[7] The Warden made her decision to transfer Grievant based on several considerations. One of those considerations was Grievant's behavior on August 20, 2010. One could argue that because the decision to transfer was made based, in part, on a protected activity that the transfer must be reversed. In other words the transfer was based upon the "mixed motive" of the Agency. This is a case of first impression under the Virginia grievance procedure. Grievant's behavior on August 20, 2010 is considered protected under State statute, not necessarily under federal discrimination statutes. The analysis appropriate for a mixed motive case under federal civil rights legislation or under age discrimination U.S. Supreme Court precedent is not controlling. Virginia law gives greater discretion to managers of State agencies than is afforded to most private employers. See, Va. Code § 2.2 – 3004(B). The most appropriate standard to use in mixed motive cases is whether the protected activity was the deciding factor in the Agency's decision. In this case, Grievant's protected behavior on August 20, 2010 was a factor in the decision to transfer him but it was not the deciding factor. The Warden reached the conclusion that she should transfer Grievant prior to August 20, 2010. Grievant's protective behavior on August 20, 2010 triggered her to implement a decision she had reached for the most part prior to August 20, 2010.

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 St., 12th Floor
   Richmond, VA 23219

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

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

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

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[8]

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

[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

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Department of Corrections

May 16, 2011

The grievant has requested that the Department of Human Resource Management conduct an administrative review of the hearing officer's decision in Cases Nos.9504/9525. The hearing officer heard both grievances but the grievant has contested the decision related to Case No. 9525 only. The grievant requested the review because he believes the hearing decision is inconsistent with agency and state policy. For the reasons stated below, this Department will not disturb the decision. The agency head, Ms. Sara Redding Wilson, has asked that I respond to this appeal.

FACTS

The facts as set forth by the hearing officer in his Finding of Facts, in relevant part, are as follows:[*]

> 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 employs Grievant as a Sergeant at one of its Facilities. No evidence of prior active disciplinary action was introduced during the hearing.
>
> An inmate had developed a pattern of failing to comply with the Facility's policy regarding making telephone calls. Grievant and another staff had attempted to correct her behavior but were unsuccessful. The inmate made 12 telephone calls contrary to policy. Grievant decided to issue the inmate 12 separate charges, one charge for each improper telephone call. By issuing 12 separate charges instead of one charge listing 12 examples of misbehavior, Grievant increased the odds that the inmate would suffer serious consequences including being placed in administrative segregation. The Warden learned of Grievant's action. On August 20, 2010, the Warden called Grievant over the telephone and questioned why he had issued 12 separate charges instead of one charge listing 12 examples. Grievant said that the inmate had a history of misbehavior and was arrogantly disregarding the policy. He told the Warden that he wanted to make sure she got some charges. The Warden told Grievant that the determination of punishment was not within his purview as an investigator and his only function was to write the charge based upon the facts before him and that he should not be concerned about the penalty. The Warden told Grievant that she

[*] References as listed in the original hearing decision were omitted from this document.

would not uphold the 12 charges. Grievant did not like the Warden's comments. His voice became elevated but he did not yell at the Warden. He expressed his objection to the Warden's decision and argued why his position was correct. Grievant asked the Warden what she wanted from him. He told her that that she "had it in for him from day one." The Warden construed Grievant's tone of voice and statements as insubordination. She determined that the issuance of a Written Notice was necessary.

In September 2005, Grievant was transferred into the position of Institutional Investigator at the Facility. His position reported directly to the Assistant Warden. Other sergeants at the facility reported to lieutenants or captains at the Facility. On August 23, 2010, the Warden sent Grievant a memorandum stating:

> The Institutional Investigator post is an important post within the operations of an institution. This assignment requires a trusted and close working relationship with the Warden and other upper management staff. Since assigned to [the Facility] I have held several meetings with you where your actions, behavior and conduct have been undermining, insubordinate, and not in line with the vision set by this management. I do not believe that you are effective in your current post, nor that you are interested in modifying your behaviors and/or performance to meet the expectations of the post. Therefore, effective immediately, you are no longer assigned to the Institutional Investigator's post and you will re-enter the security rotation. Please clear your office today and meet with [Major F] for your new post assignment.

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." 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.'" Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."

The Agency contends the Grievant should receive a Group I Written Notice for insubordination during his telephone conference with the Warden on August 20, 2010. In EDR Ruling 2008-1964, 2008-1970, the Director addressed the following allegation: The grievant asserts that she asked her supervisor to reconsider her annual performance evaluation. When her supervisor refused to do so, the grievant asked her supervisor's supervisor (the reviewer) to reassess her evaluation. The grievant asserts that shortly after the reviewer modified her

evaluation, her supervisor screamed at her on a number of occasions, called her a liar, and threatened to "write her up" (issue formal discipline).

Virginia Code §2.2-3000(A) states:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management. To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes that may arise between state agencies and those employees who have access to the procedure under §2.2-3001.

The EDR Director concluded:

Under Virginia Code § 2.2-3000, "[i]t shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management." Thus, bringing a concern about an annual performance evaluation to a reviewer would appear to be an act "otherwise protected by law."

The EDR Director has broadly interpreted Virginia Code § 2.2.-3000 to define as protected activities (otherwise protected by law) attempts by employees to freely discuss their concerns with Agency management.

In EDR Ruling 2009-2128, the EDR Director narrowed the protection as follows:

This protection, however, is not without exception. For instance, an employee might still be disciplined for raising workplace concerns with management if the manner in which such concerns are expressed is unlawful (for instance, a threat of violence to life or property) or otherwise exceeds the limits of reasonableness." The limited exceptions to the general protection of employees who raise workplace concerns can only be determined on a case-by-case basis." Further, under analogous Title VII retaliation case law, it is important to note that:

[a]lmost every form of 'opposition to an unlawful employment practice' [the "protected act" under Title VII] is in some sense 'disloyal' to the employer, since it entails a disagreement with the employer's views and a challenge to the employer's policies. Otherwise, the conduct would not be 'opposition.' If discharge or other disciplinary sanctions may be imposed, simply on 'disloyal' conduct, it is difficult to see what opposition would remain protected."

The same can be said for the ability of an employee to raise their workplace concerns with management, which the General Assembly has protected in Virginia Code § 2.2-3000.

The Warden was criticizing Grievant's application of an Agency policy. Grievant disputed the criticism and believed that his actions were appropriate and authorized by the policy. Grievant was attempting to resolve a problem or complaint with the Warden and his speech was protected under State statute. Because Grievant's speech was protected, the question becomes whether his manner of expression was unlawful or exceeded the limits of reasonableness. Grievant's behavior was not unlawful. He did not yell or curse at the Warden. He did not make any threat. His behavior did not exceed the limits of reasonableness.

An agency may not discipline an employee for engaging in protected activity. Grievant's discussion with the Warden was protected activity. The Group I Written Notice of disciplinary action given to Grievant must be reversed.

Grievant seeks to be restored to his position of Sergeant Institutional Investigator. The Agency has discretion regarding the assignment of its employees to particular posts. Only if Grievant can show in this case that the Agency removed him from the position of Institutional Investigator as a form of punishment pursuant to the Written Notice must that decision be reversed. Even if the Group I Written Notice had been upheld, it would not form a basis for the Agency to transfer an employee.

Grievant has not established a basis to reverse the Agency's decision to remove him from the position of Sergeant, Institutional Investigator. The position of Institutional Investigator requires a close working relationship with the Warden. In May 2010, Grievant criticize the decision of the Warden to permit inmates to receive food left over from an Agency staff function. He did so in front of approximately 40 other Agency employees. In June 2010, the Warden spoke with Central Office staff regarding whether to move Grievant from his position of Institutional Investigator. She was advised that she should remove Grievant from that position based on her concerns. The Warden learned that on August 2, 2010, two of the Agency's Special Agents met with Grievant regarding whether under the Prison Rape Elimination Act an inmate could make a free call while held in isolation. Grievant held the view that the inmate could not make a call and if the inmate did so, the action would be deemed an infraction. The Warden considered this to be contrary to her directive. The Special Agents indicated that they felt Grievant was biased against the offender. They discussed Grievant's role as an investigator and indicated he was responsible only for gathering facts and presenting them. Although Grievant's behavior on August 20, 2010 may have been a factor that the Warden considered when deciding to transfer Grievant, his status as having received a Group I Written Notice, however did not play a role in the decision to transfer. Accordingly, the Agency's decision to remove Grievant as the Institutional Investigator must be upheld.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **rescinded.** Grievant's request to be restored to the position of Institutional Investigator is **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 exceeds the limits of reasonableness, 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/or procedure.

The relevant policy, the Department of Human Resource Management's Policy No. 1.60, Standards of Conduct, states, "It is the policy of the Commonwealth to promote the well-being of its employees in the workplace by maintaining high standards of work performance and professional conduct." The policy states as its purpose, "The purpose of the policy is to set forth the Commonwealth's Standards of Conduct and the disciplinary process that agencies must utilize to address unacceptable behavior, conduct, and related employment problems in the workplace, or outside the workplace when conduct impacts an employee's ability to do his/her job and/or influences the agency's overall effectiveness." Attachment A, Unacceptable Standards of Conduct, of that policy sets forth examples of unacceptable behavior for which specific disciplinary action may be warranted. These examples are not all-inclusive.

In the instant case, the hearing officer rescinded the disciplinary action taken against the grievant (Group I Written Notice). However, he upheld the transfer of the grievant from the Institutional Investigator job to that of Corrections Sergeant.

According to the evidence, the Warden at the facility wrote the following memorandum to the grievant:

> The Institutional Investigator post is an important post within the operations of an institution. This assignment requires a trusted and close working relationship with the Warden and other upper management staff. Since assigned to [the Facility] I have held several meetings with you where your actions, behavior and conduct have been undermining, insubordinate, and not in line with the vision set by this

management. I do not believe that you are effective in your current post, nor that you are interested in modifying your behaviors and/or performance to meet the expectations of the post. Therefore, effective immediately, you are no longer assigned to the Institutional Investigator's post and you will re-enter the security rotation. Please clear your office today and meet with [Major F] for your new post assignment.

Summarily, the grievant raised the following issues in his appeal:

1. He deemed his transfer to another position a demotion, and DHRM policy 1.40 states "when an employee is moved to another position with lower duties due to unsatisfactory performance, the action is considered a Performance Demotion."
2. The Department of Corrections currently has a policy relating to establishment and transfer of positions which states that a position can be requested by the Organizational Unit Head and is defined by organizational charts as the official written record of position reporting relationships.
3. The Department of Corrections currently has a policy relating to employee recruitment, selection, and appointment. This policy (see DOC Procedure 5-7 also known as DOC Policy 1.70) states that employees who desire to be transferred laterally (defined as "the transfer of an employee from one position to another in the same pay grade.") may do so but must compete for the position if the position has been advertised.

Concerning item number 1, according to the hearing decision, the grievant's movement from the Institutional Investigator position was based not only on the August 20, 2010, incident that gave rise to the Group I Written Notice but also on a series of incidents preceding the August 20, 2010, incident. It appears that the Warden had determined, even before the August 20, 2010 incident, that it would be in the best interest of the facility to move the grievant to another position. This action was not a demotion but a reassignment. While some duties and responsibilities changed, compensation and all other duties and responsibilities remained the same.

Concerning item number 2, while the referenced policy does define the organizational structure, the Warden as the head of the facility, with appropriate reason may transfer and reassign personnel.

Concerning item number 3, management officials have the right to manage the affairs of their agencies. Those rights include, but are not limited to, reassignment of duties. The referenced policy in 5-7.8.A., in relevant part states, "Based on agency and need, the appointing authority may administratively fill a position by lateral transfer or demotion. Section 5-7.8.G. states, in relevant part, "The Department may administratively laterally transfer or demote an employee without posting a position. If the position is posted, the selection process may be cancelled and the transfer or demotion may be made."

Based on the above, it is clear that the Warden was not pleased with the performance of the grievant as the Institutional Investigator. Therefore, the Warden exercised the right of management to manage the affairs of the agency by reassigning the grievant to a position for which he was better suited. This reassignment was not a demotion. Because the hearing decision is in compliance with policy and procedure, this Agency has no basis to interfere with the application of this decision.

_____

Ernest G. Spratley