Issue: Group II Written Notice (failure to follow policy/instructions); Hearing Date: 03/02/11; Decision Issued: 03/07/11; Agency: DOC; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 9510; Outcome: No Relief – Agency Upheld.

# *COMMONWEALTH of VIRGINIA*

## *Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION**

In the matter of: Case No. 9510

Hearing Date: March 2, 2011
Decision Issued: March 7, 2011

## PROCEDURAL HISTORY

Grievant is a corrections officer for the Department of Corrections ("the Agency"), with 20 years of service. On September 29, 2010, the Grievant was charged with a Group II Written Notice for failing to be alert and observant while on duty on August 24, 2011. The Written Notice carried no suspension. The Grievant had no other active Written Notices.

Grievant timely filed a grievance to challenge the Agency's disciplinary action. The outcome of the resolution steps was not satisfactory to the Grievant and he requested a hearing. On February 7, 2011, the Department of Employment Dispute Resolution ("EDR") appointed the Hearing Officer. A pre-hearing conference was held by telephone on February 11, 2011. The hearing ultimately was scheduled for the first date available between the parties and the hearing officer, March 2, 2011, on which date the grievance hearing was held, at the Agency's facility.

The Agency submitted documents for exhibits that were, without objection from the Grievant, accepted into the grievance record, and they will be referred to as Agency's Exhibits. The Grievant offered no additional exhibits. The hearing officer has carefully considered all evidence presented.

## APPEARANCES

Grievant
Advocate for Grievant
Representative and Witnesses for Agency
Advocate for Agency

## 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?

The Grievant requests rescission or reduction of the Group II Written Notice.

## BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

## APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .
> To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Agency's Standards of Conduct, Operating Procedure 135.1, defines Group III offenses to include acts and behavior of such a serious nature that a first occurrence normally should warrant removal. Agency Exh. 7. An example of a Group III offense is sleeping during work hours. Group II offenses include acts and behavior that are more severe in nature [than a Group I offense] and are such than an accumulation of two Group II offenses normally should

warrant removal. An example of a Group II offense is failure to perform assigned work or otherwise comply with established written policy.

When issuing a Group II Written Notice, management should issue such notice as soon as practical, and discipline shall normally take the form of the notice and up to 10 workdays maximum suspension without pay. Operating Procedure 135.1, ¶ XI.C.1.; Agency Exh. 7.

Facility Post Order #19 requires the dorm officer to remain alert and observant at all times, and to remain on the post at all times during the officer's tour of duty unless properly relieved. Agency Exh. 5.

## The Offense

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

The Agency employed Grievant as a corrections officer, with 20 years of service. The Grievant has no other active disciplinary actions, with a performance review establishing a contributor rating. Agency Exh. 4. On August 24, 2010, the Grievant was assigned the post of dorm officer supervising facility inmates. The Agency's assistant warden testified that he observed the conduct giving rise to the Written Notice. The Written Notice charged:

> On 8/24/10 at approx. 1:40 PM, I, [Assistant Warden], observed you in Housing Unit [ ] sitting in a chair on the floor in front of the Control Room, with your head down and your eyes closed. You did not raise your head until I walked over to you and touched you on the shoulder. You were neither alert nor observant of your area at that time. You admitted to having your eyes closed due to a headache. Because your behavior could have resulted in a serious breach of security, you are being issued a Group II Written Notice.

At hearing, the assistant warden testified consistently with the charge in the Written Notice. The assistant warden testified that he observed the Grievant with his eyes closed for about two minutes before approaching and touching the Grievant to get his attention. The warden testified that he and the agency's regional director reviewed the circumstances and intended to issue a Group III Written Notice. However, from some miscommunication to the assistant warden, the discipline was issued as a Group II Written Notice. TheGrievant admitted he had his eyes closed for a time to ease a migraine headache. The Grievant denied that he was asleep.

The Grievant points to an unreasonable delay by the Agency in issuing the Written Notice as noncompliance with the disciplinary procedure and a breach of his due process rights.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been

charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings,* § VI; *DeJarnette* v. *Corning,* 133 F.3d 293, 299 (4th Cir. 1988).

Based on the evidence, including the Grievant's admission of closing his eyes for a time—time enough for the assistant warden to observe him, to approach him undetected, and to touch him—satisfies the Agency's burden of proof that the Grievant was neither alert nor observant for a time while posted to supervise prison inmates. The offense, unless circumstances warrant mitigation, satisfies the Group II level of discipline as a potential, if not actual, security threat.

Pursuant to applicable policy, management has the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id*.

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution." The warden testified that, because of the security aspect of the offense, the Agency considered the offense to be a Group III and that no mitigation below a Group II without suspension could be justified.

While the hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances, the hearing officer is permitted to mitigate a disciplinary action if, and only if, it exceeds the limits of reasonableness. There is no authority that requires an Agency to exhaust all possible lesser sanctions or, alternatively, show that the discipline levied was its only option. Even if the hearing officer would have levied a lesser discipline, the Agency has the management prerogative to act within a continuum of discipline as long as the Agency acts within the bounds of reasonableness.

As for the Grievant's assertion of due process violation, procedural due process is inextricably intertwined with the grievance procedure. The Rules for Conducting Grievance Hearings state:

> In all circumstances, however, the employee must receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge.

When an agency delays imposition of discipline for an extended time, it gives the appearance that the offense is not serious. In an appropriate case, a hearing officer may consider reducing the level of discipline where the agency's delay in the issuance of discipline is sufficiently egregious as to negate the alleged seriousness of the offense. *See, e.g.,* Decision of Hearing

Officer, EDR Case Number 801, issued August 26, 2004. A hearing officer may not direct an agency on how to conduct its business, however, when an agency delays the imposition of discipline for an extraordinarily long time, such delay will be considered an extenuating circumstance that can mitigate the level of discipline imposed. Although there is no bright line test, the issuance of the Group II Written notice within 35 days is not severe enough to be prejudicial. While an unreasonable delay in issuing a written notice could negatively affect an employee's rights and prejudice his ability to defend a charge, the delay here in issuing the Written Notice did not prejudice the Grievant's ability to defend the charge. To satisfy the requirements of procedural due process, an agency is required, at a minimum, to give the employee (1) notice of the charges against him or her, and (2) a meaningful opportunity to respond. Whether an agency has met this standard is often a matter of degree. Here, I do not find the timing of the Written Notice prejudiced the Grievant or presents a mitigating factor sufficient to allow a hearing officer to reduce the discipline.

The Grievant argues, reasonably, that the Agency could have exercised discipline along the continuum short of a Group II Written Notice. The Agency had the discretion to elect less severe discipline. 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…." Va. Code § 2.2-3005. Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution." 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. Grievant contends his otherwise good work history, service and performance should provide enough consideration to mandate a lesser sanction than a Group II. [1] However, length of service, alone, is insufficient for a hearing officer to overrule an agency's mitigation determination. EDR Ruling No. 2007-1518 (October 27, 2009) held:

> Both length of service and otherwise satisfactory work performance are grounds for mitigation by agency management under the Standards of Conduct. However, a hearing officer's authority to mitigate under the *Rules for Conducting Grievance Hearings* is not identical to the agency's authority to mitigate under the Standards of Conduct. Under the *Rules for Conducting Grievance Hearings*, the hearing

[1] The Grievant alleged during the grievance steps that the discipline was disparate treatment. Agency Exh. 3 (Letter from Grievant dated December 30, 2010.) At the grievance hearing, no assertion or evidence was presented regarding disparate treatment as a basis for mitigation.

> officer can only mitigate if the agency's discipline exceeded the limits of reasonableness. Therefore, while it cannot be said that either length of service or otherwise satisfactory work performance are *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which these factors could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings,* § VI; *DeJarnette* v. *Corning,* 133 F.3d 293,299 (4th Cir. 1988).

Pursuant to applicable policy, management has the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id*.

The Agency presents a position in advance of its role as guardian of public and institutional safety and asserts that the Grievant's inattentiveness at his post, regardless of whether he was asleep, is a breach of security and warrants disciplinary action. The hearing officer accepts, recognizes, and upholds the Agency's important role in public safety and the valid public policies promoted by the Agency and its policies. I find that the inattentiveness the Grievant admitted clearly relates to job requirement and performance. Accordingly, I find no mitigating circumstances that render the Agency's action outside the bounds of reasonableness.

## DECISION

For the reasons stated herein, the Agency's issuance of the Group II Written Notice must be and is **upheld**.

## APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

**Administrative Review:** This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804)371-7401.

3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, Main Street Centre, 600 East Main Street, Suite 301, Richmond, VA 23219 or faxed to (804)786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision.** (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

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

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

**Judicial Review of Final Hearing Decision:** Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal

with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.

Cecil H. Creasey, Jr.
Hearing Officer