

Issue: Group III Written Notice and Termination (falsifying documents, failure to provide direct supervision); Hearing Date: 06/28/11; Decision Issued: 06/29/11; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 9618; Outcome: Partial Relief; **Administrative Review: DHRM Ruling Request received 07/13/11; DHRM Ruling issued 09/19/11; Outcome: Hearing Decision affirmed EXCEPT Grievant to be reinstated;** **Administrative Review: DHRM Reconsideration Request on 09/19/11 ruling received 09/23/11; Transferred to EDR as DHRM has no jurisdiction to reconsider; EDR Ruling No. 2012-3113 issued 10/06/11; Outcome: Remanded to AHO to be reheard; Re-Hearing Date: 11/17/11; AHO Remand Decision issued 11/18/11; Outcome: Original Decision Stands – Grievant remains terminated;** **Administrative Review: EDR Ruling Request on 11/18/11 remand decision received 11/30/11; EDR Ruling No. 2012-3183 issued 01/10/12; Outcome: AHO's Remand Decision Affirmed.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9618

Hearing Date: June 28, 2011

Decision Issued: June 29, 2011

PROCEDURAL HISTORY

On March 7, 2011, Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to provide direct supervision and falsification of an official state document.

On March 28, 2011, 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 he requested a hearing. On June 1, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 28, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
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?
5. Whether the Agency retaliated against Grievant?

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 Juvenile Justice employed Grievant as a Juvenile Correctional Officer at one of its Facilities until his removal effective March 7, 2011. Grievant had prior active disciplinary action. On December 17, 2008, Grievant received a Group III Written Notice with suspension for falling asleep while at an assigned post.

Residents at the Facility reside in rooms with doors that can be secured. The doors have windows enabling Juvenile Correctional Officers to observe residents while they are in their rooms.

On Saturday, January 22, 2011 at approximately 6 p.m., Grievant and Officer L entered the Unit to assume their post duties. Members of the outgoing shift informed Grievant that Sergeant B had observed that the fire alarm in the shower area was damaged. While Officer L was conducting a routine security check at approximately 7 p.m., the Resident showed Officer L a piece of metal. Officer L talked to the Resident and convinced him to give Officer L the piece of metal. After giving Officer L the metal piece, the Resident showed Officer L another piece of metal. The Captain and Officer B began talking to the Resident. The Resident gave them several pieces of contraband and the Captain then exited the Unit. The Captain made a telephone call to one of the officers in the unit with an instruction that an officer stand at the Resident's door and talk to the Resident. Officer L asked Grievant to complete the task because he believed the

Grievant had a better rapport with the Resident. At approximately 9 p.m., the Captain entered the Unit and observed that the Resident had several small cuts on his neck. The Captain was concerned that the Resident was engaging in self injurious behavior while refusing to exit his room. The Captain left the Unit and returned at approximately 9:28 p.m. with an extraction team consisting of five employees. The Captain instructed the Resident to lie down on his bed and the Resident complied with the instruction. The Resident was searched and changed into a new smock. The Resident's room was then cleaned and sanitized. Staff found numerous sharp objects hidden in his room. The Captain and the extraction team left the Unit. The Resident then pulled a sharp object out of his mouth and started cutting his neck. Grievant radioed for an emergency response to the Unit. Grievant and Officer L entered the Resident's room and restrained the Resident until a supervisor arrived.

Because of the nature of the incident, the Captain had to complete a Serious Incident Report to inform Agency managers of what had happened with the Resident. Grievant was instructed to submit an incident report describing what had happened. On January 22, 2011 at 11:30 p.m., Grievant completed an Institutional Incident Report. As part of his report, Grievant wrote:

At approximately 2100 hrs [Captain] was entering the unit and [Resident] covered his window for approximately 2 minutes. When he uncovered his window he had several small cuts on his neck.¹

The Acting Superintendent viewed the videotape of the incident and observed that the Resident had not covered his window. The Captain also viewed the video and observed that the Resident's window was never covered. During the Step Process, the video was shown to Grievant and Grievant agreed that the window was not covered.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."² Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

"[U]nsatisfactory work performance" is a Group I offense.³ In order to prove unsatisfactory work performance, the Agency must establish that Grievant was

¹ Agency Exhibit 2.

² The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

³ See Attachment A, DHRM Policy 1.60.

responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

One of Grievant's job duties was to draft accurate incident reports. He received in-service training informing him that he was to write what he knew about an event into his incident report describing the event. He was informed that his incident reports should be accurate. Whether the Resident had covered his window was a significant detail because it could help the Agency determine when and under what circumstances the Resident may have injured himself. Grievant wrote that the Resident covered his window for approximately two minutes when in fact the Resident did not cover his window. Grievant's incident report was inaccurate making his work performance unsatisfactory to the Agency. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice. Because Grievant already has an active Group III Written Notice, the issuance of a Group I Written Notice supports the Agency's decision to remove him from employment.

The Agency argued that Grievant should receive a Group III Written Notice for falsification of documents and failure to provide direct supervision of the Resident. No credible evidence was presented to show the Grievant failed to provide direct supervision of the Resident. In order to establish that Grievant falsified his incident report, the Agency must show that the incident report was not accurate and that Grievant knew or should have known at the time he was writing the incident report that the information he provided was not correct. The evidence showed that residents at the Facility often covered their windows in order to gain attention from the Juvenile Correctional Officers. No motive was presented as to why Grievant would falsely report what had happened. The Acting Superintendent testified that the Agency could not prove that Grievant knew what he was writing was false. The Agency has not presented sufficient evidence to support the issuance of a Group III Written Notice.

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..."⁴ 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 reduce further the disciplinary action.

⁴ Va. Code § 2.2-3005.

Agencies may not retaliate against employees for engaging in protective activities. Grievant argued that the Agency retaliated against him because he questioned the competency of Agency supervisors. No credible evidence was presented to support Grievant's assertion that the Agency retaliated against him.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **reduced** to a Group I Written Notice of disciplinary action. Grievant's removal is **upheld** based upon the accumulation of disciplinary action.

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.⁵

[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

⁵ 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 Juvenile Justice
September 19, 2011

The grievant, through his representative, has requested an administrative review of the hearing officer's decision in Case No. 9618. For the reason stated below, with one exception, we will not interfere with the application of this decision. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has directed that I conduct this administrative review.

In his PROCEDURAL HISTORY, the hearing officer stated, in relevant part, the following:

On March 7, 2011, Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to provide direct supervision and falsification of an official state document.

In his FINDINGS OF FACT, the hearing officer wrote, in relevant part, the following:

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

The Department of Juvenile Justice employed Grievant as a Juvenile Correctional Officer at one of its Facilities until his removal effective March 7, 2011. Grievant had prior active disciplinary action. On December 17, 2008, Grievant received a Group III Written Notice with suspension for falling asleep while at an assigned post.

Residents at the Facility reside in rooms with doors that can be secured. The doors have windows enabling Juvenile Correctional Officers to observe residents while they are in their rooms.

On Saturday, January 22, 2011 at approximately 6 p.m., Grievant and Officer L entered the Unit to assume their post duties. Members of the outgoing shift informed Grievant that Sergeant B had observed that the fire alarm in the shower area was damaged. While Officer L was conducting a routine security check at approximately 7 p.m., the Resident showed Officer L a piece of metal. Officer L talked to the Resident and convinced him to give Officer L the piece of metal. After giving Officer L the metal piece, the Resident showed Officer L another piece of metal. The Captain and Officer B began talking to the Resident. The Resident gave them several pieces of

contraband and the Captain then exited the Unit. The Captain made a telephone call to one of the officers in the unit with an instruction that an officer stand at the Resident's door and talk to the Resident. Officer L asked Grievant to complete the task because he believed the Grievant had a better rapport with the Resident. At approximately 9 p.m., the Captain entered the Unit and observed that the Resident had several small cuts on his neck. The Captain was concerned that the Resident was engaging in self injurious behavior while refusing to exit his room. The Captain left the Unit and returned at approximately 9:28 p.m. with an extraction team consisting of five employees. The Captain instructed the Resident to lie down on his bed and the Resident complied with the instruction. The Resident was searched and changed into a new smock. The Resident's room was then cleaned and sanitized. Staff found numerous sharp objects hidden in his room. The Captain and the extraction team left the Unit. The Resident then pulled a sharp object out of his mouth and started cutting his neck. Grievant radioed for an emergency response to the Unit. Grievant and Officer L entered the Resident's room and restrained the Resident until a supervisor arrived.

Because of the nature of the incident, the Captain had to complete a Serious Incident Report to inform Agency managers of what had happened with the Resident. Grievant was instructed to submit an incident report describing what had happened. On January 22, 2011, at 11:30 p.m., Grievant completed an Institutional Incident Report. As part of his report, Grievant wrote:

At approximately 2100 hrs [Captain] was entering the unit and [Resident] covered his window for approximately 2 minutes. When he uncovered his window he had several small cuts on his neck.

The Acting Superintendent viewed the videotape of the incident and observed that the Resident had not covered his window. The Captain also viewed the video and observed that the Resident's window was never covered. During the Step Process, the video was shown to Grievant and Grievant agreed that the window was not covered.

In his CONCLUSIONS OF POLICY, the hearing officer wrote:

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action. Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

"[U]nsatisfactory work performance" is a Group I offense. In order to prove unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

One of Grievant's job duties was to draft accurate incident reports. He received in-service training informing him that he was to write what he

knew about an event into his incident report describing the event. He was informed that his incident reports should be accurate. Whether the Resident had covered his window was a significant detail because it could help the Agency determine when and under what circumstances the Resident may have injured himself. Grievant wrote that the Resident covered his window for approximately two minutes when in fact the Resident did not cover his window. Grievant's incident report was inaccurate making his work performance unsatisfactory to the Agency. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice. Because Grievant already has an active Group III Written Notice, the issuance of a Group I Written Notice supports the Agency's decision to remove him from employment.

The Agency argued that Grievant should receive a Group III Written Notice for falsification of documents and failure to provide direct supervision of the Resident. No credible evidence was presented to show the Grievant failed to provide direct supervision of the Resident. In order to establish that Grievant falsified his incident report, the Agency must show that the incident report was not accurate and that Grievant knew or should have known at the time he was writing the incident report that the information he provided was not correct. The evidence showed that residents at the Facility often covered their windows in order to gain attention from the Juvenile Correctional Officers. No motive was presented as to why Grievant would falsely report what had happened. The Acting Superintendent testified that the Agency could not prove that Grievant knew what he was writing was false. The Agency has not presented sufficient evidence to support the issuance of a Group III Written Notice.

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 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 nonexclusive 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 reduce further the disciplinary action.

Agencies may not retaliate against employees for engaging in protective activities. Grievant argued that the Agency retaliated against him because he questioned the competency of Agency supervisors. No credible evidence was presented to support Grievant's assertion that the Agency retaliated against him.

In his DECISION, the hearing officer stated the following:

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **reduced** to a Group I Written Notice of disciplinary action. Grievant's removal is **upheld** based upon the accumulation of disciplinary action.

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. 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.

In his request to this Department for an administrative review, the grievant does not challenge the hearing officer's decision as related to inconsistent or misapplication of policy as related to the hearing decision in Case No. 9618 and there is no reason for this Department to address the results of that decision.

Under the Department of Human Resource Management's Policy 1.60, Standards of Conduct, B.3.c, an employee who is issued a Written Notice that would normally warrant termination but who is not terminated due to mitigating circumstances should be notified that any subsequent Written Notice for any level offense during the active life of the Written Notice may result in termination. In the instant case, the grievant was put on notice when he received the first Group III Written Notice in December 2008 that any subsequent written notice during the active life of that Group III Written Notice may result in termination. Therefore, even though the hearing officer reduced the second Group III Written Notice to a Group I Written Notice, the grievant remained terminated.

CONCLUSION

Summarily, the hearing officer concluded that the grievant's most recent behavior was best categorized as poor performance. A performance issue normally is addressed by issuing a Group I Written Notice. Therefore, the hearing officer reduced the Group III Written Notice to a Group I Written Notice. However, because he had an active Group III Written Notice, he remained terminated.

The grievant's concerns are related to what he feels was improper application of policy when he was issued a Group III Written Notice in December 2008 while he was a probationary employee. Because he was a probationary employee, he did not challenge the disciplinary action through the State Employee Grievance Procedure. The disciplinary action remained on file and was a factor in his termination because of accumulation of written notices. The evidence provided to this Department supports that when the Department of Juvenile Justice issued the Group III Written Notice, he was a probationary employee and he was treated as such during his first 12 months of employment by that agency; i.e., a 4-month Probationary Progress Report and a congratulatory letter from the Human Resources Director upon his completion of the 12-month probationary period. The Probationary Policy clearly communicates that the

Written Notice disciplinary process established in the Standards of Conduct policy is to be used as a guide when disciplining employees. It further states that Written Notices may not be issued to probationary employees. As a probationary employee, the grievant was subjected to all conditions and privileges accorded to probationary employees. That being the case, it was improper for the agency to have issued a Group III Written Notice while he was on probation because, among other things, he could not use the grievance procedure to appeal the disciplinary action. In the instant case, the appropriate corrective action is to remove the December 2008 Group III Written Notice. This removal will result in his reinstatement.

The main issue that the grievant raised – that he was treated unfairly when he was issued a Group III Written Notice in 2008 by the agency while he was a probationary employee – was not raised as a part of Case No. 9618 and was not considered by the hearing officer. However, this Department addressed this issue only because the grievant was a probationary employee and the improperly issued original Group III Written Notice was a factor in his termination. This ruling has no impact on the decision rendered by the hearing officer except that the grievant must be reinstated.

Ernest G. Spratley, Assistant Director
Office of Equal Employment Services



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 9618-R

Reconsideration Decision Issued: November 18, 2011

RECONSIDERATION DECISION

On September 19, 2011, the Department of Human Resource Management issued a ruling regarding this grievance. On October 6, 2011, the EDR Director issued Ruling 2012-3113 remanding the grievance to the Hearing Officer to address (1) the procedural validity of a 2008 Group III Written Notice and (2) a Group III Written Notice issued on March 7, 2011 but limiting the evidence to either (a) that which was accepted as evidence at the previous hearing or (b) newly discovered evidence.

RECONSIDERATION FACTS

On August 14, 2006, Grievant received a letter of congratulations from the Department of Corrections to confirm the Department of Corrections' offer and Grievant's acceptance of the position of Corrections Officer at one of the DOC Facilities effective August 14, 2006. Grievant was advised that:

The first twelve months of your employment is a probationary period. The period is considered part of the selection process. You must maintain satisfactory performance during this time to continue your employment. If at any time during the probationary period, it is determined that you are not suited for the job, you will be terminated from employment for allowed to resign.⁶

Grievant completed his probationary period with the Department of Corrections.

On January 17, 2008, Grievant submitted an Application for Employment to the Department of Juvenile Justice for the position of Juvenile Correctional Officer. He

⁶ Agency Reconsideration Exhibit 5.

indicated in his application that he was employed at that time by the Department of Corrections.⁷

On April 7, 2008, the Human Resource Manager for the Agency sent Grievant a letter stating:

Congratulations! We are pleased to confirm your competitive voluntary transfer to the position of Juvenile Correctional Officer [position number] effective May 19, 2008. This offer is contingent upon a successful completion of a background investigation, including FBI and State Police Fingerprint reviews, physical, and drug screening prior to your first day of employment.

Your annual salary will remain [dollar amount] which equals to be semi-monthly salary of [dollar amount]. You will be eligible for any increase in compensation that may periodically be approved by the Virginia General Assembly. Upon successful completion of your first year, you will be entitled to a 10% increase in your salary.⁸

On May 9, 2008, Grievant accepted the offer by signing the letter dated April 7, 2008 from the Human Resource Manager. On May 9, 2008, Grievant signed a Conditions of Employment stating, “[a]ll new state employees serve a twelve (12) month probationary period, which is the last phase of the selection process.”⁹

Grievant began working for the Department of Juvenile Justice as a Juvenile Correctional Officer without having a break in State service.

On June 11, 2009, Human Resources Director W sent Grievant a letter stating:

I would like to take this opportunity to congratulate you on your accomplishment of successfully completing your 12 month probationary period and all training requirements, and to confirm your advancement to Juvenile Correctional Officer Senior effective May 19, 2009. In keeping with current policy governing the progression to the Juvenile Correctional Officer Senior rank, you will receive a 10% increase; therefore, your semi-monthly salary will increase to [dollar amount]. Your increase will be retroactively paid back to your anniversary date of May 19, 2009.¹⁰

⁷ Grievant was not attempting to transfer from an exempt position into a classified position. His position with the DOC was a classified position.

⁸ Agency Reconsideration Exhibit 5.

⁹ Agency Reconsideration Exhibit 5.

¹⁰ Grievant Reconsideration Exhibit 6A.

On September 22, 2008, Grievant's Supervisor signed a Probationary Progress Review describing Grievant's Overall Results of Review as "Contributor". The top of the document showed Projected Probationary End Date as May 19, 2009 and listed the Review Interval as "Other". Grievant also signed the document.

RECONSIDERED CONCLUSIONS OF POLICY

Neither party presented additional or new evidence relating to the Group III Written Notice issued March 7, 2011. There is no basis to alter the original decision reducing the Group III Written Notice to a Group I Written Notice.

Grievant had prior active disciplinary action consisting of the Group III Written Notice issued on December 17, 2008. If that written notice was issued while Grievant was a probationary employee, then the Written Notice is void and cannot form a basis to remove Grievant from employment. If the Written Notice was issued while Grievant was no longer a probationary employee, the Written Notice is valid and forms a basis to support Grievant's removal effective March 7, 2011.

Department of Human Resource Management Policy 1.45, Probationary Period, establishes guidelines for employees to serve an introductory period of employment to determine if the employee will be granted full classified status. Under this policy, a Probationary Period is defined as:

Introductory period of employment that allows the employee and agency to determine if the employee is suited for the job. During the probationary period, employees may be terminated at the pleasure of the appointing authority, without access to the State Grievance Procedure. The normal probationary period is 12 months; however, it can be extended as described in this policy for up to 18 months for performance reasons, if an employee is absent for an extended period of time, or if an employee moves to another position within the last 6 months of the 12-month period

All persons who begin either original employment or re-employment in classified positions must serve 12-month probationary periods effective from the dates of their employment. In general, an employee who has completed a probationary period to become a classified employee cannot be forced to complete a second probationary period. A second probationary period can be required of an employee under certain circumstances:

A person who is selected for a position that requires certification following completion of a prescribed training program must complete a new probationary period. Agencies should identify positions having such requirements in their Agency Salary Administration Plans

The Department of Juvenile Justice requires newly hired security staff to complete a several month training program. Upon completion of the training program,

for example, a Juvenile Correctional Officer becomes a Juvenile Correctional Officer Senior. Although the employee receives a 10% pay increase, the employee does not receive or complete a certification. The Agency's Salary Administration Plan does not contain a requirement that employees receive a certification to be elevated from a Juvenile Correctional Officer position to a Juvenile Correctional Officer Senior position. Accordingly, the Department of Juvenile Justice did not have the authority under DHRM Policy 1.45 to require Grievant to complete a second probationary period.

Letters sent to Grievant informing him that he had completed his probationary period were in error. Grievant would have received a 10% pay increase at the end of the one year period regardless of whether he was a probationary employee or a classified employee. Grievant was a classified employee at time he received the Group III Written Notice on December 17, 2008.¹¹ The Agency had the authority to issue Grievant a Group III Written Notice on December 17, 2008. Accordingly, the Written Notice issued on March 7, 2011 along with the Group III Written Notice issued on December 17, 2008 form a basis to uphold the Agency's decision to remove Grievant based on the accumulation of disciplinary action. The outcome of the Original Hearing Decision remains unchanged.

Grievant argued that he was hired as a probationary employee by the Department of Juvenile Justice. Grievant argued that the Agency treated him as a probationary employee because it gave him a Probationary Progress Review, sent him a letter congratulating him for completing his probationary period and changed his rank from Juvenile Correctional Officer to Juvenile Correctional Officer Senior.

The evidence showed that the Agency's initial offer of employment did not mention a probationary period. However, the Agency clearly misled Grievant by incorrectly suggesting he was subject to a probationary period. The Agency's error is not a basis to create a second probationary period because the Agency did not have the authority under DHRM Policy 1.45 to impose a second probationary period.

Based on the evidence presented during the reconsideration hearing, the Original Hearing Decision remains **unchanged**. The Group III Written Notice issued on March 7, 2011 is **reduced** to a Group I Written Notice. Grievant's removal is **upheld** based on the accumulation of disciplinary action.

APPEAL RIGHTS

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

¹¹ Grievant did not testify during the reconsideration hearing. No evidence was presented to establish the extent to which Grievant relied upon the Agency's mistake. It is unclear what actions Grievant would have taken in December 2008 had he been aware of the Agency's error. It is unclear whether any mitigating circumstances exist to reduce further the March 7, 2011 Written Notice with removal. Nevertheless, the legal principle of estoppel does not bind the Commonwealth.

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