Issue: Group II Written Notice (failure to follow policy and perform assigned work); Hearing Date: 10/12/11; Decision Issued: 10/18/11; Agency: DOC; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 9533; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION

In the matter of: Case No. 9533

Hearing Date: October 12, 2011
Decision Issued: October 18, 2011

PROCEDURAL HISTORY

Grievant was a time computation specialist for the Department of Corrections ("the Agency"), with 2 years of service in this position as of the offense date. On November 10, 2010, the Grievant was charged with a Group II Written Notice for failure to follow supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy. The Grievant requested and was granted a voluntary demotion and no other disciplinary action was taken. The Grievant had no other active Written Notices.

Grievant timely filed a grievance to challenge the Agency's disciplinary action, including a challenge to her voluntary demotion. The demotion was not qualified for a grievance hearing, and outcome of the resolution steps was not satisfactory to the Grievant and she requested a hearing. On April 19, 2011, the Department of Employment Dispute Resolution ("EDR") appointed the Hearing Officer. Before the hearing was scheduled, the hearing officer was advised that the related issue concerning the Grievant's intent to grieve the demotion was pending an appeal in circuit court, and the grievance hearing should be held in abeyance pending the circuit court's ruling on the appeal. Following notification that the circuit court denied the Grievant's appeal, a pre-hearing conference was held on September 20, 2011, and the grievance hearing ultimately was scheduled for the first date available between the parties and the hearing officer, October 12, 2011, on which date the grievance hearing was held, at the Agency's facility.[1] Accordingly, for good cause shown, the time for completing the grievance has been extended.

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.

[1] The Grievant was not present in person for the grievance hearing, and, by agreement among the parties, participated via teleconference.

APPEARANCES

Grievant
Representative and Witness 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 relied on the Standards of Conduct, promulgated by the Department of Human Resource Management, Policy 1.60, which defines Group II offenses to include acts of misconduct of a more serious [than a Group I offense] and/or repeat nature that require formal disciplinary action. This level is appropriate for offenses that significantly impact business operations and/or constitute neglect of duty, insubordination, the abuse of state resources, violations of policies, procedures, or laws. An example of a Group II offense is failure to follow supervisor's instructions or comply with written policy.

The Agency's Hot/Priority Files policy applies to the handling of this offender's case. Under the policy, "hot" files are files with a release date within 60 days. These files should be processed immediately with all information. Hot files that have a past release date must be completed as early as possible and given directly to a verifier to ensure a timely release from custody. "Priority" files are project files and expedite files with tags on the outside of the folder. Under policy, these files should be completed after the "hot" files, but before regular files, usually within 2-3 days of receipt. The policy states that if a priority file is determined to be "hot" it should be handled as a hot file. Agency Exh. B.

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 time computation specialist, with 2 years of service in the position and 16 years with the Agency. The Grievant has no other active disciplinary actions, with a performance review establishing a contributor rating. Agency Exh. A. On or about September 21, 2010, the Grievant was assigned the file of Offender B, and the Grievant was to determine the offender's date of release from custody. The file was a "priority" file, meaning the offender's release date was within 9 months. The Grievant calculated a release date of January 10, 2010 (a past date). Because the offender was already 9 months past the date calculated by the Grievant, applicable procedure required this case to be considered a "hot" file and to be resolved the same day. The Grievant did not notice the date discrepancy and held it among her pending files to work on. On October 28, 2010, the offender's family contacted the department to inquire about release. The manager receiving the inquiry located the file among the Grievant's workload, reviewed the file documentation, and arranged for the offender's release later the same day.

The Grievant's initial calculation of the offender's release date was incorrect, and the correct release date was not established at the grievance hearing. The Agency asserted its discipline was not directed to the Grievant's initial miscalculation of the release date, but, rather,

her mishandling of the case by leaving it unresolved from September 23, 2010, until the manager was contacted by the offender's family. The case file documentation indicates the Grievant worked on the file to obtain what she believed was necessary documentation or information intermittently between September 23, 2010, and October 25, 2010. There are call sheet notes for October 15, 2010, and October 25, 2010. Agency Exh. A.

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, I find that the Grievant was careless in handling the matter at issue. Although the Grievant calculated incorrectly, as far as the Grievant knew, Offender B had already been held in custody 9 months beyond his release date. The Grievant allowed this "hot" file to linger on her desk for over a month after her receipt of the file for the purpose of processing the offender's release. Had the offender's family not contacted the manager on October 28, 2010, the matter may have lingered indefinitely. The offense, unless circumstances warrant mitigation, satisfies the Group II level of discipline as a failure to follow supervisor's instructions or comply with written policy.

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 manager testified that, because of the liability exposure to the Agency for detaining offenders in custody beyond their release dates, the Agency considered the offense to be a Group II 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.

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 her otherwise good work history, service and performance should provide enough consideration to mandate a lesser sanction than a Group II. 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 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 integrity regarding the allowed custody of offenders in its charge. The Grievant's inattentiveness at this concern is a breach of responsibility and policy and warrants disciplinary action. The hearing officer accepts, recognizes, and upholds the Agency's important role in safeguarding the public and offenders in its charge, as well as the valid public policies promoted by the Agency and its policies. I find that the inattentiveness of the Grievant in this offense clearly relates to policy requirement, supervisor's instruction, 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