

Issue: Group III Written Notice with demotion and pay reduction (excessive use of force); Hearing Date: 10/14/11; Decision Issued: 12/30/11; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9675; Outcome: Full Relief; **Administrative Review**: AHO Reconsideration Request received 01/11/12; Reconsideration Decision issued 03/09/12; Outcome: Original decision affirmed; **Administrative Review**: DHRM Ruling Request received 03/11/12; DHRM Ruling issued 03/16/12; Outcome: AHO's decision affirmed.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9675

Hearing Date: October 14, 2011
Decision Issued: December 30, 2011

PROCEDURAL HISTORY

On February 17, 2011, Grievant was issued a Group III Written Notice of disciplinary action with demotion from Lieutenant to Corrections Officer and a five percent disciplinary pay reduction for use of excessive force.

On March 10, 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 September 7, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 14, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?

2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary 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 employed Grievant as a Corrections Lieutenant at one of its Facilities until his demotion to Corrections Officer with a five percent disciplinary pay reduction effective February 21, 2011. He began working for the Agency in October 1990. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

The Agency presented a video recording showing the Inmate being placed in restraints, taken to a shower stall, and placed under a flow of water. Because of the number of employees involved and the position of the video camera, significant portions of the interaction between Grievant and the Inmate cannot be viewed. The Hearing Officer relied upon witness testimony to supplement the video recording. It is clear that the Inmate resisted instructions from the Corrections Officers, knew that he was being video recorded, made statements intended to mislead someone viewing the video recording, and pretended to have become unconscious. The Hearing Officer doubts the credibility of several of the Inmate's statements heard on the video and written later by the Inmate. The Hearing Officer gives little weight to several statements made by the Inmate. For example, at one point in the video, the Inmate states he is drowning. He was not drowning and was able to breathe and talk.¹ In the Inmate's statement to the Investigator, the Inmate claimed that while he was on the floor pretending to be

¹ Corrections Officer W observed the Inmate try to fill his mouth with water and spit.

unconscious, Grievant put his finger in the Inmate's nose and pressed down hard. The video does not support this assertion and no credible witnesses confirmed the Inmate's allegation.

On July 12, 2010, Grievant and several Corrections Officers were attempting to place the Inmate in restraints. The Inmate was combative and resisted any attempts by the Corrections Officers to place him in restraints. For example, he held his legs stiff and apart which prevented the application of leg irons. While the Corrections Officers were attempting to move the Inmate's hands to his front, they lost control of one of his arms and the Inmate attempted to swing his arm around. Grievant drew his O.C. spray canister and sprayed the Inmate's forehead. The Corrections Officers were able to finish placing ambulatory restraints on the Inmate. The Agency does not contend Grievant used excessive force by using O.C. spray on the Inmate.

The Inmate was escorted to the shower. The Inmate said, "Y'all slow the f—k down." Grievant and Corrections Officer W helped the Inmate into the shower. As the Inmate approached the shower he stated, "Y'all gonna give me some shower shoes? Can't go into the shower without shower shoes."² As the Inmate entered the shower stall, he was held up by Grievant and several Corrections Officers who also entered the shower stall. While the Inmate was in the shower stall, Grievant held the Inmate and positioned the Inmate under the shower head. Corrections Officer W turned on the water. Grievant was positioned in the shower behind and touching the Inmate so that the Inmate's body was under the shower head. Grievant briefly held the back of the Inmate's head and pushed and positioned the Inmate's head so that the water flowed down across his head and face. Grievant's objective was to flush the O.C. spray off of the Inmate's head and face. The Inmate "played for the camera". The Inmate yelled "I can't breathe!"³ A Corrections Officer yelled "Yes you can". The Inmate replied "No I can't!" A Corrections Officer replied, "If you can talk, you can breathe." Grievant asked the Inmate "Had enough water yet? Have you had enough water?" The Inmate responded to Grievant with several words that were unintelligible on the video. The Inmate then became less responsive. Grievant asked, "Have you had enough water? Had enough water?" Grievant said "I can sit here as long as you can. I got all day." The video shows that the Inmate's head was angled slightly downward. The Inmate coughed several times but remained otherwise non-responsive. Grievant turned off the water and asked a Corrections Officer to obtain an ammonia tablet and to get the nurse. The Inmate was giving the appearance of being unconscious at this point in time even

² The practice of security staff at the Facility was not to permit Inmates in ambulatory restraints to have shower shoes when they entered the shower.

³ The video does not show the Inmate's head when he first claims he cannot breathe. A few seconds later, the video shows the Inmate's head to be level with his face pointed forward and again he claims he cannot breathe. Then the Inmate angles his face upwards slightly so that the water flows into his face. Grievant does not appear to have forced the Inmate to move his face upwards into the water stream. Grievant was holding the Inmate by placing his left arm over the Inmate's left shoulder. As the Inmate raises his face towards the water, Grievant removes his left arm from the left side of the Inmate's shoulder in what appears to be an attempt immediately thereafter to prevent the Inmate from keeping his head angled upward.

though he was not unconscious.⁴ The Inmate was placed on his back on the floor of the shower. The Nurse arrived and examined the Inmate. She flashed a light onto the Inmate's face. Approximately 30 minutes later, the Inmate coughs. Approximately three and a half minutes later, the Inmate stands up and exits the shower.

Although Grievant was positioning the Inmate's head upward at times, it does not appear that Grievant positioned the Inmate's head in a manner that would have had the effect of drowning the Inmate. Although the Inmate exclaimed he was drowning, there is no reason for the Hearing Officer to believe that the Inmate's assertion was true. At one point, when the Inmate was not responding, the video shows the back of the Inmate's head and shows that his head was not tilted upwards.

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."⁵ 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."⁶ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁷

Virginia Department of Corrections Operating Procedure 135.1(IV)(C), *Standards of Conduct*, states, "[t]he list of offenses in this procedure is illustrative, not all-inclusive. An action or event occurring either during or outside of work hours that, in the judgment of the agency head, undermines the effectiveness of the employee or of the agency may be considered a violation of these *Standards of Conduct* and may result in disciplinary action consistent with the provisions of this procedure based on the severity of the offense." In the Agency's judgment, excessive use of force is a Group III offense.

Operating Procedure 420.1 governs Use of Force. The purpose of the policy is to provide "guidance in the use of force by Department of Corrections facility employees in the performance of their duties."

Section IV(A)(4) provides:

The use of force is restricted to instances of justifiable self-defense, protection of others, protection of property, prevention of escapes, and to

⁴ The Inmate admitted to the Agency's Investigator that he "pretended to pass out."

⁵ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

⁶ Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

⁷ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

maintain or regain control, and then only as a last resort in accordance with appropriate statutory authority.

Section IV(C) states:

1. Force shall be used only as a method of control.
 - a. Non-force methods of control should be used whenever possible and the minimum necessary force should be used to gain control only when non-force methods have failed or are not appropriate.

2. Employees are permitted to use as much force as they reasonably perceive necessary to perform their duties and to protect themselves and others from harm.

- a. Based on use of force continuum, only force that is reasonably necessary to overcome resistance or gain control under the circumstances, is permissible.

- b. The use of excessive force or unreasonable force by a DOC employee may lead to criminal prosecution, a civil suit, or disciplinary action against the employee.

4. Less lethal force may be used in the following situations:

To compel an offender or a group of offenders to comply with direct orders when no quick or immediate alternative method of persuasion is effective and other types of force are deemed not appropriate.

Section V(D) addresses Chemical Agents and Munitions and provides:

- i. Aerosol propelled chemical agent should be used to control an offender in accordance with the following procedures:
- ii. After a chemical agent has been used to control an offender, that offender shall be allowed to shower and change clothes as soon as possible and the site of chemical agent use ventilated and decontaminated.

Excessive force is defined as:

That amount of force that is beyond what is reasonably required to prevent harm or to control a particular situation or that is not justified by the circumstances.

If the Hearing Officer considers only the Agency's Use of Force policy, Grievant used excessive force. The Agency's policy provides that the Inmate "shall be allowed to shower". It does not say that the Inmate must shower. If Grievant had offered the Inmate the opportunity to shower and the Inmate refused, Grievant would not have needed to use any additional force on the Inmate. Although the Inmate did not expressly refuse to take a shower, his demeanor and comments showed that he was resistant to being forced to engage in any action proposed by the Corrections Officers including taking a shower. Once the Inmate was inside the shower stall, he continued to be combative and resistant to Grievant's physical control of him. The Inmate was especially resistant to having his body and head held under the flow of water. Grievant used excessive force as prohibited by the Agency's policy because he forced the Inmate to take a shower and held the Inmate's body and head under the stream of water as the Inmate resisted.

The Hearing Officer must consider more than just the Agency's Use of Force policy to resolve this case. *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...."⁸ 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.

There are several factors justifying mitigation of the disciplinary action against Grievant. First, Grievant was obligated to comply with Security Post Order 6 governing his position as Building Unit Supervisor. Grievant was obligated to read and sign the post order before assuming his post.⁹ If Grievant failed to comply with his post order, he would have been subject to disciplinary action.

Security Post Order 6 provides:

⁸ Va. Code § 2.2-3005.

⁹ Grievant signed Security Post Order 6 on September 1, 2009.

The following procedures outlined the policy of the Division of Field Operations concerning the use of chemical agents. However, as with all situations, the correctional officer on the scene must use discretion and judgment in determining when and how to administer chemical agents.

F. After a chemical agent has been used to control an inmate, that inmate must be allowed to shower and change clothes as soon as possible, and the site of gas usage ventilated and/or decontaminated as recommended by the manufacturer.

CS and OC Decontamination Procedures

All persons who have been exposed to CS or OC shall be decontaminated in the following manner:

After the inmate has been restrained, expose to fresh air.

Flush affected area with large amounts of COOL water.

Remove contact lenses.

Remove contaminated clothing.

Place subject in shower under COOL water.

Issue clean clothing.

Observe subject at fifteen (15) minute intervals for one (1) hour to ensure that there is no permanent damage.

If subject requires medical attention, allow treatment as soon as possible.

Do not allow any salves, ointments, or creams to be applied. (Emphasis Added).¹⁰

Security Post Order 6 requires that Grievant comply with certain procedures to decontaminate an individual exposed to O.C. spray. Security Post Order 6 states, "Place subject in shower under COOL water." The Inmate was the subject exposed to O.C. spray. Grievant placed the Inmate in the shower and positioned the Inmate so that the Inmate would be under the water coming from the shower head. This action was consistent with Security Post Order 6.

Security Post Ordered 6 states, "Flush affected area with large amounts of COOL water." Grievant was obligated to flush the Inmate's affected area with large amounts of cool water. The Inmate's affected area was his forehead where the O.C. spray had been directed and his face where the spray had dripped. No evidence was presented to show that the showerhead was movable and, thus, Grievant could have moved the

¹⁰ Agency Exhibit 6.

showerhead towards Grievant's face without touching Grievant's head.¹¹ Grievant moved the Inmate's body and head to position the Inmate's head under the water flow so that the affected area would be flushed with large amounts of water. Grievant's actions were consistent with his Post Orders.

Second, the length of time the Inmate's head was held under the water was influenced by the Inmate's objective of "playing to the camera". After the Inmate was placed in the water, he yelled that he could not breathe. A Corrections Officer responded "If you can talk, you can breathe." Apparently, in response to this comment, the Inmate began pretending to have become nonresponsive and later unconscious. For approximately two minutes after the Inmate pretended to be nonresponsive, Grievant asked the Inmate five times if the Inmate had had enough water. Because the Inmate ignored Grievant's comments, Grievant continued to hold the Inmate under the water. If the Inmate had stated that he had had enough water, Grievant would have turned off the water.

Third, the context of the use of force must also be considered. Force was used on the Inmate when he was being placed in ambulatory restraints. Force was used on the Inmate when he was sprayed with O.C. spray. The Agency did not object to Grievant's use of force with respect to these instances. The Agency objected to Grievant's use of force once the Inmate was inside the shower stall and Grievant was holding the Inmate's body and head under the flow of water. The degree of force used on the Inmate when he was in the shower stall was not extraordinarily different from the degree of force used on the Inmate when he was sprayed with O.C. spray and placed against his will in ambulatory restraints.¹²

In light of the standard set forth in the Rules, the disciplinary action against Grievant must be reversed. Although Grievant used excessive force under the Agency's Use of Force policy, he could have been disciplined for failing to comply with his Post Order had he not taken the Inmate to the shower and flushed the Inmate's forehead and face. Because the Security Post Order 6 authorized Grievant's actions, there is no basis to take disciplinary action against him.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with demotion and disciplinary pay reduction is **rescinded**. The Agency is ordered to reinstate Grievant to Grievant's same position

¹¹ The Inmate was in ambulatory restraints and was unable to shower himself. The Inmate's continued combative behavior would not have justified removing the ambulatory restraints to enable the Inmate to shower by himself.

¹² In addition, Grievant had his hand on the back of the Inmate's head while escorting the Inmate to the shower. Grievant showed that when an inmate is in ambulatory restraints, an inmate's head "is his only weapon".

prior to removal, or if the position is filled, to an equivalent position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of demotion and credit for leave and seniority that the employee did not otherwise accrue.

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.¹³

[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

¹³ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 9675-R

Reconsideration Decision Issued: March 9, 2012

RECONSIDERATION DECISION

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

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

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

The Agency argues that Security Post Order 6 does not say “HOLD the Inmate and/or position the Inmate under the shower head.” This argument fails. The Inmate was in ambulatory restraints. The Warden testified Grievant could have placed the Inmate in the shower and stepped away. This conclusion is not supported by the evidence. If Grievant had placed the disoriented Inmate in the shower and failed to hold the Inmate steady, it is likely the Inmate would have fallen. Because he was in ambulatory restraints, he would have been unable to mitigate the fall thereby suffering certain injury. The least appropriate action would have been for Grievant to have placed the Inmate in the shower and not hold him. Grievant was obligated to place the Inmate “under COOL water”. That means he was obligated to place the Inmate under

the shower head. Grievant was obligated to “flush affected area with large amounts of COOL water.” The Inmate continued to struggle and it was appropriate for Grievant to hold the Inmate under the water in order to flush the affected area. Security Post Order 6 refers to “large amounts” of water. This language justifies holding the Inmate under the shower for a sufficient period of time to remove the O.C. spray. Holding the Inmate’s head under the water was consistent with Grievant’s obligation to flush the affected area.

The Agency asks “Shouldn’t the Warden and the Master Special Agent that have many years of experience and have reviewed videos as part of their regular duties be given credit for what they see on the video and what they testified to as “excessive force?” The Hearing Officer carefully considered the testimony of the Warden and the Master Special Agent. There is little doubt that their opinions were sincere and based on their judgment and years of experience. The definition of excessive force is found in the Agency’s policy. If the Hearing Officer considers only the Agency’s Use of Force Policy, then the Agency has established Grievant used excessive force. The Hearing Officer’s conclusion is consistent with the testimony of the Warden and the Master Special Agent that Grievant used excessive force. The Hearing Officer, however, must also consider mitigating factors when resolving grievance hearings.

The Agency argues that the Inmate’s statements “I am drowning” is a clear sign that he had had enough water. The Inmate’s statement is consistent with his “playing to the camera”. It is just as likely that the Inmate wanted Grievant to continue holding him under the shower in order to give him more opportunities to claim he was abused by Grievant as it is likely the Agency’s interpretation of the Inmate’s wording. Grievant repeatedly asked the Inmate if he had had enough water. The Inmate could have said yes.

The Agency contends it is significant that the Grievant called for the nurse “to bring me an ammonia tablet.” The Hearing Officer gives little weight to this evidence. The Inmate was pretending to be harmed by the corrections officers. If the Inmate’s acting skills were sufficient to fool Grievant for a brief period of time, the outcome of this case does not change.

The Agency argues that Grievant held the Inmate’s head in the shower as a form of punishment. No credible evidence was presented to support this assertion. Grievant held the Inmate’s head under the shower because the Inmate refused to cooperate and Grievant believed he was obligated to flush the Inmate’s head with water.

The Agency argues that Grievant should have asked questions about any discrepancy between “place subject in shower” and “inmate shall be allowed to shower.” To the extent the Agency’s policy and Security Post Order 6 conflicted with respect to this wording or any other wording, the Agency was obligated to write clear post orders. Grievant was obligated to comply with his post orders. Because the Agency failed to draft clearly Security Post Order 6, it reduced its ability to enforce its Use of Force Policy.

Grievant was required by the Agency to comply with his post order. It is not appropriate for the Agency to ignore Grievant's post order in order to justify disciplining him.

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

APPEAL RIGHTS

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

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

Judicial Review of Final Hearing Decision

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

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of
The Department of Corrections

March 16, 2012

The agency has requested an administrative review of the hearing officer's decision in Case No. 9675. For the reasons stated below, the Department of Human Resource Management (DHRM) will not intercede with the application of this decision. The agency head of DHRM, Ms. Sara R. Wilson, has directed that I conduct this administrative review.

In his PROCEDURAL HISTORY, the hearing officer stated the following:

On February 17, 2011, Grievant was issued a Group III Written Notice of disciplinary action with demotion from Lieutenant to Corrections Officer and a five percent disciplinary pay reduction for use of excessive force.

On March 10, 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 September 7, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 14, 2011, a hearing was held at the Agency's office.

The hearing officer identified the following as 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?

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

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

The Department of Corrections employed Grievant as a Corrections Lieutenant at one of its Facilities until his demotion to Corrections Officer with a five percent disciplinary pay reduction effective February 21, 2011. He began working for the Agency in October 1990. No evidence of prior active disciplinary

action against Grievant was introduced during the hearing.

The Agency presented a video recording showing the Inmate being placed in restraints, taken to a shower stall, and placed under a flow of water. Because of the number of employees involved and the position of the video camera, significant portions of the interaction between Grievant and the Inmate cannot be viewed. The Hearing Officer relied upon witness testimony to supplement the video recording. It is clear that the Inmate resisted instructions from the Corrections Officers, knew that he was being video recorded, made statements intended to mislead someone viewing the video recording, and pretended to have become unconscious. The Hearing Officer doubts the credibility of several of the Inmate's statements heard on the video and written later by the Inmate. The Hearing Officer gives little weight to several statements made by the Inmate. For example, at one point in the video, the Inmate states he is drowning. He was not drowning and was able to breathe and talk. In the Inmate's statement to the Investigator, the Inmate claimed that while he was on the floor pretending to be unconscious, Grievant put his finger in the Inmate's nose and pressed down hard. The video does not support this assertion and no credible witnesses confirmed the Inmate's allegation.

On July 12, 2010, Grievant and several Corrections Officers were attempting to place the Inmate in restraints. The Inmate was combative and resisted any attempts by the Corrections Officers to place him in restraints. For example, he held his legs stiff and apart which prevented the application of leg irons. While the Corrections Officers were attempting to move the Inmate's hands to his front, they lost control of one of his arms and the Inmate attempted to swing his arm around. Grievant drew his O.C. spray canister and sprayed the Inmate's forehead. The Corrections Officers were able to finish placing ambulatory restraints on the Inmate. The Agency does not contend Grievant used excessive force by using O.C. spray on the Inmate.

The Inmate was escorted to the shower. The Inmate said, "Y'all slow the f-k down." Grievant and Corrections Officer W helped the Inmate into the shower. As the Inmate approached the shower he stated, "Y'all gonna give me some shower shoes? Can't go into the shower without shower shoes." As the Inmate entered the shower stall, he was held up by Grievant and several Corrections Officers who also entered the shower stall. While the Inmate was in the shower stall, Grievant held the Inmate and positioned the Inmate under the shower head. Corrections Officer W turned on the water. Grievant was positioned in the shower behind and touching the Inmate so that the Inmate's body was under the shower head. Grievant briefly held the back of the Inmate's head and pushed and positioned the Inmate's head so that the water flowed down across his head and face. Grievant's objective was to flush the O.C. spray off of the Inmate's head and face. The Inmate "played for the camera". The Inmate yelled "I can't breathe!" A Corrections Officer yelled "Yes you can". The Inmate replied "No I can't!" A Corrections Officer replied, "If you can talk, you can breathe." Grievant asked the Inmate "Had enough water yet? Have you had enough water?" The Inmate responded to Grievant with several words that were unintelligible on the video. The Inmate then became less responsive. Grievant asked, "Have you had enough water? Had enough water?" Grievant said "I can sit here as long as you can. I got all day." The video shows that the Inmate's head was angled slightly downward. The Inmate coughed several times but remained otherwise non-responsive. Grievant turned off the water and asked a Corrections Officer to obtain an ammonia tablet and to get the nurse. The Inmate was giving the appearance of being unconscious at this point in time even though he was not

unconscious. The Inmate was placed on his back on the floor of the shower. The Nurse arrived and examined the Inmate. She flashed a light onto the Inmate's face. Approximately 30 minutes later the Inmate coughs. Approximately three and a half minutes later, the Inmate stands up and exits the shower.

Although Grievant was positioning the Inmate's head upward at times, it does not appear that Grievant positioned the Inmate's head in a manner that would have had the effect of drowning the Inmate. Although the Inmate exclaimed he was drowning, there is no reason for the Hearing Officer to believe that the Inmate's assertion was true. At one point, when the Inmate was not responding, the video shows the back of the Inmate's head and shows that his head was not tilted upwards.

The hearing officer's CONCLUSIONS OF POLICY is listed as follows:

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."

Virginia Department of Corrections Operating Procedure 135.1 (IV) (C), *Standards of Conduct*, states, "[t]he list of offenses in this procedure is illustrative, not all-inclusive. An action or event occurring either during or outside of work hours that, in the judgment of the agency head, undermines the effectiveness of the employee or of the agency may be considered a violation of these *Standards of Conduct* and may result in disciplinary action consistent with the provisions of this procedure based on the severity of the offense." In the Agency's judgment, excessive use of force is a Group III offense.

Operating Procedure 420.1 governs Use of Force. The purpose of the policy is to provide "guidance in the use of force by Department of Corrections facility employees in the performance of their duties."

Section IV (A)(4) provides:

The use of force is restricted to instances of justifiable self-defense, protection of others, protection of property, prevention of escapes, and to maintain or regain control, and then only as a last resort in accordance with appropriate statutory authority.

Section IV(C) states:

1. Force shall be used only as a method of control.
 - a. Non-force methods of control should be used whenever possible and the minimum necessary force should be used to gain control only when non-force methods have failed or are not appropriate.

2. Employees are permitted to use as much force as they reasonably perceive

necessary to perform their duties and to protect themselves and others from harm.

- a. Based on use of force continuum, only force that is reasonably necessary to overcome resistance or gain control under the circumstances, is permissible.
 - b. The use of excessive force or unreasonable force by a DOC employee may lead to criminal prosecution, a civil suit, or disciplinary action against the employee.
4. Less lethal force may be used in the following situations:

To compel an offender or a group of offenders to comply with direct orders when no quick or immediate alternative method of persuasion is effective and other types of force are deemed not appropriate.

Section V (D) addresses Chemical Agents and Munitions and provides:

- i. Aerosol propelled chemical agents should be used to control an offender in accordance with the following procedures:
- ii. After a chemical agent has been used to control an offender, that offender shall be allowed to shower and change clothes as soon as possible and the site of chemical agent use ventilated and decontaminated.

Excessive force is defined as:

That amount of force that is beyond what is reasonably required to prevent harm or to control a particular situation or that is not justified by the circumstances.

If the Hearing Officer considers only the Agency's Use of Force policy, Grievant used excessive force. The Agency's policy provides that the Inmate "shall be allowed to shower". It does not say that the Inmate must shower. If Grievant had offered the Inmate the opportunity to shower and the Inmate refused, Grievant would not have needed to use any additional force on the Inmate. Although the Inmate did not expressly refuse to take a shower, his demeanor and comments showed that he was resistant to being forced to engage in any action proposed by the Corrections Officers including taking a shower. Once the Inmate was inside the shower stall, he continued to be combative and resistant to Grievant's physical control of him. The Inmate was especially resistant to having his body and head held under the flow of water. Grievant used excessive force as prohibited by the Agency's policy because he forced the Inmate to take a shower and held the Inmate's body and head under the stream of water as the Inmate resisted.

The Hearing Officer must consider more than just the Agency's Use of Force policy to resolve this case. *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 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.

There are several factors justifying mitigation of the disciplinary action against Grievant. First, Grievant was obligated to comply with Security Post Order 6 governing his position as Building Unit Supervisor. Grievant was obligated to read and sign the post order before assuming his post. If Grievant failed to comply with his post order, he would have been subject to disciplinary action.

Security Post Order 6 provides:

The following procedures outlined the policy of the Division of Field Operations concerning the use of chemical agents. However, as with all situations, the correctional officer on the scene must use discretion and judgment in determining when and how to administer chemical agents.

F. After a chemical agent has been used to control an inmate, that inmate must be allowed to shower and change clothes as soon as possible, and the site of gas usage ventilated and/or decontaminated as recommended by the manufacturer.

CS and OC Decontamination Procedures

All persons who have been exposed to CS or OC shall be decontaminated in the following manner:

After the inmate has been restrained, expose to fresh air.
Flush affected area with large amounts of COOL water.
Remove contact lenses.
Remove contaminated clothing.
Place subject in shower under COOL water.
Issue clean clothing.
Observe subject at fifteen (15) minute intervals for one (1) hour to ensure that there is no permanent damage.
If subject requires medical attention, allow treatment as soon as possible.
Do not allow any salves, ointments, or creams to be applied. (Emphasis Added).

Security Post Order 6 requires that Grievant comply with certain procedures to decontaminate an individual exposed to O.C. spray. Security Post Order 6 states, "Place subject in shower under COOL water." The Inmate was the subject exposed to O.C. spray. Grievant placed the Inmate in the shower and positioned the Inmate so that the Inmate would be under the water coming from the shower head. This action was consistent with Security Post Order 6.

Security Post Order 6 states, "Flush affected area with large amounts of COOL water." Grievant was obligated to flush the Inmate's affected area with large amounts of cool water. The Inmate's affected area was his forehead where the O.C. spray had been directed and his face where the spray had dripped. No evidence was

presented to show that the showerhead was movable and, thus, Grievant could have moved the showerhead towards Grievant's face without touching Grievant's head. Grievant moved the Inmate's body and head to position the Inmate's head under the water flow so that the affected area would be flushed with large amounts of water. Grievant's actions were consistent with his Post Orders.

Second, the length of time the Inmate's head was held under the water was influenced by the Inmate's objective of "playing to the camera". After the Inmate was placed in the water, he yelled that he could not breathe. A Corrections Officer responded "If you can talk, you can breathe." Apparently, in response to this comment, the Inmate began pretending to have become nonresponsive and later unconscious. For approximately two minutes after the Inmate pretended to be nonresponsive, Grievant asked the Inmate five times if the Inmate had had enough water. Because the Inmate ignored Grievant's comments, Grievant continued to hold the Inmate under the water. If the Inmate had stated that he had had enough water, Grievant would have turned off the water.

Third, the context of the use of force must also be considered. Force was used on the Inmate when he was being placed in ambulatory restraints. Force was used on the Inmate when he was sprayed with O.C. spray. The Agency did not object to Grievant's use of force with respect to these instances. The Agency objected to Grievant's use of force once the Inmate was inside the shower stall and Grievant was holding the Inmate's body and head under the flow of water. The degree of force used on the Inmate when he was in the shower stall was not extraordinarily different from the degree of force used on the Inmate when he was sprayed with O.C. spray and placed against his will in ambulatory restraints.

In light of the standard set forth in the Rules, the disciplinary action against Grievant must be reversed. Although Grievant used excessive force under the Agency's Use of Force policy, he could have been disciplined for failing to comply with his Post Order had he not taken the Inmate to the shower and flushed the Inmate's forehead and face. Because the Security Post Order 6 authorized Grievant's actions, there is no basis to take disciplinary action against him.

The hearing officer's DECISION is as follows:

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with demotion and disciplinary pay reduction is **rescinded**. The Agency is ordered to reinstate Grievant to Grievant's same position prior to removal, or if the position is filled, to an equivalent position. The Agency is directed to provide the Grievant with back pay less any interim earnings that the employee received during the period of demotion and credit for leave and seniority that the employee did not otherwise accrue.

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 its appeal to DHRM, the agency challenged the hearing officer's decision on the basis that it is inconsistent with law and written policy. The DHRM has the authority to address this challenge only on the basis that the decision is inconsistent with policy. The agency contends that the hearing officer lists three factors for justifying mitigation:

1. Grievant was obligated to comply with Security Post Order 6 governing his position as Building Unit Supervisor.
2. The length of time the inmate's head was held under the water was influenced by the inmate's objective of "playing to the camera."
3. The context of the use of force must also be considered.

While the agency contends that the disciplinary action was rescinded because the hearing officer applied mitigation factors, DHRM could not draw that conclusion based on our reading of the hearing decision. While the hearing officer did list the above three items in arriving at his decision to rescind the disciplinary action, there is no indication that he used these as mitigation factors to rescind the disciplinary action. It is indisputable that Agency Operating Procedure 420.1 and Security Post Order 6 are applicable in this case. It also appears that the hearing officer made his decision after considering the totality of the evidence. It is beyond the purview of the DHRM to review what evidence the hearing officer considers and how he evaluates that evidence. Therefore, this Department has no basis to intercede in the application of this decision.

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