Issues: Group II Written Notice (inappropriate language), Group III Written Notice (failure to follow policy), Group III Written Notice (conduct unbecoming a superior), and Termination; Hearing Date: 10/19/11; Decision Issued: 11/21/11; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9682, 9683, 9684; Outcome: Partial Relief; **Administrative Review: EDR Ruling Request received 12/05/11; EDR Ruling No. 2012-3188 issued 01/31/12; Outcome: Remanded to AHO; Remand Decision issued 03/12/12; Original decision affirmed; Administrative Review: DHRM Ruling Request on original hearing decision received 12/05/11, and DHRM Ruling Request on 3/12/12 Remand Decision received 03/19/12; DHRM ruling issued 03/23/12; Outcome: AHO's decision affirmed; Administrative Review: EDR Ruling Request on 03/12/12 Remand Decision received 03/19/12; Outcome pending.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9682 9683 9684

Hearing Date: October 19, 2011
Decision Issued: November 21, 2011

PROCEDURAL HISTORY

On February 23, 2011, Grievant was issued a Group III Written Notice of disciplinary action with removal for conduct unbecoming a supervisor. On February 23, 2011, Grievant received a second Group III Written Notice of disciplinary action with removal for violation of Operating Procedure 101.3, Conflict of Interest, and Conduct Unbecoming of a Corrections Supervisor. Also on February 23, 2011, Grievant was issued a Group II Written Notice of disciplinary action with removal for violation of operating procedures 135.1 and 030.2.

On March 21, 2011, Grievant timely filed three grievances to challenge the Agency's action. The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and she requested a hearing. On August 29, 2011, the EDR Director issued Ruling No. 2012-3068, 2012-3069, 2012-3070 consolidated the three grievances for a single hearing. On September 14, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision in this appeal due to the unavailability of a party. On October 19, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant Counsel
Agency Party Designee
Agency Representative
Witnesses

ISSUES

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

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 Corrections employed Grievant as a Corrections Lieutenant at one of its Facilities. She had been employed by the Agency for approximately 27 years prior to her removal effective February 23, 2011.

Grievant often served as Watch Commander on weekends at the Facility. As Watch Commander she typically was in charge of the Facility and responsible for supervising approximately 40 security staff.

Grievant smoked cigarettes for approximately 26 years. On February 1, 2010, the Agency no longer permitted employees or inmates to smoke at the Facility. Grievant knew of the policy change and was responsible for complying with the policy and enforcing the policy.

The sally port is located inside the Facility but not inside the secured perimeter where inmates have access. A Control Room Officer controls the gate permitting employees to enter and exit the sally port.

On September 15, 2010, Grievant entered the sally port control room and placed a cigarette behind a control panel in an area several smokers used to hide their cigarettes. Officer S was working as the Control Room Officer. Officer S permitted Grievant to enter the sally port and observed Grievant hiding her cigarettes. Officer S had observed Grievant hide her cigarettes behind the control panel in the sally port on at least 10 occasions in the past. Officer S had observed at least 10 other employees hide their cigarettes behind the control panel. Officer S observed at least 20 employees smoke in the sally port after February 1, 2010 when the Agency began prohibiting smoking at the Facility. The Agency confronted Grievant regarding the allegation that she smoked at the Facility. Grievant did not attempt to deceive the Warden and admitted that she had smoked cigarettes in front of Sergeant S and Officer S.

In December 2009, Officer W submitted to Lieutenant M a request for vacation leave from August 13 to August 29, 2010. He was approved for leave including the date of August 14, 2010. On August 5, 2010, Officer W went to the Watch Office to check the master roster to verify his vacation time. His leave scheduled for August 13 through August 15, 2010 had been canceled. Officer W asked Grievant why his leave had been cancelled. She responded “institutional needs”. When employees asked about changes in their leave, Grievant often replied “institutional needs” even though she might not have known the reasons why specific leave requests had been cancelled.

Officer L and Officer C enjoyed cooking on grills at outdoor functions. On July 4, 2010, Officer L and Officer C unassembled Officer C’s grills at a picnic held for employees at the Facility. They were not compensated for cooking at the picnic and did so to boost morale with their coworkers. Grievant observed how well Officer L and Officer C cooked for the picnic and asked them if they would cook at her daughter’s wedding scheduled for August 14, 2010. Grievant did not offer to pay them any money. She indicated that if they were to cook at the wedding, she would be able to avoid paying fees to a caterer. Officer L and Officer C agreed to cook at Grievant’s daughter’s wedding. Grievant told the employees that she would take care of ensuring that they were not scheduled to work on August 14, 2010. On August 9, 2010, Officer W learned that Officer L, Officer C, and Officer P had been granted leave for August 14, 2010 so they could cook at Grievant’s daughter’s wedding. He believed the Grievant had

canceled his vacation leave so that the other officers would not have to work that weekend. He complained to Facility managers.

Grievant provided Officer L and Officer C with $400 to be used to purchase food for the wedding. On August 14, 2010, Officer L and Officer C cooked food at Grievant's daughter's wedding. Officer P also assisted. Grievant's husband complained to Officer L and Officer C that they were not cooking the food quickly enough. He offended both employees with his abrasive tone. At the end of the function, Grievant's husband gave a bottle of liquor with a value of approximately $20 to Officer L and to Officer C. Grievant later told an investigator that everyone who assisted in the wedding received a gift.

As part of the Agency's investigation of Grievant, an Investigator spoke with Officer L about the wedding. Although Officer L was informed not to reveal to anyone else that he was interviewed, Officer L told Grievant that she was under investigation. On September 30, 2010, Grievant called the Warden and asked him if he could tell her why she was under investigation for misconduct. The Warden told Grievant that he had requested the investigation and that he was not at liberty to discuss the investigation. He told Grievant that she would be interviewed soon because the Investigators had already interviewed other staff. On October 1, 2010, Grievant called the Investigator and told him she knew that the Special Investigations Unit was investigating her. She asked when the Warden had requested the Special Investigations Unit to initiate an investigation of her. The Investigator told Grievant he could not answer her question but that she would be interviewed regarding the allegations. On October 4, 2010, Grievant was interviewed by the Investigator.

In the spring or summer of 2010, Officer Pr was speaking with Grievant in the control room of the Special Housing Unit. While they were talking, Captain M entered the unit and went into the counselor's office. Officer Pr and Grievant continue their conversation. Captain M entered the Control Room and then left the housing unit. After Captain M left the Special Housing Unit, Grievant said in anger "[Captain M] does not know who he is f—king with. I am a patient person and I will get mine in the end." Grievant's statement made Officer Pr feel uneasy. He was concerned that if Grievant was willing to "go after" a higher ranking employees such as the Captain M, Grievant would be willing to "go after" Officer Pr if he did something to Grievant.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses "include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force."[1] Group II offenses "include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should

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

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

Group III Written Notice Regarding Tobacco Free Policy

"[F]ailure to … comply with applicable established written policy" is a Group II offense.[4] The Agency adopted a policy that the Facility would be tobacco free beginning February 1, 2010. Grievant was aware of the policy and was obligated to comply with and enforce that policy. On several occasions including on September 15, 2010, Grievant brought cigarettes into the Facility and hid them behind the control panel in the sally port. Grievant acted contrary to policy thereby justifying the issuance of a Group II Written Notice.

In certain extreme circumstances an offense listed as a Group II Notice may constitute a Group III offense based on the unique impact that a particular offense has on the Agency. In this case, the Agency has presented sufficient evidence to support the elevation of the Group II offense to a Group III offense. On many occasions, Grievant was the highest-ranking security officer at the Facility. If she chose to disregard a policy, the Agency was no longer able to enforce that policy on its employees. Grievant not only violated the tobacco policy, she did so in plain view of subordinate staff. Through her example as a supervisor, Grievant undermined the Agency's ability to enforce the tobacco policy on its employees. Grievant's behavior created a unique impact on the Agency thereby justifying the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant argued that she was removed from employment for smoking although others who continued to smoke at the Facility were not removed from employment. The evidence showed that Grievant was not removed solely for smoking. The evidence showed that Grievant was removed from employment because she held a senior leadership position at the Facility and was responsible for disciplining subordinate staff whom she observed smoking at the Facility. Grievant violated the Facility smoking ban in front of subordinate staff.

Group III Written Notice Regarding Grievant's Daughter's Wedding.

Operating Procedure 101.3 governs Standards of Ethics and Conflict of Interest. This policy requires:

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

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

[4] Virginia Department of Corrections Operating Procedure 135.1(XI)(B)(1).

> Employees of the Department shall conduct themselves by the highest standards of ethics and that their actions will not be construed as a conflict of interest or conduct unbecoming an employee of the Commonwealth.

The Agency contends that Grievant significantly orchestrated the rearranging of multiple staff members schedules in order for subordinate staff to work at her daughter's wedding on August 14, 2010. The Agency asserted that Grievant received a significant personal financial gain from her actions and created hostility among subordinate staff. The Agency claimed the Grievant's actions could be construed as a conflict of interest and contrary to the goals and mission of the Department and that she undermined her effectiveness as a supervisor.

The Agency has not presented sufficient evidence to show that Grievant violated Operating Procedure 101.3. The focus of this policy is on prohibiting employees from benefiting from their contractual relationships. It is not written with sufficient detail to place Grievant on notice that asking subordinate staff to cook at her daughter's wedding would be prohibited by policy. Officer L and Officer C volunteered to assist Grievant. They were not coerced. They were not compensated for their work. The gift they received was given to all individuals who helped at the wedding. Their actions were consistent with their behavior on July 4, 2010 when they cooked without compensation to benefit staff at the Facility. The Agency accepted the free services of Officer L and Officer C as did Grievant.

The Agency argued that Grievant canceled the scheduled leave of Officer W so that he would work on August 14, 2010 and Officer L and Officer C would be able to cook at Grievant's daughter's wedding. Although Grievant may have had a motive to cancel Officer W's scheduled leave on August 14, 2010, insufficient evidence exists to establish that Grievant canceled Officer W's leave. Grievant denied erasing Officer W's name from the leave schedule. Officer W's leave for the dates of August 13 and August 15, 2010 was also canceled, but those dates did not relate to the date of the wedding. Grievant obtained permission from Captain W before scheduling Officer L and Officer C for leave on August 14, 2010. The Group III Written Notice issued for violation of Operating Procedure 101.3 must be reversed.

Group II Written Notice Regarding Derogatory/Revengeful Comments

"[D]isruptive behavior" is a Group I offense.[5] In the spring or summer of 2010, Grievant told a subordinate employee that Captain M did not know "who he was f—king with" and that she would "get mine in the end." DOC is a quasi-military organization where employees wear uniforms and hold rank. Grievant's comments were disruptive to the Agency because Grievant's comments showed a lack of respect for a superior officer. Grievant's comments upset Officer Pr who became concerned about how Grievant may react to him in the future. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

[5] Virginia Department of Corrections Operating Procedure 135.1(X)(B)(5).

Grievant argued that she did not make negative comments about Captain M and that they had a good working relationship. The Agency presented credible testimony to support its allegation that Grievant made an inappropriate comment about Captain M.

The Agency contends that Grievant should receive a Group II Written Notice instead of a Group I Written Notice. Insufficient evidence was presented to establish that the impact on the Agency was sufficiently severe to raise the Group I offense to a Group II offense. Grievant's comments were more of an expression of her frustration with Captain M during a difficult day at work than an expression of an actionable vendetta against Captain M.

The Agency argued that Grievant violated Operating Procedure 030.4, Special Investigations Unit, because she did not timely report Officer L's violation of his agreement with the Agency's Investigator not to disclose that he had been questioned by the Investigator. Section VII(B) of Operating Procedure 030.4 states:

> Employees who observe or suspect violations of laws or regulations or the DOC standards of conduct … are required to report their observations or suspicions directly to their supervisor or manager, or to the Organizational Unit Head or to the Office of Inspector General or Special Investigations Unit.

The Operating Procedure does not specify a time period for reporting violations of this section. The evidence showed the Grievant was the individual who advised the Warden that she knew she was under investigation. The Warden did not ask Grievant how she knew this information but advised her she would be interviewed later by the Special Investigations Unit. Although Grievant may not have spoken to the Warden with the intent of informing him of Officer L's breach of the agreement, the effect of Grievant's communication was to inform the Agency of Officer L's action. When Grievant was asked later how she knew she was under investigation, she was truthful. Grievant complied with Operating Procedure 030.4 albeit inadvertently.

Mitigation

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…."[6] 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-

[6] Va. Code § 2.2-3005.

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 Group III Written Notice regarding smoking should be mitigated. She argues that the Agency inconsistently applied disciplinary action. She points out that several employees who were smoking after February 1, 2010 were given written counseling instead of disciplinary action. She argues that Sergeant S smoked in front of subordinate employees but he received no disciplinary action.

In order to establish that an agency has inconsistently applied disciplinary action, there must be evidence sufficient to establish that the Agency inappropriately singled out an individual for disciplinary action. The evidence showed that employees who were caught smoking received written counseling. Grievant was disciplined for more than just smoking at the Facility. She held one of the highest ranking positions at the Facility and was expected to serve as a role model for other employees. She was also expected to enforce the Facility policy prohibiting smoking. Instead, Grievant admitted to smoking in front of Sergeant S and Officer S. She hid cigarettes behind the control panel and was observed doing so by Officer S. Grievant gained entry to the sally port for personal reasons instead of business reasons.

The Agency similarly treated Grievant and Officer S. Officer S also received a Group III Written Notice. She was disciplined for smoking at the Facility but also for permitting other employees to enter the sally port so that they could hide cigarettes and smoke cigarettes contrary to policy. Officer S did not record in her logbook the times when Grievant entered the sally port to use tobacco products. Officer S was attempting to protect Grievant.

The Agency treated Grievant differently from Sergeant S. Sergeant S smoked cigarettes in front of Officer S. The Agency did not take disciplinary action against Sergeant S because the Warden did not believe he could prove that Sergeant S smoked in front of a subordinate. Sergeant S denied smoking in front of any subordinates. The Warden was unable to find a sufficient number of employees to confirm that Sergeant S smoked in front of them. The Warden believed he lacked sufficient evidence to support the issuance of a Written Notice to Sergeant S. The Hearing Officer will not second guess the Warden's decision regarding the weight of evidence he believed was necessary to support taking disciplinary action against Sergeant S. It is clear to the Hearing Officer that the Warden would have taken disciplinary action against Sergeant S if he had been able to develop sufficient evidence to do so.

Grievant's length of service and otherwise satisfactory work performance are not sufficient to mitigate the Agency's disciplinary action. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce further the disciplinary actions.

Retaliation

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;[7] (2) suffered a materially adverse action[8]; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.[9]

Grievant engaged in protected activity when she filed a grievance in September 2010. Grievant suffered a materially adverse action because she received disciplinary action. Grievant has not established a link between her protected activity and the materially adverse action. The Warden denied taking action against Grievant because of her September 2010 grievance. His denial was credible. The Agency did not take disciplinary action against Grievant as a pretext for retaliation.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal regarding bringing into and using tobacco products at the Facility is **upheld**. The Group III Written Notice of disciplinary action regarding having employees cook at her daughter's wedding is **rescinded**. The Group II Written Notice of disciplinary action regarding making derogatory/revengeful comments is **reduced** to a Group I Written Notice.

APPEAL RIGHTS

[7] See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

[8] On July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, the EDR Director adopted the "materially adverse" standard for qualification decisions based on retaliation. A materially adverse action is an action which well might have dissuaded a reasonable worker from engaging in a protected activity.

[9] This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

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.[10]

[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].

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

S/Carl Wilson Schmidt

_____

Carl Wilson Schmidt, Esq.
Hearing Officer

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 9682 / 9683 / 9684-R

Reconsideration Decision Issued: March 12, 2012

RECONSIDERATION DECISION

On January 31, 2012, the EDR Director issued Ruling Number 2012–3188 remanding the grievance to the Hearing Officer for further consideration. The EDR Director wrote:

> D. The grievant asserts that the discipline should be removed because of the delay in issuing it. This is essentially an argument that the discipline is inconsistent with policy in that it was not issued promptly. The Department of Human Resource Management (DHRM) has the sole authority to make a final determination on whether the hearing decision comports with policy. DHRM has the authority to take the facts, as found by the hearing officer, and determine whether under those facts the agency's actions and the hearing officer's policy determinations were not in accord with policy. However, because the hearing officer has not addressed this issue and the facts surrounding it, it would be premature for the DHRM Director to make her final determination at this time.
>
> The grievant asserts that grievant's counsel raised the issue of the timeliness of the issuance of the Written Notice. Based on this Department's review of the hearing record, the manner in which it was raised was somewhat disjointed. Thus, it is not surprising that the hearing decision did not address this particular issue. In the request for administrative review, the grievant argues more directly that (Management) Captain M knew about the alleged comment for 9-12 months but took no action which violates policy's mandate that discipline be issued as soon as reasonably possible.

> As noted above, the grievant has appealed this decision to the DHRM Director. The DHRM Director is the appropriate authority to rule on the issue of whether the decision is in compliance with policy. However, before the DHRM Director addresses this issue, the hearing officer must first to develop facts surrounding the timing of the issuance of the discipline as it relates to when the misconduct occurred. Accordingly, on remand the hearing officer shall address the issue of the timing of the Written Notice.
>
> DHRM Policy 1.60, Standards of Conduct, provides that:
>
> Management should issue Written Notices as soon as reasonably possible after becoming aware of misconduct or unacceptable performance.
>
> E. Finally, the grievant asserts that her due process rights were violated because the agency could not pinpoint with any degree of certainty when the disruptive statement was purportedly made. This was an objection raised throughout the hearing but it is not addressed in the hearing decision.
>
> Due process is a legal concept. Accordingly, either [party] can raise any concerns regarding any purported due process violations with the circuit court in the jurisdiction in which the grievance arose. However, the hearing decision should have addressed this argument. Because it was not addressed, the hearing officer is directed to address the due process objection. Appeals based on his remanded decision may be raised with the circuit court.

DHRM Policy 1.60 does not establish a limitation of actions such that the Agency's failure to timely issue disciplinary action creates an employee's immunity from receiving disciplinary action. DHRM Policy 1.60 does not provide a basis to reverse disciplinary action because it was not timely issued. When agencies fail to timely issue disciplinary action, the question becomes whether the witnesses are able to remember events with sufficient clarity as to enable the Hearing Officer to make findings of fact. The several month delay in this case was not sufficient to undermine the Hearing Officer's ability to determine Grievant's behavior. Grievant had adequate notice of the allegations against her and had the opportunity to present her defenses to the allegations. She was not denied procedural due process. The Agency's inability to establish the specific date and time of Grievant's behavior is not fatal to its case. The Agency was able to present credible evidence regarding Grievant's behavior and the season of the year in which it occurred. Those facts are sufficient for the Agency to meet its burden of proof in this case.

There is no basis to reverse the disciplinary action in this case based on any delay by the Agency.

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 23, 2012

The grievant has requested an administrative review of the hearing officer's decision in Cases Nos. 9682, 9683 and 9684. 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 23, 2011, Grievant was issued a Group III Written Notice of disciplinary action with removal for conduct unbecoming a supervisor. On February 23, 2011, Grievant received a second Group III Written Notice of disciplinary action with removal for violation of Operating Procedure 101.3, Conflict of Interest, and Conduct Unbecoming of a Corrections Supervisor. Also on February 23, 2011, Grievant was issued a Group II Written Notice of disciplinary action with removal for violation of operating procedures 135.1 and 030.2.
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> On March 21, 2011, Grievant timely filed three grievances to challenge the Agency's action. The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and she requested a hearing. On August 29, 2011, the EDR Director issued Ruling No. 2012-3068, 2012-3069, 2012-3070 consolidated the three grievances for a single hearing. On September 14, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision in this appeal due to the unavailability of a party. On October 19, 2011, a hearing was held at the Agency's office.

****

The hearing officer identified the following ISSUES to be assessed in these cases:

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

****

The relevant FINDINGS OF FACT in these cases are as follows:

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

The Department of Corrections employed Grievant as a Corrections Lieutenant at one of its Facilities. She had been employed by the Agency for approximately 27 years prior to her removal effective February 23, 2011.

Grievant often served as Watch Commander on weekends at the Facility. As Watch Commander she typically was in charge of the Facility and responsible for supervising approximately 40 security staff.

Grievant smoked cigarettes for approximately 26 years. On February 1, 2010, the Agency no longer permitted employees or inmates to smoke at the Facility. Grievant knew of the policy change and was responsible for complying with the policy and enforcing the policy.

The sally port is located inside the Facility but not inside the secured perimeter where inmates have access. A Control Room Officer controls the gate permitting employees to enter and exit the sally port.

On September 15, 2010, Grievant entered the sally port control room and placed a cigarette behind a control panel in an area several smokers used to hide their cigarettes. Officer S was working as the Control Room Officer. Officer S permitted Grievant to enter the sally port and observed Grievant hiding her cigarettes. Officer S had observed Grievant hide her cigarettes behind the control panel in the sally port on at least 10 occasions in the past. Officer S had observed at least 10 other employees hide their cigarettes behind the control panel. Officer S observed at least 20 employees smoke in the sally port after February 1, 2010 when the Agency began prohibiting smoking at the Facility. The Agency confronted Grievant regarding the allegation that she smoked at the Facility. Grievant did not attempt to deceive the Warden and admitted that she had smoked cigarettes in front of Sergeant S and Officer S.

In December 2009, Officer W submitted to Lieutenant M a request for vacation leave from August 13 to August 29, 2010. He was approved for leave including the date of August 14, 2010. On August 5, 2010, Officer W went to the Watch Office to check the master roster to verify his vacation time. His leave scheduled for August 13 through August 15, 2010 had been canceled. Officer W asked Grievant why his leave had been cancelled. She responded "institutional needs". When employees asked about changes in their leave,

Grievant often replied “institutional needs” even though she might not have known the reasons why specific leave requests had been cancelled.

Officer L and Officer C enjoyed cooking on grills at outdoor functions. On July 4, 2010, Officer L and Officer C unassembled Officer C’s grills at a picnic held for employees at the Facility. They were not compensated for cooking at the picnic and did so to boost morale with their coworkers. Grievant observed how well Officer Land Officer C cooked for the picnic and asked them if they would cook at her daughter's wedding scheduled for August 14, 2010. Grievant did not offer to pay them any money. She indicated that if they were to cook at the wedding, she would be able to avoid paying fees to a caterer. Officer L and Officer C agreed to cook at Grievant's daughter's wedding. Grievant told the employees that she would take care of ensuring that they were not scheduled to work on August 14, 2010. On August 9, 2010, Officer W learned that Officer L, Officer C, and Officer P had been granted leave for August 14, 2010 so they could cook at Grievant's daughter's wedding. He believed the Grievant had canceled his vacation leave so that the other officers would not have to work that weekend. He complained to Facility managers.

Grievant provided Officer L and Officer C with $400 to be used to purchase food for the wedding. On August 14, 2010, Officer L and Officer C cooked food at Grievant's daughter's wedding. Officer P also assisted. Grievant's husband complained to Officer L and Officer C that they were not cooking the food quickly enough. He offended both employees with his abrasive tone. At the end of the function, Grievant's husband gave a bottle of liquor with a value of approximately $20 to Officer L and to Officer C. Grievant later told an investigator that everyone who assisted in the wedding received a gift.

As part of the Agency's investigation of Grievant, an Investigator spoke with Officer L about the wedding. Although Officer L was informed not to reveal to anyone else that he was interviewed, Officer L told Grievant that she was under investigation. On September 30, 2010, Grievant called the Warden and asked him if he could tell her why she was under investigation for misconduct. The Warden told Grievant that he had requested the investigation and that he was not at liberty to discuss the investigation. He told Grievant that she would be interviewed soon because the Investigators had already interviewed other staff. On October 1, 2010, Grievant called the Investigator and told him she knew that the Special Investigations Unit was investigating her. She asked when the Warden had requested the Special Investigations Unit to initiate an investigation of her. The Investigator told Grievant he could not answer her question but that she would be interviewed regarding the allegations. On October 4, 2010, Grievant was interviewed by the Investigator.

In the spring or summer of 2010, Officer Pr was speaking with

Grievant in the control room of the Special Housing Unit. While they were talking, Captain M entered the unit and went into the counselor's office. Officer Pr and Grievant continue their conversation. Captain M entered the Control Room and then left the housing unit. After Captain M left the Special Housing Unit, Grievant said in anger "[Captain M] does not know who he is f--king with. I am a patient person and I will get mine in the end." Grievant's statement made Officer Pr feel uneasy. He was concerned that if Grievant was willing to "go after" a higher ranking employees such as the Captain M, Grievant would be willing to "go after" Officer Pr if he did something to Grievant.

The CONCLUSIONS OF POLICY listed by the hearing officer are 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."

Group III Written Notice Regarding Tobacco Free Policy

"[Failure to ... comply with applicable established written policy" is a Group II offense." The Agency adopted a policy that the Facility would be tobacco free beginning February 1, 2010. Grievant was aware of the policy and was obligated to comply with and enforce that policy. On several occasions including on September 15, 2010, Grievant brought cigarettes into the Facility and hid them behind the control panel in the sally port. Grievant acted contrary to policy thereby justifying the issuance of a Group II Written Notice.

In certain extreme circumstances an offense listed as a Group II Notice may constitute a Group III offense based on the unique impact that a particular offense has on the Agency. In this case, the Agency has presented sufficient evidence to support the elevation of the Group II offense to a Group III offense. On many occasions, Grievant was the highest-ranking security officer at the Facility. If she chose to disregard a policy, the Agency was no longer able to enforce that policy on its employees. Grievant not only violated the tobacco policy, she did so in plain view of subordinate staff. Through her example as a supervisor, Grievant undermined the Agency's ability to enforce the tobacco policy on its employees. Grievant's behavior created a unique impact on the Agency thereby justifying the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant argued that she was removed from employment for smoking

although others who continued to smoke at the Facility were not removed from employment. The evidence showed that Grievant was not removed solely for smoking. The evidence showed that Grievant was removed from employment because she held a senior leadership position at the Facility and was responsible for disciplining subordinate staff whom she observed smoking at the Facility. Grievant violated the Facility smoking ban in front of subordinate staff.

Group III Written Notice Regarding Grievant's Daughter's Wedding.

Operating Procedure 101.3 governs Standards of Ethics and Conflict of Interest. This policy requires:

> Employees of the Department shall conduct themselves by the highest standards of ethics and that their actions will not be construed as a conflict of interest or conduct unbecoming an employee of the Commonwealth.

The Agency contends that Grievant significantly orchestrated the rearranging of multiple staff members schedules in order for subordinate staff to work at her daughter's wedding on August 14, 2010. The Agency asserted that Grievant received a significant personal financial gain from her actions and created hostility among subordinate staff. The Agency claimed the Grievant's actions could be construed as a conflict of interest and contrary to the goals and mission of the Department and that she undermined her effectiveness as a supervisor.

The Agency has not presented sufficient evidence to show that Grievant violated Operating Procedure 101.3. The focus of this policy is on prohibiting employees from benefiting from their contractual relationships. It is not written with sufficient detail to place Grievant on notice that asking subordinate staff to cook at her daughter's wedding would be prohibited by policy. Officer L and Officer C volunteered to assist Grievant. They were not coerced. They were not compensated for their work. The gift they received was given to all individuals who helped at the wedding. Their actions were consistent with their behavior on July 4, 2010 when they cooked without compensation to benefit staff at the Facility. The Agency accepted the free services of Officer Land Officer C as did Grievant.

The Agency argued that Grievant canceled the scheduled leave of Officer W so that he would work on August 14, 2010 and Officer L and Officer C would be able to cook at Grievant's daughter's wedding. Although Grievant may have had a motive to cancel Officer W's scheduled leave on August 14, 2010, insufficient evidence exists to establish that Grievant canceled Officer W's leave. Grievant denied erasing Officer W's name from the leave schedule. Officer W's leave for the dates of August 13 and August 15, 2010 was also canceled, but those dates did not relate to the date of the

wedding. Grievant obtained permission from Captain W before scheduling Officer L and Officer C for leave on August 14, 2010. The Group III Written Notice issued for violation of Operating Procedure 101.3 must be reversed.

Group Written Notice Regarding Derogatory/Revengeful Comments

"[D]isruptive behavior" is a Group I offense. In the spring or summer of 2010, Grievant told a subordinate employee that Captain M did not know "who he was f-king with" and that she would "get mine in the end." DOC is a quasi-military organization where employees wear uniforms and hold rank. Grievant's comments were disruptive to the Agency because Grievant's comments showed a lack of respect for a superior officer. Grievant's comments upset Officer Pr who became concerned about how Grievant may react to him in the future. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant argued that she did not make negative comments about Captain M and that they had a good working relationship. The Agency presented credible testimony to support its allegation that Grievant made an inappropriate comment about Captain M.

The Agency contends that Grievant should receive a Group II Written Notice instead of a Group I Written Notice. Insufficient evidence was presented to establish that the impact on the Agency was sufficiently severe to raise the Group I offense to a Group II offense. Grievant's comments were more of an expression of her frustration with Captain M during a difficult day at work than an expression of an actionable vendetta against Captain M.

The Agency argued that Grievant violated Operating Procedure 030.4, Special Investigations Unit, because she did not timely report Officer L's violation of his agreement with the Agency's Investigator not to disclose that he had been questioned by the Investigator. Section VII(B) of Operating Procedure 030.4 states:

> Employees who observe or suspect violations of laws or regulations or the DOC standards of conduct ... are required to report their observations or suspicions directly to their supervisor or manager, or to the Organizational Unit Head or to the Office of Inspector General or Special Investigations Unit.

The Operating Procedure does not specify a time period for reporting violations of this section. The evidence showed the Grievant was the individual who advised the Warden that she knew she was under investigation. The Warden did not ask Grievant how she knew this information but advised her she would be interviewed later by the Special Investigations Unit. Although Grievant may not have spoken to the Warden with the intent of informing him of Officer L's breach of the agreement, the effect of Grievant's communication was to inform the Agency of Officer L's

action. When Grievant was asked later how she knew she was under investigation, she was truthful. Grievant complied with Operating Procedure 030.4 albeit inadvertently.

Mitigation

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,* U[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.

Grievant contends the Group III Written Notice regarding smoking should be mitigated. She argues that the Agency inconsistently applied disciplinary action. She points out that several employees who were smoking after February 1, 2010 were given written counseling instead of disciplinary action. She argues that Sergeant S smoked in front of subordinate employees but he received no disciplinary action.

In order to establish that an agency has inconsistently applied disciplinary action, there must be evidence sufficient to establish that the Agency inappropriately singled out an individual for disciplinary action. The evidence showed that employees who were caught smoking received written counseling. Grievant was disciplined for more than just smoking at the Facility. She held one of the highest ranking positions at the Facility and was expected to serve as a role model for other employees. She was also expected to enforce the Facility policy prohibiting smoking. Instead, Grievant admitted to smoking in front of Sergeant S and Officer S. She hid cigarettes behind the control panel and was observed doing so by Officer S. Grievant gained entry to the sally port for personal reasons instead of business reasons.

The Agency similarly treated Grievant and Officer S. Officer S also received a Group III Written Notice. She was disciplined for smoking at the Facility but also for permitting other employees to enter the sally port so that they could hide cigarettes and smoke cigarettes contrary to policy. Officer S did not record in her logbook the times when Grievant entered the sally port to use tobacco products. Officer S was attempting to protect Grievant.

The Agency treated Grievant differently from Sergeant S. Sergeant S smoked cigarettes in front of Officer S. The Agency did not take disciplinary action against Sergeant S because the Warden did not believe he could prove that Sergeant S smoked in front of a subordinate. Sergeant S denied smoking in front of any subordinates. The Warden was unable to find a sufficient number of employees to confirm that Sergeant S smoked in front of them. The Warden believed he lacked sufficient evidence to support the issuance of a Written Notice to Sergeant S. The Hearing Officer will not second guess the Warden's decision regarding the weight of evidence he believed was necessary to support taking disciplinary action against Sergeant S. It is clear to the Hearing Officer that the Warden would have taken disciplinary action against Sergeant S if he had been able to develop sufficient evidence to do so.

Grievant's length of service and otherwise satisfactory work performance are not sufficient to mitigate the Agency's disciplinary action. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce further the disciplinary actions.

Retaliation

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity; (2) suffered a materially adverse action; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn there from may be considered on the issue of whether the Agency's explanation was pretextual.

Grievant engaged in protected activity when she filed a grievance in September 2010. Grievant suffered a materially adverse action because she received disciplinary action. Grievant has not established a link between her protected activity and the materially adverse action. The Warden denied taking action against Grievant because of her September 2010 grievance. His denial was credible. The Agency did not take disciplinary action against Grievant as a pretext for retaliation.

The hearing officer directed the following in his DECISION:

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal regarding bringing into and using tobacco products at the Facility is upheld. The Group III Written Notice of disciplinary action regarding having employees cook at her daughter's wedding is rescinded. The Group II Written Notice of disciplinary action regarding making derogatory/revengeful comments is reduced to a Group I Written Notice.

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 her appeal to DHRM, the employee challenged the hearing decision on the basis that "…the Hearing Decision contains substantial error with regard to the proper application of applicable state/agency policy, which policy is relevant and pertinent to key aspects of the EDR case." More specifically, the grievant raised the issues that the hearing officer approved the (1) agency's action of elevating to a Group III with termination a violation that is normally a Group II Written Notice and the agency and (2) the agency taking disciplinary action against the grievant approximately several months after the violation occurred. The DHRM will address the challenges as follows.

Concerning elevating the Group II Written Notice to the level of a Group III Written Notice, this Agency has determined that DHRM Policy No. 1.60 gives agencies that option based on the impact of the violation. Thus, DHRM will not intercede with application of this part of the decision.

Concerning the delay in taking disciplinary action for an alleged violation, it is the intent of DHRM Policy No. 1.60 for agencies to take disciplinary action as soon as practicable after the violation is discovered. In his reconsideration decision, the hearing officer stated, in relevant part, the following:

> DHRM Policy 1.60 does not establish a limitation of actions such that the Agency's failure to timely issue disciplinary action creates an employee's immunity from receiving disciplinary action. DHRM Policy 1.60 does not provide a basis to reverse disciplinary action because it was not timely issued. When agencies fail to timely issue disciplinary action, the question becomes whether the witnesses are able to remember events with sufficient clarity as to enable the Hearing Officer to make findings of fact. The several month delay in this case was not sufficient to undermine the Hearing Officer's ability to determine Grievant's behavior. Grievant had adequate notice of the allegations against her and had the opportunity to present her defenses to the allegations. She was not denied procedural due process. The Agency's inability to establish the specific date and time of Grievant's behavior is not fatal to its case. The Agency was able to present credible evidence regarding Grievant's behavior and the season of the year in which it occurred. Those facts are sufficient for the Agency to meet its burden of proof in this case.
>
> While this Department does not condone excessive delays before initiating

disciplinary action, we concur with the hearing decision that there is no misapplication of policy. Thus, we will not intercede with the application of this part of the decision.

Therefore, this Department has no basis to intercede with the application of this decision.

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