Issue: Group III Written Notice with demotion and pay reduction (failure to follow policy); Hearing Date: 02/16/12; Decision Issued: 03/23/12; Agency: DOC; AHO: John V. Robinson, Esq.; Case No. 9758; Outcome: No Relief – Agency Upheld; **Administrative Review: AHO Reconsideration Request received 04/05/12; Reconsideration Decision issued 04/18/12; Outcome: Original decision affirmed; Administrative Review: EDR Admin Review request received 04/05/12; EDR Ruling No. 2012-3318 issued 06/04/12; Outcome: AHO's decision affirmed.**

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 9758

Hearing Officer Appointment: January 18, 2012
Hearing Date: February 16, 2012
Decision Issued: March 23, 2012

PROCEDURAL HISTORY, ISSUES AND PURPOSE OF HEARING

Pursuant to his two (2) Grievance Form As, both dated November 5, 2011, the Grievant requested an administrative due process hearing to challenge a change in position and demotion to lower pay band effective October 25, 2011, pursuant to a Group III Written Notice of October 20, 2012 issued by Management of the Department of Corrections. The Virginia Department of Employment Dispute Resolution ("EDR") has stated in its letter of January 12, 2012 that the two (2) grievances shall be considered consolidated for purposes of a single hearing because they challenge the same management action. The Grievant is seeking the relief requested in his two (2) Grievance Form As, including reinstatement and he is also seeking back-pay and restoration of all benefits if he prevails.

The parties duly participated in a first pre-hearing conference call scheduled by the hearing officer on Tuesday, January 24, 2012 at 4:30 p.m. The Grievant, the Department's advocate, a trainee for the Department's advocate and the hearing officer participated in the call. The Grievant confirmed he is seeking the relief requested in his two (2) Grievance Form As, namely, reinstatement and confirmed during the call that he is also seeking back-pay and restoration of all benefits. The Grievant also notified the parties that he had recently obtained an advocate and provided the name and contact information for his advocate. On Wednesday, January 25, 2012, the hearing officer's legal assistant spoke with both advocates, simultaneously, and confirmed all of the information discussed in the first pre-hearing conference call.

Following the pre-hearing conference call, the hearing officer issued a Scheduling Order entered on January 25, 2012 (the "Scheduling Order"), which is incorporated herein by this reference.

At the hearing, the Grievant was represented by his advocate and the Agency was represented by its advocate. Both parties were given the opportunity to make opening and

closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing[1]. The hearing officer used the recording equipment and tapes supplied by the Agency. However, while listening to the tapes for his decision the hearing officer mistakenly recorded over a relatively small segment consisting mostly of some of the rebuttal testimony. Accordingly, the parties, the advocates and the hearing officer reconvened to restore the record on March 16, 2012. *See* Tape 3.

No open issues concerning non-attendance of witnesses or non-production of documents remained by the conclusion of the hearing.

In this proceeding, the Agency bears the primary burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances. Of course, the Grievant bears the burden of proof concerning the affirmative defenses he has raised.

APPEARANCES

Representative for Agency
Grievant
Witnesses

FINDINGS OF FACT

1. At the time of the discipline which is the subject of this proceeding, the Grievant was employed as a Correctional Sergeant ("C/O"), a security position, by the Agency at a correctional facility (the "Facility").

2. Security and safety at the Facility of staff, offenders and the public are paramount.

3. As a C/O, the Grievant is responsible, amongst other things, for providing security, custody, and control over inmates at the institution.

4. The Grievant was hired by the Department on November 1, 1995. The Grievant was promoted to sergeant and came to the Facility on July 25, 2007.

5. Warden M started at the Facility on November 18, 2011. Before that time, Warden D was the warden.

[1] References to the agency's exhibits will be designated AE followed by the exhibit number and references to the Grievant's exhibits will be designated GE followed by the exhibit number.

6. On September 12, 2011, Warden D and the Chief of Security met with the Grievant. Warden D discussed with the Grievant an Order of the Juvenile and Domestic Relations District Court entered by the Judge on September 12, 2011 (the "Order"). AE 2, page 10.

7. The Grievant also signed the Order on September 12, 2011. AE 2, page 10.

8. On the face of the Order, the Grievant's attorney entered a plea of no contest on behalf of the Grievant. AE 2, page 10.

9. The Order is the basis for the discipline and provides in part:

> **FINDINGS OF THE COURT**: that there is sufficient evidence to convict the defendant of the charge. The Court further finds that the defendant is eligible for a deferred disposition pursuant to Virginia Code section 18.2-57.3.
>
> **IT IS ORDERED THAT**: the defendant is place [sic] on probation upon the following terms and conditions:
>
> i. Complete the Anger Management Program or any other program deemed necessary and appropriate by [Provider].
> ii. Be of good behavior of not less than two years; and
> iii. Also, contact [Provider] within 30 days of entry of this order and enroll and attend the program. The program must be completed within 6 months from date of entry of this order and a certificate filed with the court by 3/5/12 at 8:00 am or the defendant must appear before the court on that date and time.
>
> The Court is to be notified of failure to fully comply with this Order, in which event, the Court reserves the right to make such further disposition of the matters before the Court, as it may deem proper.
>
> **A copy of this order shall be forwarded to [Provider]**.
>
> This case is continued to 3/5/2012 at 8:00 am for presentation of the certificate from the anger management program and continued to 10/7/13 at 8:00 am and as long as the defendant complied with all terms and conditions of probations, no appearance is required; if the defendant failed to comply then he shall appear at that time.

AE 2, page 10.

10. The Warrant of Arrest charged that the Grievant on or about June 26, 2011 did unlawfully in violation of Section 18.2-57.2 of the Code of Virginia assault and batter [J], age 11, who is a family or household member. AE 2, page 11.

11. At their first meeting on September 12, 2011, Warden D went over the Order with the Grievant, explained the seriousness of the charges, the beginning of the disciplinary considerations, the due process procedure to be followed and the need to protect the Department.

12. The Grievant was shocked that the Department was considering removing him from his security position, to such an extent that the Chief of Security called the Grievant later out of concern for him.

13. At the second due process meeting on September 22, 2011, Warden D referred the Grievant to the Department's Operating Procedure 40.1 "Litigation" policy ("40.1") explaining why the Department needed to take steps to protect itself in view of the Order. The Grievant was given an opportunity to respond to the Department's charges and availed himself of this opportunity stressing, amongst other things, his approximately 17 years of service and positive evaluations in mitigation.

14. On October 18, 2011, Warden D again met with the Grievant a third time. Warden D had in the meantime had discussions about the matters and the potential discipline with the Regional Office of the Department and with the Human Resources department at the Central Office in Richmond. In part, this was done in the Department's effort to maintain consistency of discipline for like offenses.

15. The Grievant rejected the Department's offer to reduce the level of considered discipline from a Group III to a Group II if the Grievant would drop his grievance and accept responsibility for the import of the Order in view of 40.1.

16. Warden D and the Grievant met next on October 20, 2011. Again the Chief of Security was present. A Group III Written Notice was issued to the Grievant for "Violation of Operating Procedure 040.1.IV.B.4: On or about June 26, 2011, you were charge [sic] with Assault and Battery on a family/household member. On September 12, 2011, in the [Name of County] Juvenile and Domestic Relations Court you entered a plea of No Contest. The court found that there was sufficient evidence to convict and further found that you were eligible for a deferred disposition prusuant to Virginia Code 18.2-57-3. You were ordered to complete an anger management program and to be of good behavior for a period of not less than two years. The court case was continued until October 7, 2013. A

conviction of said charge would make you ineligible for a security position. The Court indicated they had enough evidence to convict, therefore keeping you in a security position is not in the best interest of the agency and raises liability or negligence concerns." AE 1.

17. The Chief of Security testified that the Department considered numerous factors in reassigning the Grievant to a non-security postal position in addition to the need to protect itself from litigation and liability, including the nature of the domestic violence, the Court ordered anger management program, the Court ordered two year probation period, the stressful environment at the Facility and the nature of the charged domestic violence.

18. The testimony of the Agency witnesses was credible. The demeanor of such witnesses was open, frank and forthright.

ADDITIONAL FINDINGS, APPLICABLE LAW, ANALYSIS AND DECISION

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

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

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

In disciplinary actions, the Agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The operative Agency Standards of Conduct (the "SOC") are contained in Agency Operating Procedure 135.1 ("Policy No. 135.1"). AE 6. The SOC provide a set of rules governing the

professional and personal conduct and acceptable standards for work performance of employees. The SOC serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

Pursuant to Policy No. 135.1, the Grievant's conduct could clearly constitute a terminable offense, as asserted by the Agency. Here, the Agency elected not to terminate but instead mitigated the disciplinary sanction to demotion to a lower pay band with 10% disciplinary pay reduction effective October 25, 2011 and reassignment from C/O to Postal Assistant. AE 1. Clearly, the punishment is not too harsh or unjust.

Policy No. 135.1 provides in part:

> (V)(D) **THIRD GROUP OFFENSES (GROUP III)**:
>
> 1. These offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.
>
> *2.* *Group III* offenses include, but are not limited to:
>
> . . . .
>
> z. Violation of DOC Operating Procedure 040.1 *Litigation,* (considered a Group III offence depending upon the nature of the violation)
>
> . . . .
>
> AE 6.

Policy No. 135.1 also provides in part:

V. GROUPS OF OFFENSES AND MITIGATING CIRCUMSTANCES

A. General

. . . . . .

3. Appropriate disciplinary action for employees who are facing criminal charges or convictions (both felonies and misdemeanors) must be assessed as to the employee's position, level of responsibility, and ability to perform the functions of the position including the ability to carry out all job requirements, the nature of the conviction, the impact the conviction has on the [Department] and its employees, the public, and its perception of the [Department] and other mitigating factors including prior discipline, length of service and performance.

a. Charges or situations that involve crimes against persons are subject to a disciplinary charge that could include termination.

b. A conviction is not necessary to proceed with a disciplinary action. The Unit Head must determine whether the evidence is sufficient to have an impact on the [Department], its employees, the public and its perception of the [Department].

In this instance, the Agency appropriately determined that the Grievant's violation of Agency policies concerning 40.1 constituted a Group III Offense.

As previously stated, the Agency's burden is to show upon a preponderance of evidence that the discipline was warranted and appropriate under the circumstances. The hearing officer agrees with the Agency's position that the Grievant's disciplinary infractions could have warranted termination by Management. The Agency reasonably mitigated the discipline under the circumstances and did not end the Grievant's employment but demoted the Grievant from his C/O role to the position of Postal Assistant. Accordingly, the Grievant's behavior constituted misconduct and the Agency's discipline is consistent with law and consistent with policy, being properly characterized as a terminable offense.

EDR's *Rules for Conducting Grievance Hearings* provide in part:

> The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances" such as "conditions that would compel a reduction in the disciplinary

> action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance." 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. *Rules* § VI(B) (alteration in original).

If the Department does not consider mitigating factors, the hearing officer should not show any deference to the Department in his mitigation analysis. In this proceeding the Department did consider mitigating factors in disciplining the Grievant.

While the Grievant did not specifically raise mitigation in the hearing or in his Form A and while the Grievant might not have specified for the hearing officer's mitigation analysis all of the mitigating factors below, the hearing officer considered a number of factors including those specifically referenced herein, in the Written Notice and all of those listed below in his analysis:

1. the Grievant's long and exemplary service to the Agency;

2. the fact that the Grievant received an overall rating of "Exceeds Contributor" in his most recent performance evaluation (GE N);

3. the often difficult and stressful circumstances of the Grievant's work environment;

4. the Grievant's professional demeanor in the due process meetings with the Warden and the Chief of Security; and

5. the Department's mistaken conclusion that the Grievant could not carry a weapon (*see* discussion below).

EDR has previously ruled that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518; and EDR Ruling 2010-2368. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. *Id.*

Here the offense was very serious. Clearly, the hearing officer would not be acting responsibly or appropriately if he were to reduce the discipline under the circumstances of this proceeding.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, and the SOC, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

In this proceeding, the Agency's actions were consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer.

The Grievant has argued that "[t]he written notice provided me on 10/20/2011 indicated that keeping me in a security position was not in the best interest of the agency, therefore I received unequal treatment/discrimination based on race and position: **OP135.1.V.D.2.M**, as another [Facility] employee with multiple convictions was not removed from his security position. The employee's conviction demonstrated inappropriate judgment especially for a supervisor and further demonstrates a lack of integrity thus could constitute negligence in regard to the agency's duties to the public. **The facts supporting this are**: On 11-26-2007, Lt. [B] was convicted of two offenses, Improper Driving and Fail to stop for an accident with property damage . . . Lt. [B] was convicted versus in my case I received a deferred or pending disposition, however, despite the conviction he was not reassigned to a non-security position." AE 2, page 1.

The hearing officer has not found any probative evidence of racial discrimination and disparate treatment. As the Agency points out, Lt. [B] is white while the Assistant Warden who issued the discipline is black.

The disciplinary offenses are very different and raise entirely different considerations for the policy mandate in 40.1 that "[t]hose situations should be handled based on the nature of the charge and evidence presented and consideration should be given to whether the criminal charge is of such nature that to continue the employee in his or her assigned position would be in the best interest of the agency." AE 4.

Lt. [B] was disciplined in 2007 following charges he received in General District Court. The Lieutenant pled to a lesser charge of improper driving reduced from reckless driving, and pled guilty to leaving the scene of an accident. Lt. [B] was disciplined based on what the

Regional Office recommended was consistent with other disciplines for convictions of traffic violations at that time in 2007.

On or about June 26, 2011, the Grievant was charged with Assault and Battery on a family/household member. On September 12, 2011, in the County Juvenile and Domestic Relations Court, the Judge found "that there is sufficient evidence to convict the defendant of the charge" and further found that the Grievant was eligible for a deferred disposition pursuant to Va. Code § 18.2-57.3. The Grievant was placed on two years of probation, was to complete an anger management program and to be of good behavior for a period of not less than two years. The court case was continued until October 7, 2013. AE 2, page 10.

However, the Grievant's advocate is correct in his argument that the Court's disposition under Va. Code § 18.2-57.3 does not preclude the Grievant from serving as a security officer at the Facility. The Grievant has not been *convicted* of anything and the Facility does not require its security officers to carry concealed weapons or, from the evidence presented at the hearing, to be eligible for or to have a concealed carry permit.

The Department's mistaken conclusion that the Grievant is prohibited by law from carrying a weapon is not fatal to the discipline imposed for the following reasons. Warden D and the Department considered this factor along with several others in arriving at the decision to reassign the Grievant from his security position to the postal department. In his Written Notice, Warden D emphasized litigation/liability concerns as the primary reason for the reassignment: ". . . keeping you in a security position is not in the best interest of the agency and raises liability or negligence concerns." AE 1. As a practical matter, the Facility does not provide security training (in-service and range) to members of the postal department. This decision is within the purview of Management's right to operate its facility. Nothing in DHRM or Agency policy requires that the discipline be undone because the Warden or Facility made a mistaken decision about the Grievant's right to carry a weapon, especially where this was only one of several factors which went into the decision to reassign the Grievant. Additionally, the decision to impose formal discipline was made collectively with the Region and the Central Office in Richmond, in an effort to make the discipline consistent with like offenses in the past.

The Agency has provided probative evidence through testimony and documentary evidence that indeed the Grievant was disciplined in a similar or more lenient manner than other employees committing similar disciplinary infractions. *See, e.g.*, EDR Case No. 8238 (AE 7).

The Grievant's contention that the due process procedure was not followed is meritless (AE 2, page 13). The rest of the Grievant's arguments can be addressed with reference to the recent decision of the Supreme Court of Virginia in *Va. Polytechnic Instit. and State Univ. v. Quesenberry* (2009). In *Quesenberry*, which involved the university's anti-discrimination and harassment prevention policy, the Court emphasized that the Court of Appeals had strayed from *Barton*, which constituted "the proper review process" and had erred in applying an analysis grounded on "sexual harassment" claims brought under Title VII. The Court emphasized that the focus must be the state agency's "exclusive right" to manage its affairs and operations, as provided by Va. Code § 2.2-3004(B). State agencies, pursuant to this exclusive right to manage,

can and do in the Commonwealth formulate more stringent policies than otherwise provided by applicable law. This is appropriate and contemplated under the statutory framework and grievance procedure. Stated simply, because of the Order, the Grievant violated policy 40.1 and the fact that he has not been convicted and probably will not be convicted of anything, is of no consequence to the determination that he violated the policy.

In EDR Case No. 8975 involving the University of Virginia ("UVA"), a grievant received a Group III Written Notice with removal for falsifying records on five (5) separate dates. Although the evidence supported only one of those instances, the hearing officer upheld the disciplinary action. The Grievant appealed to EDR asserting that the disciplinary action was inappropriate in that the grievant did not engage in as much misconduct as alleged by UVA. The Director upheld the hearing officer's decision:

> The grievant's arguments essentially contest the hearing officer's determinations of fact as they relate to the proper sanction for the misconduct. Such determinations are within the hearing officer's authority as the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate. In this case, while it appears that the hearing officer did find that the grievant did not engage in as much misconduct as alleged by the University, it was still determined that the grievant had falsified a state record with the requisite intent, generally a Group III offense under the Standards of Conduct. [footnote omitted] Upon review of the record, there is no indication that the hearing officer abused his discretion in making these findings or that the facts were not supported by the hearing record. Consequently, this Department has no basis to disturb the hearing decision.

EDR Ruling Number 2009-2192; February 6, 2009.

The hearing officer decides for the offense specified in the written notice (i) the Grievant engaged in the behavior described in the written notice; (ii) the behavior constituted serious misconduct; (iii) the Department's discipline was consistent with law and policy and that there are no mitigating circumstances justifying a further reduction or removal of the disciplinary action.

DECISION

The Agency has sustained its burden of proof in this proceeding and the action of the Agency in issuing the written notice and in disciplining the Grievant and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the Agency's action concerning the Grievant is hereby upheld, having been shown by the Agency, by a preponderance of the evidence, to be warranted by the facts and consistent

with law and policy. The Grievant failed to sustain his burden of proof concerning the affirmative defenses he raised.

APPEAL RIGHTS

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

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

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

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

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

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

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

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or

2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

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

ENTER:

_____

John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 9758

Hearing Officer Appointment: January 18, 2012
Hearing Date: February 16, 2012
Original Decision Issued: March 23, 2012
Review Decision Issued: April 18, 2012

ISSUES

The Virginia Department of Employment Dispute Resolution's ("EDR") Rules for Conducting Grievance Hearings (the "Rules") provide that the hearing officer's decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision (Rules, Section VII). The grievant has raised all of the three types of review in this proceeding:

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

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

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

If multiple requests for administrative review are pending, a hearing officer's decision on reconsideration or reopening should be issued before any decisions are issued by the DHRM Director or the EDR Director. Rules, Section VII.

The hearing officer should issue a written decision on a request for reconsideration or reopening within 15 calendar days of receiving the request. Rules, Section VII.

The hearing officer received the Grievant's Request for Hearing Officer to Reconsider his Decision on April 5, 2012. Accordingly, the deadline for the hearing officer's reconsideration decision is April 20, 2012.

DECISION

The hearing officer accepts the Grievant's position that "he and his attorney mistakenly believed that the language in the order would not negatively impact his employment status and thus did not challenge the language in the order. The timeframe for the appeal in [County] Court system had expired before the Grievant was notified of the disciplinary actions and decision by Warden D." Grievant's Reply of April 17, 2012.

However, the hearing officer also agrees with the Agency's position that the hearing officer lacks subject matter jurisdiction or the power to invalidate or question an official court Order. AE 2, page 10.

Accordingly, in his request to reconsider the decision, the Grievant has not offered any probative newly discovered evidence. Similarly, the grievant has not presented probative evidence of any incorrect legal conclusions by the hearing officer as the basis for such a request. The evidence presented by the Agency at the hearing was credible and compelling. For the reasons provided herein and in the Agency's letter brief of April 13, 2012, the hearing officer hereby denies the grievant's request for reconsideration directed to him and hereby affirms his decision that the Agency has met its burden of proving by a preponderance of the evidence that the discipline was warranted and appropriate.

As his role in this proceeding is now ended, the hearing officer will forward the record (including the tapes of the hearing) to EDR and the Grievant should request copies of the tapes of the hearing directly from EDR.

APPEAL RIGHTS

The hearing officer attaches hereto and incorporates herein Section VII of the Rules.

ENTER:

_____

John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List.