Issue: Group II Written Notice with Suspension (unsatisfactory performance and failure to follow instructions); Hearing Date: 05/29/12; Decision Issued: 06/06/12; Agency: DJJ; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 9812; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION

In the matter of: Case No. 9812

Hearing Date: May 29, 2012
Decision Issued: June 6, 2012

PROCEDURAL HISTORY

Grievant is a security officer for the Department of Juvenile Justice ("the Agency"), with at least 15 years of service with the Agency as of the offense date. On February 17, 2012, the Grievant was charged with a Group II Written Notice, with five days suspension without pay, for unsatisfactory performance and failure to follow instructions and/or policy on January 18, 2012. The Grievant had no other active Written Notices.

Grievant timely filed a grievance to challenge the Agency's disciplinary action. The outcome of the resolution steps was not satisfactory to the Grievant and he requested a hearing. On May 9, 2012, the Department of Employment Dispute Resolution ("EDR") appointed the Hearing Officer. During a pre-hearing conference, the grievance hearing ultimately was scheduled for the first date available between the parties and the hearing officer, May 29, 2012, on which date the grievance hearing was held at the Agency's facility.

Both sides submitted documents for exhibits that were, without objection, accepted into the grievance record, and they will be referred to as Agency's or Grievant's Exhibits.[1] The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant
Advocate for Agency
Witnesses

[1] The parties jointly moved to submit post-hearing a video disc of the precipitating event recorded by the Rapid Eye camera. Neither side identified, prior to the hearing, the video disc as a document expected to be used for the evidentiary hearing, and it was not subject of any formal request or order for documents. The evidentiary record was left open for receipt of the disc, which was received on May 30, 2012. However, the disc submitted was unreadable by the hearing officer's equipment and, consequently, not considered. Several still pictures from the video were admitted into the grievance hearing record. Agency Exh. 4.

ISSUES

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

The Grievant requests rescission or reduction of the Group II Written Notice and applicable relief.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

APPLICABLE LAW AND OPINION

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

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

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .
> To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of

employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Agency relied on the Standards of Conduct, promulgated by the Department of Human Resource Management, Policy 1.60, which defines Group II offenses to include acts of misconduct of a more serious [than a Group I offense] and/or repeat nature that require formal disciplinary action. This level is appropriate for offenses that significantly impact business operations and/or constitute neglect of duty, insubordination, the abuse of state resources, violations of policies, procedures, or laws. An example of a Group II offense is failure to follow supervisor's instructions or comply with written policy. Agency Exh. 7.

The Agency's internal operating procedure No. IOP-212, *Movement and Supervision of Residents*, provides, "[s]taff shall always position themselves where there will be maximum sight supervision and not be 'blind spots' in the coverage/supervision area." IOP-212-4.2(3). Agency Exh. 6.

The Agency's administrative directive 05-009.1, *Staff Code of Conduct*, prohibits "[t]reating wards, probationers, or parolees in a manner that is inconsistent with established Department procedures." Agency Exh. 7.

The Offense

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

The Agency employed Grievant as a security officer, with at least 15 years of service with the Agency. The Grievant has no other active disciplinary actions. On the evening of January 18, 2012, the Grievant was one of two officers supervising a unit of juvenile offenders. Offender H was involved in a dispute with Offender R, and the Grievant told Offender H to "handle it." The involvement escalated ultimately to a physical altercation between Offenders H and R.

The Grievant and his co-officer were seated together at the front desk during the time the two offenders were engaged in the unruly behavior toward the rear of the dorm. In response to Offender H seeking supervisor intervention regarding his situation with Offender R, the Grievant told him to handle it and stay in his bed. Offender did not stay in his bed, but engaged in escalating behavior to the point of a physical altercation with Offender R. Ultimately, the Grievant and his co-officer responded to the disruption, along with other Agency staff.

The Agency witnesses, including the shift commander, operations sergeant, and the institutional training officer testified that the corrections officers are taught to use techniques and responses that de-escalate situations to their lowest levels. The Agency witnesses testified that telling an offender to "handle it" sends the opposite message and risks escalation, which is what occurred in the present matter. The Agency witnesses also testified that the Grievant was among the best corrections officers on staff.

The Grievant testified that he did not dispute the essential facts, but, the meaning of his remark to "handle it" was a reminder to Offender H to control internally his emotions. The Grievant's co-officer testified consistently with other Agency witnesses that the Grievant's remark was inappropriate and that he would not have told the offender to "handle it."

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings,* § VI; *DeJarnette* v. *Corning,* 133 F.3d 293, 299 (4th Cir. 1988).

Based on the evidence, I find that the Grievant did, in fact, make the verbal statement to Offender H to "handle it" and was not positioned as expected in the dorm unit. While the Grievant's explanation that his statement was intended to reinforce positive coping skills, the preponderance of the evidence shows the Grievant's statement and actions had the opposite effect and contributed to the escalation of the incident. The offense, unless circumstances warrant mitigation, satisfies the Group II level of discipline as a failure to follow agency policy.

Pursuant to applicable policy, management has the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, *even if he would levy lesser discipline,* 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*. A hearing officer does not have the same discretion for applying mitigation as management does.

The Grievant argues, reasonably, that the Agency could have exercised discipline along the continuum short of a Group II Written Notice. The Agency had the discretion to elect less severe discipline. Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution…." Va. Code § 2.2-3005. Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution." Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee

received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant contends the disciplinary action was unwarranted, extreme, or should be mitigated. Grievant contends his otherwise good work history, service and performance should provide enough consideration to mandate a lesser sanction than a Group II with five days suspension. However, length of service, alone, is insufficient for a hearing officer to overrule an agency's mitigation determination. EDR Ruling No. 2007-1518 (October 27, 2009) held:

> Both length of service and otherwise satisfactory work performance are grounds for mitigation by agency management under the Standards of Conduct. However, a hearing officer's authority to mitigate under the *Rules for Conducting Grievance Hearings* is not identical to the agency's authority to mitigate under the Standards of Conduct. Under the *Rules for Conducting Grievance Hearings*, the hearing officer can only mitigate if the agency's discipline exceeded the limits of reasonableness. Therefore, while it cannot be said that either length of service or otherwise satisfactory work performance are *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which these factors could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings,* § VI; *DeJarnette* v. *Corning,* 133 F.3d 293, 299 (4th Cir. 1988).

The Agency presents a position in advance of its role as guardian of public and institutional integrity regarding the security of the facility. The Grievant's conduct was, at some level, involved in the escalation of altercation between Offenders H and R and warrants disciplinary action. The hearing officer accepts, recognizes, and upholds the Agency's important role in safeguarding the public and offenders in its charge, as well as the valid public policies promoted by the Agency and its policies. The applicable standards of conduct provide stringent expectations of corrections officers. Accordingly, I find no mitigating circumstances that allow the hearing officer to reduce the Agency's action regarding the Group II Written Notice outside the bounds of reasonableness.

DECISION

For the reasons stated herein, the Agency's issuance of the Group II Written Notice is **upheld**.

APPEAL RIGHTS

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

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

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

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

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

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

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

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

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

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.

Cecil H. Creasey, Jr.
Hearing Officer