

Issue: Group III Written Notice with Suspension (engaging in conduct that undermines the agency's effectiveness); Hearing Date: 10/23/12; Decision Issued: 10/29/12; Agency: VSP; AHO: Lorin A. Costanzo, Esq.; Case No. 9921; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 11/13/12; EDR Ruling No. 2013-3476 issued 01/22/13; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 02/07/13; DHRM Ruling issued 02/21/13; Outcome: AHO's decision affirmed.**

**COMMONWEALTH OF VIRGINIA
OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

DECISION OF HEARING OFFICER

In the matter of: Grievance Case No. 9921

**Hearing Date: October 23, 2012
Decision Issued: October 29, 2012**

PROCEDURAL HISTORY

Grievant was issued a Group III Written Notice with 5 day suspension on May 10, 2012 for Written Notice Offense Codes/Categories "99", (Other). The *Nature of Offense and Evidence* indicated:

The employee provided another employee with a biscuit, consumed by the other employee, which was knowingly adulterated with O. C. (Oleoresin Capsicum) spray by the first employee which is an unauthorized use of a less lethal weapon. The aforementioned actions constituted a violation of General Order ADM 12.02, paragraph 13.b. (20) that is a Group III offense which states, "Engaging in conduct, whether on or off the job, that undermines the effectiveness or efficiency of the Department's activities. This includes actions which might impair the Departments reputation as well as the reputation or performance of its employees."

On June 8, 2012 Grievant timely grieved the issuance of the Group III Written Notice with 5 day suspension. When matters were not resolved to the satisfaction of Grievant, on August 6, 2012 Grievant requested qualification of his grievance for hearing. Agency Head qualified matters for hearing on August 23, 2012. On September 25, 2012 a hearing officer was appointed by the Office of Employment Dispute Resolution. A pre-hearing telephone conference was held on September 27, 2012 with Grievant and Agency Advocate. After the pre-hearing conference was held Hearing Officer was notified that an attorney would be representing Grievant. A grievance hearing was held at Agency facility on October 23, 2012.

Grievant offered 8 pages of documents which were admitted into evidence by agreement. Agency presented a three ring binder of documents for admission tabbed A through Z with an additional tab designated "Mc". Agency's documents under tabs A through C and under tabs F through V, including documents under tab "Mc", were admitted into evidence. Documents under tabs D and E were not admitted. There were no documents under tabs W through Z.

The top portion of page 6 of Tab C was missing. By agreement, a copy of the full page was marked and admitted as page "6A" and placed with page 6 under Tab C of Agency Exhibits.

APPEARANCES AT HEARING

Grievant (who was also a witness)
Grievant's Attorney
Agency's Advocate

Agency Party Designee (who was also a witness)

Other Witnesses:

Sergeant

First Sergeant #1

First Sergeant #2

Captain

Trooper

ISSUES

Whether the issuance of a Group III Written Notice with five day suspension was warranted and appropriate under the circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence more convincing than the opposing evidence.¹

Section 5.8 of the *Grievance Procedure Manual*, provides that the employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline.

FINDINGS OF FACT

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

01. Grievant is a Trooper II and has been employed by Agency for over 6 years.²
02. On December 20, 2011, during an investigation concerning a matter not involving Grievant, Agency received information an individual had placed Oleoresin Capsium (OC) on a biscuit Trooper ate. The individual who placed OC on the biscuit was subsequently identified as Grievant.³
03. Trooper indicated to Agency investigators that during May or June of 2011, while on duty, Grievant placed OC on a biscuit he gave to Trooper and which Trooper ate.⁴
04. Both Trooper and Grievant indicated Grievant's placing OC on the biscuit Trooper ate was a joke. Grievant indicated that no harm was intended. No injury or harm was alleged by Trooper.⁵
05. Grievant does not contest he placed OC on Trooper's biscuit. He indicated to investigators and testified he placed a few drops of OC onto a spoon and applied it to the egg portion of a sausage, egg, and cheese biscuit he gave to Trooper. He and Trooper stated this was a practical joke. Grievant further

¹ Office of Employment Dispute Resolution, *Grievance Procedure Manual*, Sections 5.8 and 9.

² Agency Exhibits Tab C page 26 and Tab S.

³ Agency Exhibits Tab C page 17.

⁴ Agency Exhibits Tab C, page. 17-19, and testimony.

⁵ Agency Exhibits Tab C, page. 17-19, and testimony.

stated no harm was intended. Grievant told Trooper about the OC after Trooper's first bite or two. Even after Trooper was told of OC being placed on his biscuit Trooper finished eating the biscuit. Trooper indicated no harm was done.⁶

06. Oleoresin Capsium (OC) is a derivative of a strain of South American pepper called the Habanera. The oil extract of this pepper is then dried and powdered to microscopic density. Simplified: OC is a derivative of cayenne pepper.⁷

07. OC Aerosol Spray is an aerosol product in which the active ingredients are the five most active compounds of oleoresin capsicum, or cayenne pepper. OC is an oily resin with a yellowish-orange color formulated at a 5.5% concentration. OC is classified as an organic inflammatory agent.⁸

08. Oleoresin Capsium (OC) Spray is issued to Agency sworn employees, including Grievant, who have been trained and certified in its proper use. OC Spray is required to be carried by uniform personnel at all times while on duty and may be carried off-duty also.⁹

09. Officers are required to be trained concerning OC and are required to complete a Departmental approved OC training program prior to being issued OC and a bi-annual recertification is conducted. Grievant has received training on OC.¹⁰

10. Agency has adapted and promulgated policy concerning Oleoresin Capsium (OC) Spray and its authorized use.¹¹

11. Agency training manual insert volume 2, MEMO-2007-No. 11 provides, in pertinent part:

V. AUTHORIZED USES, OPERATION:

- A. OC Aerosol Spray can be used at any time a sworn employee encounters resistance, aggression against himself/herself, or any other violence that may threaten others in the execution of an arrest or in the lawful performance of their duties.
- C. OC Aerosol Spray will not be used in a non-justifiable manner. OC will not be sprayed in a manner so as to engage in horseplay or pranks. ...
- D. Operation: ...
 - 5. All uses of OC constitute use of force. The sworn employee is required to comply with use of force reporting requirements in effect. ...¹²

APPLICABLE LAW AND OPINION

General Order ADM 12.02:

The Standards of Conduct in General Order ADM 12.02 are designated to protect the well-being and rights of all covered employees; to ensure safe, efficient government operations; and to ensure

⁶ Agency Exhibits Tab C, page 19 and testimony.

⁷ Agency Exhibits Tab P, page 2

⁸ Agency Exhibits Tab Q.

⁹ Agency Exhibits Tab G, & Q and testimony

¹⁰ Agency Exhibits Tab B, Tab P, Tab Q, Tab R, and testimony.

¹¹ Agency Exhibits Tabs G, I, P, and R, and testimony.

¹² Agency Exhibits Tab B, Memo-2007-No.11.

compliance with public law. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance and distinguish between less serious and more serious actions of misconduct.

Unacceptable behavior is divided into three types of offenses according to their severity. Group I offenses include types of behavior least 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 of a more severe and/or repetitive nature and are such that an additional Group II offense should normally warrant removal. Group III offenses include acts and behaviors of such a serious nature that a first occurrence should normally warrant removal.

The Standards are intended to be illustrative, not all inclusive. Accordingly, an offense which, in the judgment of the agency head, although not listed in the policy, undermines the effectiveness of the agency's activities or the employee's performance should be treated consistently with the provisions of this policy.

General Order ADM 12.02 paragraph 13 b. (20) provides that Group III offenses include, but are limited to:

Engaging in conduct, whether on or off the job, that undermines the effectiveness or efficiency of the Department's activities. This includes actions which might impair the Department's reputation as well as the reputation or performance of its employees.

General Order ADM 12.02 paragraph 13.c. (1.) sets forth procedures for issuing a Group III Notice and provides as follows:

When issuing an employee a Written Notice form for a Group III offense, management should issue such notice as soon as practicable. Discipline shall normally take the form of the notice and removal or notice and up to 30 workdays (or maximum of 240 hours for non-exempt employees) maximum suspension without pay in lieu of removal. ...

NOTE: Mitigating circumstances may justify the use of demotion, suspension for up to 30 days (or maximum of 240 hours for non-exempt employees), and/or transferred to a position with reduced responsibilities and a disciplinary salary action with a minimum 5% reduction in salary or transfer to an equivalent position in a different work area as an alternative to removal.

General Order ADM 12.02 paragraph 14. (a) provides Group I Written Notices have a two year "active" period from the date the notice was issued and Group III Written Notices shall have a four year "active" period. Furthermore, General Order ADM 12.02 paragraph 14. (b) and 14 (c.) indicate:

- b. Written Notices shall not be removed from the employees personnel file.
EXCEPTION: A Written Notice can be removed if the agency reduces or vacates its action or, through the grievance procedure, it is determined the notice issued is not justified. ...
- c. Written Notices that are no longer active as stated in paragraph a. above shall not be taken into consideration in the accumulation of notices or the degree of discipline for a new offense; however, an inactive notice may be considered in determining the appropriate disciplinary action if the conduct or behavior is

repeated.¹³

MEMO - 2007- NO. 11:

Agency Memo 2007 – No. 11, SUBJECT: Oleoresin Capsicum Training and Use provides:

I. POLICY

It is a policy of this Department to provide the tools necessary for its sworn employees to do their job in a productive, effective, and safe manner. The use of Oleoresin Capsicum (OC) is classified as a use of force and shall be governed by this memo and General Order 24. The sworn employees are issued OC so they may successfully defend themselves from combative, resisting, and/or violent individuals while reducing the risk of inflicting or receiving injury. ...

III. OC AEROSOL SPRAY:

- A. Description: OC Aerosol Spray is an aerosol product in which the active ingredients are the five most active compounds of, or cayenne pepper. OC, oleoresin capsicum, is an oily resin with a yellowish- orange color formulated a 5.5% concentration. OC is classified as an organic inflammatory agent.
- B. Physiological Effects:
 - 2. Effect on the Respiratory System: A direct spray produces immediate respiratory inflammation, which causes uncontrollable coughing, retching, shortness of breath, and gasping for air with a gagging sensation in the throat.
 - 3. Effect on the Skin: A direct spray on the Face causes an immediate burning sensation of the mucous membranes, skin, and inside the nose and mouth.

V. AUTHORIZED USES, OPERATION:

- A. OC aerosol spray can be used at any time a sworn employee encounters resistance, aggression against himself/herself, or any other violence that may threaten others in the execution of an arrest or in the lawful performance of their duties.
- C. OC Aerosol Spray will not be used in a non-justifiable manner. OC will not be sprayed in a manner so as to engage in horseplay or pranks. ...
- D. Operation: ...
 - 5. All uses of OC constitute use of force. The sworn employee is required to comply with use of force reporting requirements in effect. ...¹⁴

General Order OPR 5.01:

General Order OPR 5.01 establishes guidelines for use of force and uniform procedures for reporting and investigating the use of force incidents. General Order OPR 5.01 states, in pertinent part:

- 7. Sworn employees will immediately inform their superior under the following circumstances:
 - c. The sworn employee applies force through the use of a lethal or less lethal weapon.¹⁵

¹³ Agency Exhibits Tab M.

¹⁴ Agency Exhibits Tab B, Memo-2007-No.11.

¹⁵ Agency Exhibits Tab I.

General Order ADM 11.00:

General Order ADM 11.00 paragraph 29 provides, "Sworn employees will exercise sound discretion in carrying out duties and responsibilities. Such discretion should be based on Department policies and procedures, Departmental training, and supervisory recommendations."¹⁶

OC used:

Agency investigation was initiated when an incident involving Grievant's use of Oleoresin Capsium (OC) came to Agency's attention on December 20, 2011 when Trooper was being interviewed by Agency regarding a case. Trooper indicated that during May or June of 2011, while on duty, he consumed a biscuit given to him by Grievant on which Grievant had placed OC.¹⁷

Criminal Investigation not opened:

On January 24, 2012 this matter was referred to BCI for criminal investigation. On January 26, 2012 BCI reviewed the incident with Commonwealth Attorney. Commonwealth Attorney noted that no bodily injury occurred from the incident, which he described as a joke among friends, and Commonwealth Attorney indicated he would not approve prosecution.

By written document dated February 9, 2012, notification was given that a criminal investigation would not be opened. The document indicated, " [Field Office] will not be opening a criminal investigation into this matter as there is no criminal conduct contained within this allegation and its' attachments."¹⁸

Chronology and events:

December 20, 2011 On this date Trooper was being interviewed on matters not involving Grievant. During the interview Trooper referenced an incident of OC being applied to his biscuit in May or June of 2011. This gave rise to Agency concerns and an investigation being initiated. Agency pursued securing from Trooper the name of the individual involved and Trooper indicated Grievant placed OC on his biscuit.¹⁹

January 2, 2012 Trooper provided Agency written statements dated this date which describe Grievant placing OC on his biscuit in May or June of 2011.²⁰

January 24, 2012 On this date Sergeant was assigned the VSP Complaint/Request/Incident Report.²¹ Also a request was received for a BCI Criminal Investigation to be conducted into matters.²²

February 9, 2012 A document of this date indicated a criminal investigation into this matter would not be conducted as there is no criminal conduct contained within the allegations.²³

March 2, 2012 Agency interviewed employee of facility as to employee's knowledge of matters. Employee indicated he did not recall any incident.

¹⁶ Agency Exhibits Tab J.

¹⁷ Agency Exhibits Tab C, page 17-20, page 35, and testimony.

¹⁸ Agency Exhibits Tab C, page 18 and page 36.

¹⁹ Agency Exhibits Tab C, page 17 and testimony.

²⁰ Agency Exhibits Tab C, page 35 and 37.

²¹ Agency Exhibits Tab C, page 34

²² Agency Exhibits Tab C, page 42.

²³ Agency Exhibits Tab C, page 36.

March 6, 2012 Agency interviewed owner of facility concerning his knowledge of matters. Owner indicated he did not recall any such incident. Additionally, on this date Trooper was interviewed regarding whether he suffered any ill effect from consumption of the biscuit with OC and Trooper advised he did not become ill.

March 13, 2012 A document of this date was provided Grievant indicating an administrative complaint, job-related, has been referred to Sergeant for investigation. The document alleged, "During, but not limited to, May or June 2011, while on duty, you provided [*Trooper*] with a biscuit, consumed by him, which you knowingly adulterated with OC spray." The document informed Grievant his responsibilities were set forth in General Order ADM 12.00 and that he was required to respond in writing within 3 work days. He was further advised his rights are set forth in General Order ADM 13.00 of the State Police Manual and Title 9.1, Chapter 5, of the Code of Virginia. Grievant signed indicating he understood his rights.

Grievant was interviewed on 3/13/12 by Sergeant and another individual. Prior to interview both indicated they were members of Internal Affairs and displayed identification. Grievant was given allegation letter of 3/13/12. Grievant was advised of the administration investigation, job related, and advised his responsibilities were set forth in General Order ADM 12.00 and his rights were set forth in General Order ADM 13.00 of the State Police Manual and Title 9.1, Chapter 5, of the Code of Virginia. Grievant stated he understood his rights.

Grievant did not contest matters during the interview. Grievant confirmed he and Trooper were working daylight shift and he arranged to obtain a sausage, egg, and cheese biscuit for Trooper. Both met at facility where, prior to giving him the biscuit, Grievant placed a small amount of his issued OC spray into a spoon and applied the OC to the egg portion of the biscuit. Upon taking one or two bites, Trooper commented the biscuit tasted hot/spicy and concluded Trooper put OC on the biscuit. During conversation Grievant acknowledged he did so. Trooper laughed and then finished eating the biscuit.²⁴

March 18, 2012 In a written memorandum of this date Grievant responded to the administrative complaint of March 13, 2012. Grievant admitted, while on duty, he provided Trooper with a biscuit which Trooper consumed and on which Grievant had placed OC. Grievant admitted he obtained a sausage, egg, and cheese biscuit from a restaurant. He then met with Trooper at facility and, after putting OC on the biscuit, gave it to Trooper. Grievant stated "I sprayed a small amount on a white plastic spoon and dripped a few drops on the egg portion of his biscuit." Upon taking a couple of bites, Trooper commented something of the nature that [**restaurant**] must have changed their sausage, this biscuit is pretty spicy. Both laughed and it was determined he had placed OC on the biscuit. Grievant acknowledged doing so to Trooper. Trooper laughed about the matter and finished eating the biscuit after learning it contained OC.²⁵

March 20, 2012 Grievant was re-interviewed by telephone this date. Interviewer identified himself as a member of the Internal Affairs section and reviewed Grievant's allegation letter dated 3/13/12, Grievant was advised this was an administrative investigation, job related, and that his responsibilities were set forth in General Order ADM 12.00 and his rights were set forth in General Order ADM 13.00 of the State Police Manual and Title 9.1, Chapter 5, of the Code of Virginia. Grievant stated he understood his rights. In this interview Grievant stated he was behind the store counter at

²⁴ Agency Exhibits Tab C, page 18-19.

²⁵ Agency Exhibits Tab C, page 39.

facility when he applied the OC to the biscuit on the counter. Grievant indicated his back was turned toward the clerk and Grievant did not think the clerk observed his actions.²⁶

March 21, 2012 Investigative Report of this date from Sergeant detailed the investigation and his findings. The report, among other matters confirmed that:

- Grievant admitting putting OC on a biscuit consumed by Trooper while both were on duty
- Trooper consumed the remainder of the biscuit even after learning of the OC
- Trooper did not become ill
- Both Trooper and Grievant believed this to be a joke.²⁷

April 12, 2012 (Endorsement No.1) Sergeant's Investigation Report was reviewed by First Sergeant who identified two Group III offenses, six Group II offenses, and one Group I offense and recommended the following allegation be sustained:

During, but not limited to, May or June 2011, while on duty, you provided Trooper with a biscuit, consumed by him, which you knowingly adulterated with OC spray.

First Sergeant concluded that Grievant's actions were in violation of the following:

- a. General Order ADM 12.02 paragraph 11.b.(4) a Group I offense
- b. General Order ADM 12.02 paragraph 4 a Group II offense
- c. General Order OPR 5.01, paragraph 4 a Group II offense
- d. General Order ADM 11.00, paragraph 29 a Group II offense
- e. General Order OPR 1.00, paragraph 22 a Group II offense
- f. General Order ADM 12.b. (5) a Group II offense
- g. Violation of 12/5/09 Orientation Instructions a Group II offense
- h. General Order ADM 12.02 paragraph 13b. (10) ... a Group III offense
- i. General Order ADM 12.02 paragraph 13b. (20) ... a Group III offense

First Sergeant further found mitigating factors including Grievant being completely candid and truthful in his response to the allegations and, although Grievant's action was inside a public store, his action was directed at a co-worker friend. Additionally, it was noted Grievant had been employed since July 10, 2006, performs his duties at the "Contributor" level, and was a dependable and capable member of the Tactical Team.

First Sergeant recommended issuance of only one Group III Written Notice and, in lieu of termination, Grievant be suspended without pay for a period of five workdays for violation of General ADM 12.02, paragraph 13 b. (20) which states:

Engaging in conduct, whether on or off the job, that undermines the effectiveness or efficiency of the Department's activities. This includes actions which might impair the Department's reputation as well as the reputation or performance of its employees.²⁸

April 16, 2012 (Endorsement No. 2 by Lieutenant) Lieutenant set forth concerns as to the seriousness and danger of matters. He recommended the Department consider as sustained the allegation that Grievant admits to using his O.C. spray in a manner inconsistent with the training. Lieutenant recommended the Agency find Grievant violated General Order ADM 12.02 paragraph 13 b.(20) and recommended a Group III Written Notice with a five day suspension without pay.²⁹

²⁶ Agency Exhibits Tab C, page 19-20.

²⁷ Agency Exhibits Tab C, page 17-21.

²⁸ Agency Exhibits Tab C, page 23-27.

²⁹ Agency Exhibits Tab C, page 28-30.

April 18, 2012 (Endorsement No. 3) Endorsing Officer noted statements of Grievant as to playing a practical joke. Endorsing officer expressed concern about departmental training requirements and, policies and procedures governing the proper use of OC spray. Concern was further expressed as to the seriousness of these actions and that these actions could possibly pose civil liability for Agency. He also recommended a Group III Written Notice be issued for violation of General Order ADM 12.02 paragraph 13 b. (20) and that Grievant be suspended without pay for a period of five days.³⁰

April 20, 2012 Letter of this date requested review of investigative report for mitigating circumstances as provided in ADM Order 2.20, paragraph 4 (h).³¹

May 3, 2012 Letter of this date to Grievant from Captain indicating, among other matters, charges of violation of Standards of Conduct as per General Order ADM 12.02 paragraph 13 b. (19) and 13 b. (20) and noting each was a Group III offense. The letter indicated a meeting was scheduled for May 10, 2012 with Captain, Lieutenant, and First Sergeant, for purpose of allowing an oral response and taking appropriate action in this matter. The letter confirmed Grievant was offered the opportunity to review the records and to respond in writing. The letter indicated, "You may also respond in writing at your discretion prior to the scheduled meeting".³²

May 10, 2012 Grievant met with Captain, Lieutenant, and First Sergeant on this date and after opportunity to discuss matters a Group III Written Notice with 5 day suspension was issued to Grievant. A confirmatory memorandum discussing matters was provided Grievant of this date.³³

The evidence indicates that Agency's investigation and Agency's initiation of the disciplinary action was done in a timely manner consistent with policy and law. The evidence indicates, and Grievant does not contest, that on duty he provided another employee with a biscuit, consumed by the other employee, which was knowingly adulterated with OC (Oleoresin Capsicum) spray by Grievant. The evidence further indicates this was done as a prank or joke and was an unauthorized use of OC/OC Aerosol Spray in a non-justifiable manner.

Concerns:

Grievant expressed his concern that a Group III is not warranted by the facts. He does not contest that he placed OC on his friend's biscuit. He stated that it was only a joke, no harm was intended or done, and that even after Trooper was told of the OC being placed on his biscuit he finished eating the biscuit. Grievant expressed concern that OC is, in essence, cayenne pepper. He presented articles/internet articles discussing capsicum (also known by other names including cayenne pepper) and its uses, including use as a spice and use for medicinal purposes.

Agency expressed concern that the use of OC in this situation is a violation of policy, a use of force matter, and an improper use of a less lethal weapon which warrants serious concern and attention.

The evidence does not indicate that Grievant had any intent to harm Trooper or that this situation was anything more than a prank. The evidence indicates that the OC was issued to Grievant and its use is strictly governed as stated in policy. While Grievant contends he did not spray the OC on the biscuit or Trooper it is noted he did "spray" the OC issued to him onto the spoon.

³⁰ Agency Exhibits Tab C, page 31-33.

³¹ Agency Exhibits Tab C, page 12.

³² Agency Exhibits Tab C, page 9-10.

³³ Agency Exhibits Tab C, page 3-5 and testimony.

Agency provides OC to its sworn employees after they have received training on its use and training on applicable policy as to its use. Agency has implemented strict policy as to OC's proper uses and has even adopted policy requiring use of force reporting after OC is use. Policy specifically provides that OC Aerosol Spray will not be used in a non-justifiable manner and specifically provides OC will not be sprayed in a manner so as to engage in horseplay or pranks. Grievant was aware or should have been aware of this.

Management concerns included that OC is issued, carried, and authorized for use as a non-lethal methodology to counter resistance and/or aggression. There was concern the incident involved utilizing issued OC in a manner not provided for in policy and in a manner which was specifically prohibited by policy. Concern was expressed that the incident occurred between employees who were on duty and at facility which was public. Management was concerned that policy specifically provides that all uses of OC constitute use of force and that use of force reporting requirements were not complied with. Additional concerns were expressed with possible liability that could have arisen.

Inactive:

Grievant expressed concern that Agency had in its possession documents concerning issuance of a Group I Written Notice issued on December 1, 2009. As provided for in General Orders (discussed above) a Group I Written Notice has an active life of two years from the date it is issued. Thus, the Group I Written Notice was not active at the time the present Group III Written Notice was issued.

Policy provides that inactive Written Notices shall not be removed from personnel records. General Order ADM 12.02 paragraph 14. (b) states, "Written Notices shall not be removed from the employee's personnel file.". Certain exceptions to this are provided for Agency reduction, Agency vacating of its actions, or for certain grievance procedure determinations. But even in these circumstances Policy provides, "Under no circumstances should it be destroyed ..."

General Order ADM 12.02 paragraphs 14. (c) indicates inactive Written Notices shall not be taken into consideration in the accumulation of notices or the degree of discipline for a new offense; however, an inactive notice may be considered in determining the appropriate disciplinary action if the conduct or behavior is repeated.³⁴

There is no issue or evidence of an accumulation of notices and there is no evidence of repeated conduct or a pattern of repeated conduct or behavior.

There is insufficient evidence to find that Agency improperly gave consideration to an inactive Written Notice in determining the degree of discipline. The Hearing Officer gives no evidentiary weight to any inactive Written Notice in this cause.

Due Process:

General Order ADM 12.02, paragraph 8. d. provides:

Prior to the issuance of all Written Notices, disciplinary suspensions, demotions, disciplinary transfers, and terminations, employees must be given oral or written notification of the offense, an explanation of the agency's evidence in support of the

³⁴ Agency Exhibits Tab M.

charge and a reasonable opportunity to respond. After notice of charges has been given, the person who is to take action shall arrange to meet with the charged employee and appropriate supervisors without undue delay, but not sooner than five calendar days after notice of charges.³⁵

The evidence indicates that, prior to any disciplinary action, Grievance received a letter dated May 3, 2012 from Captain in which it was indicated, among other matters, the Group offenses being charged and that he was charged with violating the following Standards of Conduct, as specified in General Order ADM 12.02:

General Order ADM 12.02 paragraph 13 b (19), "engaging in criminal conduct on or off the job." This is a Group III offense.

General Order ADM 12.02, paragraph 13 b (20) "Engaging in conduct, whether on or off the job, that undermines the effectiveness or efficiency of the Department's activities. This includes actions which might impair the Department's reputation as well as the reputation or performance of its employees. This is a Group III offense.

The letter provided a meeting was scheduled for May 10, 2012 with Captain, Lieutenant, and First Sergeant, for purpose of allowing an oral response and taking appropriate action in this matter. Grievant was afforded opportunity to review the records regarding this matter prior to the meeting. He was informed, "You may also respond in writing at your discretion prior to the scheduled meeting".³⁶

Additionally, Grievant had met with investigators who discussed matters including allegations of his placing OC on the biscuit of a fellow officer while both were on duty. Grievant had meetings with investigators on March 13, 2012 and March 20, 2012. Grievant was aware of the facts being alleged and told investigators he did place OC on his friend's biscuit as a joke.³⁷ Grievant received and signed a written document dated March 13, 2012 addressing an administrative complaint and indicating a sustained allegation may result in disciplinary action. The document set forth the specific allegations that, "during, but not limited to, May or June 2011, while on duty, you provided [*Trooper*] with a biscuit, consumed by him, which you knowingly adulterated with OC spray".

Testimony indicated that Captain, in addition to affording Grievant an opportunity to respond in writing in the letter of 5/3/12, met with Grievant on May 10, 2012 and, prior to issuance of the Group III Written Notice, inquired if Grievant had anything to say concerning matters.

Prior to issuance of the Written Notice, Grievant was given oral and/or written notification of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond and present mitigating factors or denial of the charge. After notice of charges was given, Captain arranged to meet with the Grievant and appropriate supervisors without undue delay, but not sooner than five calendar days after notice of charges.

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 the

³⁵ Agency Exhibits Tab M.

³⁶ Agency Exhibits Tab C, page 9-10.

³⁷ Agency Exhibits Tab C, page 9, pages 17-20, and testimony.

rules established by the department of employment dispute resolution..."³⁸ 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". 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."

The evidence indicates that Agency took into consideration mitigating factors. Agency chose to issue only one Group III Written Notice with a 5 day suspension. Even though the normal Disciplinary action for a first Group III Offense is termination Agency did not terminate and also did not impose the maximum workday suspension period provided by policy.

The Hearing Officer does not find that the agency's discipline exceeds the limits of reasonableness.

CONCLUSION

For the reasons stated above, based upon consideration of all the evidence, it is found that Agency has met its burden of proof, by a preponderance, that Grievant, while on duty, provided another employee with a biscuit, consumed by the other employee, which was knowingly adulterated with OC (Oleoresin Capsicum) spray by Grievant, that this is an unauthorized use of a less lethal weapon, a violation of General Order ADM 12.02, paragraph 13.b. (20), and a Group III Offense.

Furthermore, for the reasons stated above, based upon consideration of all the evidence presented at hearing, Agency has met its burden of proof, by a preponderance of the evidence, that:

1. Grievant engaged in the behavior described in the Written Notice.
2. The behavior constituted misconduct.
3. The Agency's discipline was consistent with law and policy.
4. There are not mitigating circumstances justifying a reduction or removal of the disciplinary action and Agency's discipline does not exceed the limits of reasonableness.

DECISION

For the reasons stated above, the Agency has proven by a preponderance of the evidence that the disciplinary action of issuing a Group III Written Notice with 5 day suspension was warranted and appropriate under the circumstances and the Agency's issuance of a Group III Written Notice with 5 day suspension is **UPHELD**.

APPEAL RIGHTS

³⁸ Va. Code § 3005.

As the *Grievance Procedure Manual (effective date: July 1, 2012)* 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.

A. Administrative Review:

A hearing officer's decision is subject to administrative review by both EDR and Director of DHRM based on the request of a party. Requests for review may be initiated by electronic means such as facsimile or e-mail. A copy of all requests for administrative review must be provided to the other party, EDR, and the Hearing Officer.

A party may make more than one type of request for review. All requests for administrative review must be made in writing and **received by** the reviewer within 15 calendar days of the date of the original hearing decision. "**Received by**" means delivered to, not merely postmarked or placed in the hands of a delivery service.

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

2. Challenges to the hearing decision for noncompliance with the grievance procedure and/or the Rules for Conducting Grievance Hearings, as well as any request to present newly discovered evidence, are made to EDR. This request must state the specific requirement of the grievance procedure with which the hearing decision is not in compliance. The Office of Employment Dispute Resolution's ("EDR's") authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests must be sent to the Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, VA 23219, faxed to EDR (EDR's fax number is 804-786-1606), or e-mailed to EDR (EDR's e-mail address is edr@dhrm.virginia.gov).

B. Final Hearing Decisions:

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.

C. Judicial Review of Final Hearing Decision:

Once an original hearing decision becomes final, either party may seek review by the circuit court on the ground that the final hearing decision is contradictory to law. A notice of appeal must be filed with the clerk of the circuit court in the jurisdiction in which the grievance arose within 30 calendar days of the final hearing decision.

S/Lorin A. Costanzo

Lorin A. Costanzo, Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of
The Department of State Police

February 21, 2013

The grievant has requested an administrative review of the hearing officer's decision in Case No. 9921. For the reasons stated below, the Department of Human Resource Management (DHRM) will not interfere with the application of this decision. The agency head of DHRM, Ms. Sara R. Wilson, has directed that I conduct this administrative review.

The PROCEDURAL HISTORY, in part, of this case is as follows:

Grievant was issued a Group III Written Notice with 5-day suspension on May 10, 2012 for Written Notice Offense Codes/Categories "(99)", (Other). The *Nature of Offense and Evidence* indicated:

The employee provided another employee with a biscuit, consumed by the other employee, which was knowingly adulterated with O. C. (Oleoresin Capsicum) spray by the first employee which is an unauthorized use of a less lethal weapon. The aforementioned actions constituted a violation of General Order ADM 12.02, paragraph 13.b. (20) that is a Group III offense which states, "Engaging in conduct, whether on or off the job, that undermines the effectiveness or efficiency of the Department's activities. This includes actions which might impair the Departments reputation as well as the reputation or performance of its employees."

On June 8, 2012, Grievant timely grieved the issuance of the Group III Written Notice with 5 day suspension. When matters were not resolved to the satisfaction of Grievant, on August 6, 2012 Grievant requested qualification of his grievance for hearing. Agency Head qualified matters for hearing on August 23, 2012.

The hearing officer identified the following as Issues in this case:

Whether the issuance of a Group III Written Notice with five day suspension was warranted and appropriate under the circumstances?

The Findings of Fact as per the hearing officer are as follows:

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

01. Grievant is a Trooper II and has been employed by Agency for over 6 years.
02. On December 20, 2011, during an investigation concerning a matter not involving Grievant, Agency received information an individual had placed Oleoresin Capsicum (OC) on a biscuit Trooper ate. The individual who placed OC on the biscuit was subsequently identified as Grievant.
03. Trooper indicated to Agency investigators that during May or June of 2011, while on duty, Grievant placed OC on a biscuit he gave to Trooper and which Trooper ate.
04. Both Trooper and Grievant indicated Grievant's placing OC on the biscuit Trooper ate was a joke. Grievant indicated that no harm was intended. No injury or harm was alleged by Trooper.
05. Grievant does not contest he placed OC on Trooper's biscuit. He indicated to investigators and testified he placed a few drops of OC onto a spoon and applied it to the egg portion of a sausage, egg, and cheese biscuit he gave to Trooper. He and Trooper stated this was a practical joke. Grievant further stated no harm was intended. Grievant told Trooper about the OC after Trooper's first bite or two. Even after Trooper was told of OC being placed on his biscuit Trooper finished eating the biscuit. Trooper indicated no harm was done."
06. Oleoresin Capsicum (OC) is a derivative of a strain of South American pepper called the Habanera. The oil extract of this pepper is then dried and powdered to microscopic density. Simplified: OC is a derivative of cayenne pepper.
07. OC Aerosol Spray is an aerosol product in which the active ingredients are the five most active compounds of oleoresin capsicum} or cayenne pepper. OC is an oily resin with a yellowish-orange color formulated at a 5.5% concentration. OC is classified as an organic inflammatory agent.
08. Oleoresin Capsicum (OC) Spray is issued to Agency sworn employees, including Grievant, who have been trained and certified in its proper use. OC Spray is required to be carried by uniform personnel at all times while on duty and may be carried off-duty also.
09. Officers are required to be trained concerning OC and are required to complete a Departmental approved OC training program prior to being issued OC and a bi-annual recertification is conducted. Grievant has received training on OC.
10. Agency has adapted and promulgated policy concerning Oleoresin Capsicum (OC) Spray and its authorized use.
11. Agency training manual insert volume 2, MEMO-2007- No. 11 provides, in pertinent part:

V. AUTHORIZED USES, OPERATION:

A. OC Aerosol Spray can be used at any time a sworn employee encounters resistance, aggression against himself/herself, or any other violence that may threaten others in the execution of an arrest or in the lawful performance of their duties.

C. OC Aerosol Spray will not be used in a non-justifiable manner. OC will not be sprayed in a manner so as to engage in horseplay or pranks....

D. Operation ...

5. All uses of OC constitute use of force. The sworn employee is required to comply with use of force reporting requirements in effect....

APPLICABLE LAW AND OPINION

General Order ADM 12.02:

The Standards of Conduct in General Order ADM 12.02 are designated to protect the well-being and rights of all covered employees; to ensure safe, efficient government operations; and to ensure compliance with public law. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance and distinguish between less serious and more serious actions of misconduct.

Unacceptable behavior is divided into three types of offenses according to their severity. Group I offenses include types of behavior least 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 of a more severe and/or repetitive nature and are such that an additional Group II offense should normally warrant removal. Group III offenses include acts and behaviors of such a serious nature that a first occurrence should normally warrant removal.

The Standards are intended to be illustrative, not all inclusive. Accordingly, an offense which, in the judgment of the agency head, although not listed in the policy, undermines the effectiveness of the agency's activities or the employee's performance should be treated consistently with the provisions of this policy.

General Order ADM 12.02 paragraph 13 b. (20) provides that Group III offenses include, but are limited to:

Engaging in conduct, whether on or off the job, that undermines the effectiveness or efficiency of the Department's activities. This includes actions which might impair the Department's reputation as well as the reputation or performance of its employees.

General Order ADM 12.02 paragraph 13.c. (1.) sets forth procedures for issuing a Group III Notice and provides as follows:

When issuing an employee a Written Notice form for a Group III offense, management should issue such notice as soon as practicable. Discipline

shall normally take the form of the notice and removal or notice and up to 30 workdays (or maximum of 240 hours for non-exempt employees) maximum suspension without pay in lieu of removal....

NOTE: Mitigating circumstances may justify the use of demotion, suspension for up to 30 days (or maximum of 240 hours for non-exempt employees), and/or transferred to a position with reduced responsibilities and a disciplinary salary action with a minimum 5% reduction in salary or transfer to an equivalent position in a different work area as an alternative to removal.

General Order ADM 12.02 paragraph 14. (a) provides Group I Written Notices have a two year “active” period from the date the notice was issued and Group III Written Notices shall have a four year “active” period. Furthermore, General Order ADM 12.02 paragraph 14. (b) and 14 (c.) indicate:

b. Written Notices shall not be removed from the employees personnel file.

EXCEPTION: A Written Notice can be removed if the agency reduces or vacates its action or, through the grievance procedure, it is determined the notice issued is not justified...

c. Written Notices that are no longer active as stated in paragraph a. above shall not be taken into consideration in the accumulation of notices or the degree of discipline for a new offense; however, an inactive notice may be considered in determining the appropriate disciplinary action if the conduct or behavior is repeated.

MEMO - 2007- NO. 11:

Agency Memo 2007 - No. 11, SUBJECT: Oleoresin Capsicum Training and Use provides:

I. POLICY

It is a policy of this Department to provide the tools necessary for its sworn employees to do their job in a productive, effective, and safe manner. The use of Oleoresin Capsicum (OC) is classified as a use of force and shall be governed by this memo and General Order 24. The sworn employees are issued OC so they may successfully defend themselves from combative, resisting, and/or violent individuals while reducing the risk of inflicting or receiving injury

III. OC AEROSOL SPRAY:

A. Description: OC Aerosol Spray is an aerosol product in which the active ingredients are the five most active compounds of, or cayenne pepper. OC, oleoresin capsicum, is an oily resin with a yellowish- orange color formulated at 5.5% concentration. OC is classified as an organic inflammatory agent.

B. Physiological Effects:

2. Effect on the Respiratory System: A direct spray produces immediate respiratory inflammation, which causes uncontrollable coughing, retching, shortness of breath, and gasping for air with a gagging sensation in the throat.
3. Effect on the Skin: A direct spray on the face causes an immediate burning sensation of the mucous membranes, skin, and inside the nose and mouth.

V. AUTHORIZED USES, OPERATION:

- A. OC Aerosol Spray can be used at any time a sworn employee encounters resistance, aggression against himself/herself, or any other violence that may threaten others in the execution of an arrest or in the lawful performance of their duties.
- C. OC Aerosol Spray will not be used in a non-justifiable manner. OC will not be sprayed in a manner so as to engage in horseplay or pranks
- D. Operation:
 5. All uses of OC constitute use of force. The sworn employee is required to comply with use of force reporting requirements in effect

General Order OPR 5.01:

General Order OPR 5.01 establishes guidelines for use of force and uniform procedures for reporting and investigating the use of force incidents. General Order OPR 5.01 states, in pertinent part:

7. Sworn employees will immediately inform their superior under the following circumstances:
 - c. The sworn employee applies force through the use of a lethal or less lethal weapon

General Order ADM 11.00:

General Order ADM 11.00 paragraph 29 provides, "Sworn employees will exercise sound discretion in carrying out duties and responsibilities. Such discretion should be based on Department policies and procedures, Departmental training, and supervisory recommendations."

OC used:

Agency investigation was initiated when an incident involving Grievant's use of Oleoresin Capsicum (OC) came to Agency's attention on December 20, 2011 when Trooper was being interviewed by Agency regarding a case. Trooper indicated that during May or June of 2011, while on duty, he consumed a biscuit given to him by Grievant on

which Grievant had placed OC.

Criminal Investigation not opened:

On January 24, 2012, this matter was referred to BCI for criminal investigation. On January 26, 2012, BCI reviewed the incident with Commonwealth Attorney. Commonwealth Attorney noted that no bodily injury occurred from the incident, which he described as a joke among friends, and Commonwealth Attorney indicated he would not approve prosecution.

By written document dated February 9, 2012, notification was given that a criminal investigation would not be opened. The document indicated, “[Field Office] will not be opening a criminal investigation into this matter as there is no criminal conduct contained within this allegation and its’ attachments.”

Chronology and events:

December 20, 2011.... On this date Trooper was being interviewed on matters not involving Grievant. During the interview Trooper referenced an incident of OC being applied to his biscuit in May or June of 2011. This gave rise to Agency concerns and an investigation being initiated. Agency pursued securing from Trooper the name of the individual involved and Trooper indicated Grievant placed OC on his biscuit.

January 2, 2012 Trooper provided Agency written statements dated this date which describe Grievant placing OC on his biscuit in May or June of 2011.

January 24, 2012 On this date Sergeant was assigned the VSP Complaint/Request/Incident Report. Also a request was received for a BCI Criminal Investigation to be conducted into matters.

February 9, 2012 A document of this date indicated a criminal investigation into this matter would not be conducted as there is no criminal conduct contained within the allegations.

March 2, 2012 Agency interviewed employee of facility as to employee’s knowledge of matters. Employee indicated he did not recall any incident.

March 6, 2012 Agency interviewed owner of facility concerning his knowledge of matters. Owner indicated he did not recall any such incident. Additionally, on this date Trooper was interviewed regarding whether he suffered any ill effect from consumption of the biscuit with OC and Trooper advised he did not become ill.

March 13, 2012.... A document of this date was provided Grievant indicating an administrative complaint, job-related, has been referred to Sergeant for investigation. The document alleged, “During, but not limited to, May or June 2011, while on duty, you provided [*Trooper*] with a biscuit, consumed by him, which you knowingly adulterated with OC spray.” The document informed Grievant his responsibilities were set forth in General Order ADM 12.00 and that he was required to respond in writing within 3 work days. He was further advised his rights are set forth in General Order ADM 13.00 of the State Police Manual and Title 9.1, Chapter 5, of the Code of Virginia. Grievant signed

indicating he understood his rights.

Grievant was interviewed on 3/13/12 by Sergeant and another individual. Prior to interview, both indicated they were members of Internal Affairs and displayed identification. Grievant was given allegation letter of 3/13/12. Grievant was advised of the administration investigation, job related, and advised his responsibilities were set forth in General Order ADM 12.00 and his rights were set forth in General Order ADM 13.00 of the State Police Manual and Title 9.1, Chapter 5, of the Code of Virginia. Grievant stated he understood his rights.

Grievant did not contest matters during the interview. Grievant confirmed he and Trooper were working daylight shift and he arranged to obtain a sausage, egg, and cheese biscuit for Trooper. Both met at facility where, prior to giving him the biscuit, Grievant placed a small amount of his issued OC spray into a spoon and applied the OC to the egg portion of the biscuit. Upon taking one or two bites, Trooper commented the biscuit tasted hot/spicy and concluded Trooper put OC on the biscuit. During conversation Grievant acknowledged he did so. Trooper laughed and then finished eating the biscuit.

March 18, 2012.... In a written memorandum of this date Grievant responded to the administrative complaint of March 13, 2012. Grievant admitted, while on duty, he provided Trooper with a biscuit which Trooper consumed and on which Grievant had placed OC. Grievant admitted he obtained a sausage, egg, and cheese biscuit from a restaurant. He then met with Trooper at facility and, after putting OC on the biscuit, gave it to Trooper. Grievant stated "I sprayed a small amount on a white plastic spoon and dripped a few drops on the egg portion of his biscuit." Upon taking a couple of bites, Trooper commented something of the nature that [restaurant] must have changed their sausage, this biscuit is pretty spicy. Both laughed and it was determined he had placed OC on the biscuit. Grievant acknowledged doing so to Trooper. Trooper laughed about the matter and finished eating the biscuit after learning it contained OC.

March 20, 2012 Grievant was re-interviewed by telephone this date. Interviewer identified himself as a member of the Internal Affairs section and reviewed Grievant's allegation letter dated 3/13/12, Grievant was advised this was an administrative investigation, job related, and that his responsibilities were set forth in General Order ADM 12.00 and his rights were set forth in General Order ADM 13.00 of the State Police Manual and Title 9.1, Chapter 5, of the Code of Virginia. Grievant stated he understood his rights. In this interview Grievant stated he was behind the store counter at facility when he applied the OC to the biscuit on the counter. Grievant indicated his back was turned toward the clerk and Grievant did not think the clerk observed his actions.

March 21, 2012 Investigative Report of this date from Sergeant detailed the investigation and his findings. The report, among other matters confirmed that:

- Grievant admitting putting OC on a biscuit consumed by Trooper while both were on duty
- Trooper consumed the remainder of the biscuit even after learning of the OC
- Trooper did not become ill
- Both Trooper and Grievant believed this to be a joke.

April 12, 2012 (Endorsement No.1) Sergeant's Investigation Report was reviewed by First Sergeant who identified two Group III offenses, six Group II offenses, and one Group I offense and recommended the following allegation be sustained:

During, but not limited to, May or June 2011, while on duty, you provided Trooper with a biscuit, consumed by him, which you knowingly adulterated with OC spray.

First Sergeant concluded that Grievant's actions were in violation of the following:

- a. General Order ADM 12.02 paragraph 11.b.(4)a Group I offense
- b. General Order ADM 12.02 paragraph 4a Group II offense
- c. General Order OPR 5.01, paragraph 4a Group II offense
- d. General Order ADM 11.00, paragraph 29a Group II offense
- e. General Order OPR 1.00, paragraph 22a Group II offense
- f. General Order ADM 12.b. (5)a Group II offense
- g. Violation of 12/5/09 Orientation Instructionsa Group II offense
- h. General Order ADM 12.02 paragraph 13b. (10).....a Group III offense
- i. General Order ADM 12.02 paragraph 13b. (20).....a Group III offense

First Sergeant further found mitigating factors including Grievant being completely candid and truthful in his response to the allegations and, although Grievant's action was inside a public store, his action was directed at a co-worker friend. Additionally, it was noted Grievant had been employed since July 10, 2006, performs his duties at the "Contributor" level, and was a dependable and capable member of the Tactical Team.

First Sergeant recommended issuance of only one Group III Written Notice and, in lieu of termination, Grievant be suspended without pay for a period of five workdays for violation of General ADM 12.02, paragraph 13 b. (20) which states:

Engaging in conduct, whether on or off the job, that undermines the effectiveness or efficiency of the Department's activities. This includes actions which might impair the Department's reputation as well as the reputation or performance of its employees.

April 16, 2012 (Endorsement No.2 by Lieutenant) Lieutenant set forth concerns as to the seriousness and danger of matters. He recommended the Department consider as sustained the allegation that Grievant admits to using his OC spray in a manner inconsistent with the training. Lieutenant recommended the Agency find Grievant violated General Order ADM 12.02 paragraph 13 b (20) and recommended a Group III Written Notice with a five day suspension without pay.

April 18, 2012 (Endorsement No.3) Endorsing Officer noted statements of Grievant as to playing a practical joke. Endorsing officer expressed concern about departmental training requirements and, policies and procedures governing the proper use of OC spray. Concern was further expressed as to the seriousness of these actions and that these actions could possibly pose civil liability for Agency. He also recommended a Group III Written Notice be issued for violation of General Order ADM

12.02 paragraph 13 b. (20) and that Grievant be suspended without pay for a period of five days.

April 20, 2012 Letter of this date requested review of investigative report for mitigating circumstances as provided in ADM Order 2.20, paragraph 4 (h).31

May 3, 2012 Letter of this date to Grievant from Captain indicating, among other matters, charges of violation of Standards of Conduct as per General Order ADM 12.02 paragraph 13 b. (19) and 13 b. (20) and noting each was a Group III offense. The letter indicated a meeting was scheduled for May 10, 2012 with Captain, Lieutenant, and First Sergeant, for purpose of allowing an oral response and taking appropriate action in this matter. The letter confirmed Grievant was offered the opportunity to review the records and to respond in writing. The letter indicated, "You may also respond in writing at your discretion prior to the scheduled meeting".

May 10, 2012 Grievant met with Captain, Lieutenant, and First Sergeant on this date and after opportunity to discuss matters a Group III Written Notice with 5 day suspension was issued to Grievant. A confirmatory memorandum discussing matters was provided Grievant of this date.

The evidence indicates that Agency's investigation and Agency's initiation of the disciplinary action was done in a timely manner consistent with policy and law. The evidence indicates, and Grievant does not contest, that on duty he provided another employee with a biscuit, consumed by the other employee, which was knowingly adulterated with OC (Oleoresin Capsicum) spray by Grievant. The evidence further indicates this was done as a prank or joke and was an unauthorized use of OC/OC Aerosol Spray in a non-justifiable manner.

Concerns:

Grievant expressed his concern that a Group III is not warranted by the facts. He does not contest that he placed OC on his friend's biscuit. He stated that it was only a joke, no harm was intended or done, and that even after Trooper was told of the OC being placed on his biscuit he finished eating the biscuit. Grievant expressed concern that OC is, in essence, cayenne pepper. He presented articles/internet articles discussing capsicum (also known by other names including cayenne pepper) and its uses, including use as a spice and use for medicinal purposes.

Agency expressed concern that the use of OC in this situation is a violation of policy, a use of force matter, and an improper use of a less lethal weapon which warrants serious concern and attention.

The evidence does not indicate that Grievant had any intent to harm Trooper or that this situation was anything more than a prank. The evidence indicates that the OC was issued to Grievant and its use is strictly governed as stated in policy. While Grievant contends he did not spray the OC on the biscuit or Trooper it is noted he did "spray" the OC issued to him onto the spoon.

Agency provides OC to its sworn employees after they have received training on

its use and training on applicable policy as to its use. Agency has implemented strict policy as to OC's proper uses and has even adopted policy requiring use of force reporting after OC is use. Policy specifically provides that OC Aerosol Spray will not be used in a non-justifiable manner and specifically provides OC will not be sprayed in a manner so as to engage in horseplay or pranks. Grievant was aware or should have been aware of this.

Management concerns included that OC is issued, carried, and authorized for use as a non-lethal methodology to counter resistance and/or aggression. There was concern the incident involved utilizing issued OC in a manner not provided for in policy and in a manner which was specifically prohibited by policy. Concern was expressed that the incident occurred between employees who were on duty and at facility which was public. Management was concerned that policy specifically provides that all uses of OC constitute use of force and that use of force reporting requirements were not complied with. Additional concerns were expressed with possible liability that could have arisen.

Inactive:

Grievant expressed concern that Agency had in its possession documents concerning issuance of a Group I Written Notice issued on December 1, 2009. As provided for in General Orders (discussed above) a Group I Written Notice has an active life of two years from the date it is issued. Thus, the Group I Written Notice was not active at the time the present Group III Written Notice was issued.

Policy provides that inactive Written Notices shall not be removed from personnel records. General Order ADM 12.02 paragraph 14. (b) states, "Written Notices shall not be removed from the employee's personnel file." Certain exceptions to this are provided for Agency reduction, Agency vacating of its actions, or for certain grievance procedure determinations. But even in these circumstances Policy provides, "Under no circumstances should it be destroyed ..."

General Order ADM 12.02 paragraphs 14. (c) indicates inactive Written Notices shall not be taken into consideration in the accumulation of notices or the degree of discipline for a new offense; however, an inactive notice may be considered in determining the appropriate disciplinary action if the conduct or behavior is repeated.

There is no issue or evidence of an accumulation of notices and there is no evidence of repeated conduct or a pattern of repeated conduct or behavior.

There is insufficient evidence to find that Agency improperly gave consideration to an inactive Written Notice in determining the degree of discipline. The Hearing Officer gives no evidentiary weight to any inactive Written Notice in this cause.

Due Process:

General Order ADM 12.02, paragraph 8.d. provides:

Prior to the issuance of all Written Notices, disciplinary suspensions, demotions, disciplinary transfers, and terminations, employees must be

given oral or written notification of the offense, an explanation of the agency's evidence in support of the charge and a reasonable opportunity to respond. After notice of charges has been given, the person who is to take action shall arrange to meet with the charged employee and appropriate supervisors without undue delay, but not sooner than five calendar days after notice of charges.

The evidence indicates that, prior to any disciplinary action, Grievance received a letter dated May 3, 2012 from Captain in which it was indicated, among other matters, the Group offenses being charged and that he was charged with violating the following Standards of Conduct, as specified in General Order ADM 12.02:

General Order ADM 12.02 paragraph 13 b (19), "engaging in criminal conduct on or off the job." This is a Group III offense.

General Order ADM 12.02, paragraph 13 b (20) "Engaging in conduct, whether on or off the job, that undermines the effectiveness or efficiency of the Department's activities. This includes actions which might impair the Department's reputation as well as the reputation or performance of its employees. This is a Group III offense.

The letter provided that a meeting was scheduled for May 10, 2012 with Captain, Lieutenant, and First Sergeant, for the purpose of allowing an oral response and taking appropriate action in this matter. Grievant was afforded opportunity to review the records regarding this matter prior to the meeting. He was informed, "You may also respond in writing at your discretion prior to the scheduled meeting."

Additionally, Grievant had met with investigators who discussed matters including allegations of his placing OC on the biscuit of a fellow officer while both were on duty. Grievant had meetings with investigators on March 13, 2012 and March 20, 2012. Grievant was aware of the facts being alleged and told investigators he did place OC on his friend's biscuit as a joke. Grievant received and signed a written document dated March 13, 2012 addressing an administrative complaint and indicating a sustained allegation may result in disciplinary action. The document set forth the specific allegations that, "during, but not limited to, May or June 2011, while on duty, you provided [*Trooper*] with a biscuit, consumed by him, which you knowingly adulterated with OC spray".

Testimony indicated that Captain, in addition to affording Grievant an opportunity to respond in writing in the letter of 5/3/12, met with Grievant on May 10, 2012 and, prior to issuance of the Group III Written Notice, inquired if Grievant had anything to say concerning matters.

Prior to issuance of the Written Notice, Grievant was given oral and/or written notification of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond and present mitigating factors or denial of the charge. After notice of charges was given, Captain arranged to meet with the

Grievant and appropriate supervisors without undue delay, but not sooner than five calendar days after notice of charges.

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 the 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”. 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.”

The evidence indicates that Agency took into consideration mitigating factors. Agency chose to issue only one Group III Written Notice with a 5-day suspension. Even though the normal disciplinary action for a first Group III Offense is termination Agency did not terminate and also did not impose the maximum workday suspension period provided by policy.

The Hearing Officer does not find that the agency’s discipline exceeds the limits of reasonableness.

CONCLUSION

For the reasons stated above, based upon consideration of all the evidence, it is found that Agency has met its burden of proof, by a preponderance, that Grievant, while on duty, provided another employee with a biscuit, consumed by the other employee, which was knowingly adulterated with OC (Oleoresin Capsicum) spray by Grievant, that this is an unauthorized use of a less lethal weapon, a violation of General Order ADM 12.02, paragraph 13.b. (20), and a Group III Offense.

Furthermore, for the reasons stated above, based upon consideration of all the evidence presented at hearing, Agency has met its burden of proof, by a preponderance of the evidence, that:

1. Grievant engaged in the behavior described in the Written Notice.
2. The behavior constituted misconduct.
3. The Agency’s discipline was consistent with law and policy.
4. There are not mitigating circumstances justifying a reduction or removal of the disciplinary action and Agency’s discipline does not exceed the limits of reasonableness.

DECISION

For the reasons stated above, the Agency has proven by a preponderance of the

evidence that the disciplinary action of issuing a Group III Written Notice with 5-day suspension was warranted and appropriate under the circumstances and the Agency's issuance of a Group III Written Notice with 5 day suspension is UPHELD.

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, as related to policy, 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 regarding policy issues, 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.

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 Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards 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 agency has adopted the provisions of the Standards as a guide to its disciplinary actions. In addition, the agency has developed additional guidelines, namely through its generals, that govern the behavior of its employees' work and non-work lives.

In his request for review, among other things the grievant raised the issue of inconsistency with agency policy. According to the evidence, the grievant was charged as follows:

The employee provided another employee with a biscuit, consumed by the other employee, which was knowingly adulterated with O. C. (Oleoresin Capsicum) spray by the first employee which is an unauthorized use of a less lethal weapon. The aforementioned actions constituted a violation of General Order ADM 12.02, paragraph 13.b. (20) that is a Group III offense which states, "Engaging in conduct, whether on or off the job, that undermines the effectiveness or efficiency of the Department's activities. This includes actions which might impair the Departments reputation as well as the reputation or performance of its employees."

Agency MEMO 2007, in part, states:

V. AUTHORIZED USES, OPERATION:

- A. OC Aerosol Spray can be used at any time a sworn employee encounters resistance, aggression against himself/herself, or any other

violence that may threaten others in the execution of an arrest or in the lawful performance of their duties.

- C. OC Aerosol Spray will not be used in a non-justifiable manner.
OC will not be sprayed in a manner so as to engage in horseplay or pranks

According to the hearing officer, it is indisputable that the grievant committed the violation with which he was charged. The agency's MEMO 2007 describes the uses of OC and prohibits engaging in pranks and horseplay. It is clear from the evidence that the incident was not related to law enforcement and the General Order lists that violation as punishable by a Group III Written Notice. This agency can find no inconsistency in the application of policy and therefore has no authority to interfere with the application of this decision.
