Issue: Group III Written Notice with Termination (failure to follow policy/instructions); Hearing Date: 11/14/12; Decision Issued: 11/16/12; Agency: DJJ; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 9953; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 12/03/12; EDR Ruling No. 2013-3493 issued 01/22/13; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 12/03/12; DHRM Ruling issued 01/24/13; Outcome: AHO's decision affirmed.**

COMMONWEALTH of VIRGINIA

Office of Employment Dispute Resolution

Department of Human Resource Management

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 9953

Hearing Date: November 14, 2012
Decision Issued: November 16, 2012

PROCEDURAL HISTORY

Grievant was a corrections officer with the Department of Juvenile Justice ("the Agency"), and she challenges the Group III Written Notice issued on September 13, 2012 for failure to follow policy and/or instructions. The Grievant has a prior active Group II Written Notice for failure to follow policy and/or instructions.

Grievant timely filed a grievance to challenge the Agency's disciplinary action of termination. On October 24, 2012, the Office of Employment Dispute Resolution ("EDR") appointed the Hearing Officer to hear the grievance. A pre-hearing conference was held by telephone on November 1, 2012. The hearing ultimately was scheduled for the first date available date, November 14, 2012, on which date the grievance hearing was held, at the Agency's facility.

The Agency submitted documents for exhibits that were, without objection, accepted into the grievance record, and they will be referred to as Agency's Exhibits. The Grievant submitted no additional documents for the grievance record. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant
Advocate for Agency
Agency Representative/Witness
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized under applicable policy)?
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 Written Notice, reinstatement, and back pay.

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.

Institutional Operation Procedure 212-4.2, Movement and Supervision of Residents, states that facility staff shall provide 24-hour awake supervision of residents on campus seven days per week. Specifically, the policy dictates, in paragraph 4:

> Staff shall always position themselves where they will have maximum sight supervision with no "blind spots" in the coverage/supervision of residents.

Agency Exh. F.

The State Standards of Conduct, DHRM Policy 1.60, defines Group III Offenses to include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination. This level is appropriate for offenses that, for example, endanger others in the workplace, constitute illegal or unethical conduct; neglect of duty; disruption of the workplace; or other serious violations of policies, procedures, or laws (especially where threat of bodily harm exists).

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

> While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy..."the hearing officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

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 Grievant has worked for the Agency for over 9 years. The Agency's Assistant Superintendent for Security testified consistently with the allegations contained in the Written Notice. The Written Notice charged that the Grievant, on August 23, 2012:

> Allowed residents to enter and remain in an area (the gym corridor) without having sight and sound supervision. . . . As a result of no direct supervision, two (2) residents brutally assaulted another resident, which also resulted in the

> resident (the victim) being sent out to the Emergency Room with facial lacerations and a potential nasal fracture. . . . According to IOP # 212-4.2 (paragraph #1): All staff are responsible for maintaining sight and sound supervision of assigned residents (and must be physically present), inside and outside the buildings, at all times.

As for circumstances considered, the Written Notice stated:

> This is not your first occurrence in regards to violating the aforementioned policy. On 04/19/12, you were issued a Group II with suspension for your failing to conduct 15 minutes checks on your assigned unit residents for nearly two (2) hours. Due to the serious impact of the current violation and your violation of this same procedure within the past six months which also posed a serious potential threat to the safety of residents, management does not deem any mitigation appropriate.

Agency Exh. C.

The Assistant Superintendent testified that the Grievant was provided training on the applicable policy. Agency Exh. G. The Assistant Superintendent also described the video of the assault that showed the placement of the Grievant and the second staff member (recreational staff) who was assigned to the group supervision in question. The Grievant had exited the building, the recreational staff member was still in the gym, and the residents were allowed to proceed out of the gym into the gym corridor area unsupervised by either staff member.

The Grievant testified that there should be three staff members supervising resident activities, and that she was responsible for the front of the line of residents and the recreational staff member was responsible for the rear of the line. The Grievant conceded that there is no policy requiring three supervising staff members, but that is her opinion. The Grievant also testified that the recreational staff member was just as much at fault, and that the recreational staff member was disciplined with only a notice of improvement needed.

The Grievant also testified that she believed her discipline and termination was disparate treatment and constituted discrimination on account of her race (black). The recreational staff member is white. The Grievant conceded that her chain of supervision is distinct from the recreational staff chain of supervision.

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).

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, 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.* As long as it acts within law and policy, the Agency is permitted to apply exacting standards to its employees.

I find that the Agency has met its burden of showing the claimant violated applicable policy direction for supervision of residents, and that such violation was causally linked to the assault of and injury of a resident. I further find that the offense is appropriately considered a Group III level offense because it constitutes a violation of policy that resulted in bodily harm.

Mitigation

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." 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.

While the hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances, the hearing officer is permitted to mitigate a disciplinary action if, and only if, it exceeds the limits of reasonableness. There is no authority that requires an Agency to exhaust all possible lesser sanctions or, alternatively, show that termination was its only option. Even if the hearing officer would have levied a lesser discipline, the Agency has the management prerogative to act within a continuum of discipline as long as the Agency acts within the bounds of reasonableness.

On the issue of mitigation, EDR has ruled:

> Importantly, because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management. Rather, mitigation by a hearing officer under the *Rules* requires that he or she, based on the record evidence, make findings of fact that clearly support the conclusion that the agency's discipline, though issued for founded misconduct described in the Written Notice, and though consistent with law and policy, nevertheless meets the *Rules* "exceeds the limits of reasonableness" standard. This is a high standard to meet, and has been described in analogous Merit System Protection Board case

> law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.

EDR Ruling #2010-2483 (March 2, 2010) (citations omitted). EDR has further explained:

> When an agency's decision on mitigation is fairly debatable, it is, by definition, within the bounds of reason, and thus not subject to reversal by the hearing officer. A hearing officer "will not freely substitute [his or her] judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"

EDR Ruling 2010-2465 (March 4, 2010) (citations omitted).

The Agency expressed its position that there are aggravating circumstances present more so than any mitigating circumstances, specifically the repeat violation of the supervision policy within a relatively short time span, and the resulting physical injury to a resident.

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 supervision lapse resulted in the opportunity for and actual occurrence of a violent assault and warrants disciplinary action. The hearing officer accepts, recognizes, and upholds the Agency's important role in safeguarding the public and residents 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. While the Agency could have justified or exercised lesser discipline, I find no mitigating circumstances that render the Agency's action of a Group III Written Notice with termination outside the bounds of reasonableness. Accordingly, I find no mitigating circumstances that allow the hearing officer to reduce the Agency's action.

Race Discrimination

An employee may demonstrate discrimination by showing direct evidence of intentional discrimination (specific remarks or practices), circumstantial evidence (statistical evidence), or disparate impact. In this case, other than pointing out that the other staff member involved in the transgression received lesser discipline, the Grievant has not presented any testimony or evidence of remarks or practices, statistical evidence, or a showing of disparate impact that would constitute racial discrimination in the discipline process. Discipline for employees should be handled on a case-by-case basis, and this Grievant had a prior Group II Written Notice for a similar, albeit less severe, occurrence. The Grievant advanced her belief of racial discrimination but she did not present any evidence in support, beyond her own opinion. Therefore, the Grievant has not borne the burden of proof to demonstrate that the disciplinary action was based on her race.

DECISION

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

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

   Director
   Department of Human Resource Management
   101 North 14th St., 12th Floor
   Richmond, VA 23219

   or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

   Office of Employment Dispute Resolution
   Department of Human Resource Management
   101 North 14th St., 12th Floor
   Richmond, VA 23219

   or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[1]

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

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

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Department of Juvenile Justice

January 24, 2013

The grievant has requested an administrative review of the hearing officer's decision in Case No. 9953. For the reason stated below, we will not interfere with the application of this decision. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has directed that I conduct this administrative review.

The hearing officer listed the procedural history of this case as follows:

> Grievant was a corrections officer with the Department of Juvenile Justice ("the Agency"), and she challenges the Group III Written Notice issued on September 13, 2012 for failure to follow policy and/or instructions. The Grievant has a prior active Group II Written Notice for failure to follow policy and/or instructions.

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The relevant facts of this case as listed by the hearing officer are as follows:

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 Grievant has worked for the Agency for over 9 years. The Agency's Assistant Superintendent for Security testified consistently with the allegations contained in the Written Notice. The Written Notice charged that the Grievant, on August 23, 2012:

> Allowed residents to enter and remain in an area (the gym corridor) without having sight and sound supervision. . . . As a result of no direct supervision, two (2) residents brutally assaulted another resident, which also resulted in the resident (the victim) being sent out to the Emergency Room with facial lacerations and a potential nasal fracture. . . . According to IOP # 212-4.2 (paragraph #1): All staff are responsible for maintaining sight and sound supervision of assigned residents (and must be physically present), inside and outside the buildings, at all times.

As for circumstances considered, the Written Notice stated:

> This is not your first occurrence in regards to violating the aforementioned policy. On 04/19/12, you were issued a Group II with suspension for your failing to conduct 15 minutes checks on your assigned unit residents for nearly two (2) hours. Due to the serious impact of the current violation and your violation of this same procedure within the past six months which also posed a serious potential threat to the safety of residents, management does not deem any mitigation appropriate. Agency Exh. C.

The Assistant Superintendent testified that the Grievant was provided training on the applicable policy. Agency Exh. G. The Assistant Superintendent also described the video of the assault that showed the placement of the Grievant and the second staff member (recreational staff) who was assigned to the group supervision in question. The Grievant had exited the building, the recreational staff member was still in the gym, and the residents were allowed to proceed out of the gym into the gym corridor area unsupervised by either staff member.

The Grievant testified that there should be three staff members supervising resident activities, and that she was responsible for the front of the line of residents and the recreational staff member was responsible for the rear of the line. The Grievant conceded that there is no policy requiring three supervising staff members, but that is her opinion. The Grievant also testified that the recreational staff member was just as much at fault, and that the recreational staff member was disciplined with only a notice of improvement needed.

The Grievant also testified that she believed her discipline and termination was disparate treatment and constituted discrimination on account of her race (black). The recreational staff member is white. The Grievant conceded that her chain of supervision is distinct from the recreational staff chain of supervision.

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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, 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. As long as it acts within law and policy, the Agency is permitted to apply exacting standards to its employees.

I find that the Agency has met its burden of showing the claimant violated applicable policy direction for supervision of residents, and that such violation was causally linked to the assault of and injury of a resident. I further find that the offense is appropriately considered a Group III level offense because it constitutes a violation of policy that resulted in bodily harm.

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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 supervision lapse resulted in the opportunity for and actual occurrence of a violent assault and warrants disciplinary action. The hearing officer accepts, recognizes, and upholds the Agency's important role in safeguarding the public and residents 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. While the Agency could have justified or exercised lesser discipline, I find no mitigating circumstances that render the Agency's action of a Group III Written Notice with termination outside the bounds of reasonableness. Accordingly, I find no mitigating circumstances that allow the hearing officer to reduce the Agency's action.

In her grievance, the grievant alleges that she was treated differently because of her race. The hearing officer considered the evidence and addressed the allegations in the following manner.

RACE DISCRIMINATION

An employee may demonstrate discrimination by showing direct evidence of intentional discrimination (specific remarks or practices), circumstantial evidence (statistical evidence), or disparate impact. In this case, other than pointing out that the other staff member involved in the transgression received lesser discipline, the Grievant has not presented any testimony or evidence of remarks or practices, statistical evidence, or a showing of disparate impact that would constitute racial discrimination in the discipline process. Discipline for employees should be handled on a case-by-case basis, and this Grievant had a prior Group II Written Notice for a similar, albeit less severe, occurrence. The Grievant advanced her belief of racial discrimination but she did not present any evidence in support, beyond her own opinion. Therefore, the Grievant has not borne the burden of proof to demonstrate that the disciplinary action was based on her race.

The hearing officer's decision is listed below:

DECISION

For the reasons stated herein, the Agency's issuance of the Group III Written Notice with termination 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, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In each instance where a request is made to this Agency for an administrative review, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent or is misinterpreted. In her request to this Department for an administrative review, the grievant raised a concern that, according to IOP #212-4.2 (paragraph #1): "All staff are responsible for maintaining sight and sound supervision of assigned residents (and must be physically present), inside and outside the buildings, at all times." She also adds, "In light of this policy and the impossibility of being in two places at one time, Officer W, like all the staff members would have to rely upon other staff members who are accompanying them in assisting in maintaining sight and sound of supervision of residents…."

In addressing this issue, there is nothing in the language of that policy that requires a single individual to be inside and outside the building at the same time. This Agency has determined that the hearing officer did not misinterpret or misapply the provisions of IOP #212-4.2. Rather, it appears that the grievant failed to follow it. Therefore, this argument fails.

In addition, the grievant raised the issue of disciplinary action under the Standards of Conduct policy. However, she failed to demonstrate how the hearing decision violated that policy. Concerning the overall decision, it appears that the grievant is contesting the evidence the hearing officer considered, how he assessed that evidence, and the resulting decision. Thus, we will not interfere with the application of this decision.

Ernest G. Spratley
Assistant Director
Office of Equal Employment Services