Issues: Group III Written Notice with Termination (failure to follow policy and falsifying documents), and Retaliation (other protected right); Hearing Date: 11/21/12; Decision Issued: 11/26/12; Agency: DJJ; AHO: Cecil H. Creasey, Esq.; Case No. 9956; Outcome: No Relief – Agency Upheld.

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. 9956

Hearing Date: November 21, 2012
Decision Issued: November 26, 2012

PROCEDURAL HISTORY

Grievant was a lieutenant with the Department of Juvenile Justice ("the Agency"), and he challenges the Group III Written Notice issued on October 2, 2012 for multiple reasons including failure to follow established policy and providing false or misleading information. The Grievant has a prior active Group I Written Notice for violation of IOP No. 218 – Use of Force.

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 conduct the grievance hearing. A pre-hearing conference was held by telephone on November 2, 2012. The hearing ultimately was scheduled for the first date available, November 21, 2012, on which date the grievance hearing was held, at the Agency's facility.

The Agency and Grievant submitted documents for exhibits that were, without objection, accepted into the grievance record. Both parties submitted rebuttal exhibits that were accepted into the grievance record. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant
Counsel for Grievant
Agency Representative
Counsel for Agency
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 of the Written Notice.

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.

Agency Administrative Directive No. 05-009.2, Staff Code of Conduct, expresses that all staff are to perform all duties professionally and competently and treat all persons in an evenhanded and courteous manner, humanely, and with respect. The policy prohibits treating wards, probationers, or parolees in a manner that is inconsistent with established department procedures. Exh. 4.

Institutional Operating Procedure (IOP) No. 218, provides at 218-4.0, the authorized criteria for physical restraint of wards:

> Self defense
> Defense of others
> To prevent an escape
> To prevent property damage
> To prevent a youth from harming self
> To prevent the commission of a crime

IOP No. 218, at 218-4.0 also provides

> Under normal circumstances, the highest ranking officer on duty shall not be involved in the use of physical restraint. He/she shall be in the immediate area to assess the situation, observe and direct staff, and remain objective.

Exh. 5.

IOP No. 219, Use of Restraining Devices, provides that "Mechanical restraints shall not be applied as punishment and shall be applied only for the absolute minimum time necessary to ensure safety and security." Exh. 6.

IOP No. 100, Incident Reports, provides, at 100-4.0:

> The timely and accurate reporting of incidents which occur in JCCs is essential to the proper management and administration of the Department of Juvenile Justice (DJJ or Department). Since IIRs and SIRs are frequently used in litigation proceedings, the importance of writing clear, concise, factual, and complete reports cannot be overemphasized. In addition, incident reports allow DJJ to make decisions concerning policy changes as needed and to keep other officials informed as necessary.

Exh. 7.

Facility Tray-Slot Protocol has as its objective to reduce or eliminate breaking of tray slots and/or refusing to allow tray slots to be closed. This protocol, after a tray slot incident, provides that an offending resident will be placed in restraints the following day, starting at 8:00 a.m. As this protocol was described by the Assistant Superintendent for Security, the placement of restraints is a voluntary action by the offending resident. This protocol is designed to be a

deterrent—not punishment. If the resident does not voluntarily comply with the restraint protocol, his time is extended during his refusal. The restraints are not forcefully applied.

The Grievant's Employee Work Profile (EWP) includes the following responsibilities:

> Provides supervision and guidance to Sergeants and Juvenile Correctional Officers in their interactions with staff, wards and the public; ensures accurate, timely and appropriate information is disseminated consistent with DJJ and [facility] procedures; provides accurate and legible reports; provides guidance and direction to Sergeants and Juvenile Correctional Officers in resolving staff problems.

Exh. 11.

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). Exh 3.

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 was a lieutenant for the Agency for at least 16 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 04-02-12, at approximately, 1524 hours, you were the Shift Commander responsible for a shield team entering HB306 to place a resident in full mechanical restraints. This investigation of this incident finds that you were in violation of IOP 218 which states: "Under normal circumstances the highest ranking officer on duty shall not be involved in the use of physical restraint. He/she shall be in the immediate area to assess the situation, observe and direct staff and remain objective." Investigation of this incident reveals that you did not remain in the immediate area, instead moving to the sally port of the unit while the restraint took place. This is a direct violation of IOP # 218-4 (Use of Physical Restraint/Procedures).
>
> Additionally, upon review of your Serious Incident Report #2012-04-02-7909 and incident investigation MA040212007, they were found to contain information that is not factual and truthful. On the day of the event in question, you requested authorization from an administrator to enter the resident's room to place him in restraints due to the resident's refusal to allow his tray slot to be closed, therefore creating a dangerous situation. You wrote that the resident's tray slot was not secured, necessitating the use of the restraint team. Evidence indicates that the tray slot was in fact secured at least as early as 1500 hours (a full 24 minutes prior to the entry of the restraint team) negating any reason for you to request or follow through with the request to enter the room. In addition, you stated in your written Serious Incident Report that you "responded with the shield extraction team and talked to resident S.W. However the resident remained unruly and made threats to the members of the shield extraction team if they entered the room." Video surveillance indicates that at no time (in at least the 24 minutes prior to the entry of the restraint team) did you approach the door of the resident to speak with him, making it impossible that your statement could be factual. You also stated to the investigators that you were instructed to leave the area of the restraint by Major [S]. You maintained these assertions while being questioned by the investigators looking into this incident.
>
> The provision of false information is a direct violation of the Standards of Conduct (Group III), Unethical Conduct) and DJJ Administrative Directive #05-009.2 (Staff Code of Conduct) which states: "The following actions relating to unprofessional conduct of employees of DJJ may result in disciplinary action:
>
> - Refusal to cooperate with or provide information during an investigation or providing false or misleading information to investigators."

As for circumstances considered, the Written Notice stated:

> The nature and severity of these actions on your part are of such impact that a Group III offense under the Standards of Conduct is warranted. Management has concluded that any mitigation of the proposed disciplinary action (termination) would not be appropriate as this incident involved physical abuse of a resident and a breach in the institution's most basic responsibility to provide a safe environment for those committed to it. Additionally, your lack of integrity and trustworthiness make it impossible for you to continue in the position of trust and responsibility you hold as a lieutenant at [the] Correctional Center. Further, you have an active Group I from 12-8-10, which states "On 08-19-10, a resident was restrained twice on you shift and made allegations of being assaulted by staff. On that same date you failed to conduct a preliminary investigation or ensure that all incident reports and forms were submitted by all staff involved. This is a violation of IOP 218 – Use of Force." You also have an active Group I written notice for unsatisfactory performance issued 9-17-12.

Exhibit 2. [The reference to the Group I Written Notice on 9-17-12 is in error, since that written notice was mitigated down to a counseling memo.]

The Assistant Superintendent testified that physical force is absolutely the last resort, and only warranted for the circumstances dictated by IOP No. 218. When the incident of April 2, 2012, occurred, the incident reports from the Grievant and the participating officers all indicated that the resident was not allowing his tray slot to be closed and secured, thus creating an emergent situation covered by IOP No. 218. A review of the Rapid Eye surveillance video and the shield extraction team's own digital video shows that the facts were not accurately reported in the incident reports justifying the use of physical force. Exhs. 20, 21.[1] The Grievant's Serious Incident Report (SIR) states that the Assistant Superintendent approved the shield extraction team's forceful restraint of the resident. However, the Assistant Superintendent testified credibly that he was not aware of and did not approve the action.

The Grievant's SIR also reports that he responded to the resident's room with the shield extraction team and talked to the resident, unsuccessfully, fulfilling the Agency's goal of de-escalation of incidents. Exh. 13. However, the surveillance video available shows that for at least 24 minutes before the shield extraction team entered the resident's room, the Grievant did not approach the resident's area. The SIR also reports that the resident resisted the shield extraction team's force. The video of the incident shows repeated assaults on the resident by the shield extraction team. Importantly, the SIR omits the fact that the resident's tray slot was closed and secured at least 24 minutes before the shield extraction team entered. No witness could state how and when the tray slot was closed and secured. As explained by the Assistant Superintendent, the only justification for entering the resident's room and forcefully placing mechanical restraints on him was the security risk presented by the open tray slot and the resident's refusal to

[1] The videos, while submitted into evidence and viewed during the grievance hearing, are subject to a confidentiality agreement among the parties and were not exchanged. The videos will be maintained and preserved by the Agency and made available to any forum considering this grievance.

comply. According to the Assistant Superintendent, the errors and omissions in the Grievant's SIR were so material that the report was a falsification. Exh. 13.

The Assistant Superintendent acknowledged that this particular resident was very difficult. The Assistant Superintendent testified that he had one of the better relationships with the resident, and, had he been aware of the tray slot incident, he would have responded personally to the resident in an effort to de-escalate the situation and get the tray slot secured without use of force. The Assistant Superintendent also testified that had the SIR indicated the tray slot was closed before the shield extraction team entered, there would have been an immediate investigation because of the unauthorized use of force. None of the shield extraction team members' incident reports indicated the tray slot was actually secured before entering. A still picture of the secured tray slot from the extraction team's video is in the record at Exh. 19.

The Assistant Superintendent testified the discrepancies in the reports and the factual inaccuracy about the tray slot came to light when an investigation occurred in late June and July 2012, in response to the resident's grievance about the assault on him on April 2, 2012. The Assistant Superintendent testified that all of those involved in the unjustified use of excessive force were terminated.

The Rapid Eye video pertaining to the use of force was retrieved for the assault investigation. Exh. 20. The actual justification for the use of force was not being investigated initially. However, that Rapid Eye video showed the tray slot was secured at the time and even well before the shield extraction team entered the resident's room. Ultimately, the Rapid Eye video expires after a certain time and earlier video is no longer available. Inexplicably, the unit log book and shift commander's log book for April 2012 are missing.

The chief of security, Major S., testified that on April 2, 2012, he heard about the incident when the Grievant phoned the Superintendent. Major S. happened to be in the Superintendent's office for the phone call. The Grievant was asking for permission to deploy the shield extraction team. Major S. testified that the Grievant told him he already had approval from the Assistant Superintendent for Security to assemble the team. Major S. testified he understood the justification for the use of force was to secure the resident's tray slot. Major S. testified that if the tray slot were already secured, there would be no reason to enter the room and exert force; the last resort is to put a hand on a resident. Major S. also testified that, in hind sight, a full team had not been assembled because the same officer was supervising and using the video camera. Those two roles should be separate officers. Major S. testified that he relied heavily on the Grievant's performance and recommendations in approving the operation

On cross-examination, Major S. testified that he had instructed staff, when deploying a shield extraction team, to have the supervising officer located in a detached position, such as the sally port. Major S. also testified that on April 2, 2012, he was actually the highest ranking uniform officer, but he did not interpret the applicable policy to require his presence for the use of force.

The Regional Program Manager testified that he oversees several facilities, including the one involved here. He reviews all SIRs, and, after reviewing all the circumstances for the April 2, 2012, incident, that he concluded the Grievant requested the use of force under false pretenses—there was not an unsecured tray slot as proved by the videographic evidence, and the Grievant's account was materially inaccurate. Although the Grievant was not one of the assaulting officers on the team, the Grievant's responsibility for the unjustified use of force made him equally culpable. He also testified that nothing less than termination is appropriate because of the risk to staff and residents by the unjustified use of force, the resulting excessive violence, and his submission of reports after the incident that omitted key and material facts. The Regional Program Manager testified to his mitigation of a Group I Written Notice issued to the Grievant in July 2012 down to a counseling memo.

The internal investigator also testified regarding his involvement. His role was to investigate the assault alleged by the resident, and the Grievant was not the subject of the investigation. A shift supervisor with 20 years of service testified that only six reasons justify deploying a restraint team and with the tray slot being secured there was no justification.

Testifying for the Grievant was another shift supervisor, who also testified that with the tray slot closed there was no justification to enter the resident's room and forcefully apply restraints. This shift commander testified that they have been instructed to stay in the sally port or shift commander's office when a restraint team is deployed, to remain unbiased and stay objective.

A sergeant on the restraint team testified that he was responsible and was recording the event. He testified that the tray slot was not secured when they entered, and that the resident had used wax paper from his lunch to cover the windows of his room. This presented a security violation because the staff could not observe the resident's actions. The sergeant testified that there was no assault of the resident.

Another officer from the restraint team testified that Major S. actually assembled the team, personally directing this officer to leave his post and join the team. He also testified that Major S., the Assistant Superintendent, and the Sergeant were all convened in the shift commander's officer following the incident to review the video of the restraint. He testified that he had heard rumors circling that management wanted the Grievant fired.

A captain testified for the Grievant, but his testimony was consistent with the Agency's witnesses who testified that once the tray slot was closed and secured, there would be no justification for entering the resident's room to place him in restraints. However, this captain also testified that once a resident has caused a restraint team to be assembled, the resident will be placed in restraints, regardless of developing events. Another sergeant testified for the Grievant, stating that following a tray slot violation, the offending resident will be placed in restraints, forcefully if required.

The Grievant testified that a tray slot violation automatically leads to restraints, by force if necessary. Thus, according to the Grievant, the fact that the tray slot was secured before the restraint team entered the room was immaterial.

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 Grievant presented materially incomplete information in obtaining supervisory approval for the use of physical force. The documented justification for the use of the shield extraction team was the dangerous situation presented by the resident refusing to allow his tray slot to be closed and secured. Applicable policy prohibits use of force unless justified by limited criteria, none of which actually existed at or about the time the shield extraction team entered the resident's room. The physical force required to place a resident in mechanical restraints, alone, is an aggravating factor for this breach of protocol. The actual excessive force exerted and recorded on video is a further aggravating factor resulting from the Grievant's lapse.

I find the Grievant's account, whether sincere or not, is not credible. Whether the Grievant's lapse of reporting the justification for the use of physical force was negligent or more purposeful is of no moment. The use of physical force requires exacting compliance with Agency policy and procedure, and a carelessly presented and documented justification has the same result as a calculating one—breach of the Agency's obligation to protect its residents and staff. The Grievant's supporting witnesses were inconsistent with the established evidence, particularly the sergeant's testimony concerning the unsecured tray slot and the resident's alleged use of wax paper to cover his windows. The entire episode captured by the video evidence shows a disregard for procedure, safety, and ulterior motivation.

Thus, I find the Agency has borne its burden of showing a Group III offense. However, I find the Agency has not borne its burden of proof that the Grievant failed to position himself correctly during the actual restraint procedure. The evidence is equivocal on Major S's instructions and directives on the process of deploying a restraint team. On this issue, the

Major's testimony was equivocal regarding his procedural instructions for following policy. For this reason, I find that the aspect of the Written Notice pertaining the Grievant's errant location in the sally port is unsupported. Nonetheless, the central offense justifies and meets the criteria for a Group III Written Notice.

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's representatives testified that the breach by the Grievant in presenting justification for the use of physical force, with the resulting excessive force imposed on the resident, is among the most serious offenses and renders inappropriate any potential mitigation below a Group III Written Notice and termination. The Agency presents a position in advance of its need to manage the important affairs of the Agency. The hearing officer accepts, recognizes, and upholds the Agency's important responsibility for the safety of the staff, residents, and the public. The Grievant's lapse in this instance put both staff and residents at physical risk. Further, the Agency's liability for the potential violation of civil rights puts the entire Agency and the public it represents at risk. I find that the Agency has acted within the bounds of reason in its discipline of the Grievant. While the Grievant was otherwise considered a satisfactory employee, the Agency demonstrated a legitimate business reason to impose the ultimate discipline. No mitigating factors exist that would give the hearing officer authority to reduce the level of discipline.

Retaliation

The Grievant asserts that the Agency's action is motivated by retaliation. For a claim of retaliation to succeed, the Grievant must show (1) he engaged in a protected activity; (2) he suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, whether management took an adverse employment action because the employee had engaged in the protected activity. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006); s*ee, e.g.*, EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633. If the Agency presents a nonretaliatory business reason for the adverse action, then the Grievant must present sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation. *See EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 405 (4th Cir. 2005). Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

The Grievant's description of the protected activity is that the Assistant Superintendent for Security was intent on terminating his employment. The Grievant's July 23, 2012, grievance against the Assistant Superintendent details this allegation. Exh. 31. The Grievant asserts that his job termination stems from the Assistant Superintendent's alleged ill will against him. From the evidence presented, I find insufficient basis for this allegation.

There is nothing to show that the Agency's handling of this discipline was in any way retaliatory beyond the Grievant's mere allegation. Grievant has not presented sufficient evidence to show that the Agency's discipline was motivated by improper factors. Rather, it appears that the determinations were based on the Grievant's actual conduct that was inadvertently disclosed

from the resident's allegation of the April 2, 2012, assault, all of which actions were primarily within the control of the Grievant.

While lesser discipline was within the discretion of Agency management, the Agency acted within its discretion by issuing a Group III Written Notice with termination.

DECISION

For the reasons stated herein, the Agency's issuance of the Group III Written Notice with termination is **upheld**. However, the Written Notice's reference to the Grievant's improper positioning during the physical restraint is reversed. Further, as stated above, the reference to a prior 9-17-12 Group I Written Notice was error and shall be stricken from this Written Notice. The Agency shall correct the Written Notice, accordingly.

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.[2]

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

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