Issue: Group III Written Notice with Termination (failure to follow policy & procedure); Hearing Date: 12/13/12; Decision Issued: 12/14/12; Agency: DJJ; AHO: Cecil H. Creasey, Jr.; Case No. 9966; 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. 9966

Hearing Date: December 13, 2012
Decision Issued: December 14, 2012

PROCEDURAL HISTORY

Grievant was a senior corrections officer with the Department of Juvenile Justice ("the Agency"), and he challenges the Group III Written Notice issued on September 13, 2012 for failure to comply with applicable policy and procedure on August 21, 2012. The Grievant has a prior active Group II Written Notice.

Grievant timely filed a grievance to challenge the Agency's disciplinary action of termination. On October 29, 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 7, 2012. The hearing was initially scheduled for November 29, 2012, but the Grievant requested a continuance for personal reasons found to constitute good cause. The hearing ultimately was re-scheduled for December 13, 2012, on which date the grievance hearing was held, at the Agency's facility. The time for completing the grievance is extended, accordingly.

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

APPEARANCES

Grievant
Advocate for Agency
Agency Representative
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, reinstatement to his job, 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.

Agency Institutional Operating Procedure (IOP) No. 100, *Incident Reports*, provides, at 100-4.1:

> On-duty staff that observe or become aware of an incident occurring in a JCC shall immediately notify the Security Supervisor (e.g., Unit Manager or Shift Commander) of the facility and complete an IIR [Institutional Incident Report].

Agency Exh. K.

Agency Security Post Order No. 16 is applicable to the Grievant's officer position, and the order requires reporting of incidents. Agency Exh. L.

The State Standards of Conduct, DHRM Policy 1.60, provides that Group III offenses 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, neglect of duty, or other serious violations of policies, procedures, or laws. Agency Exh. I.

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 7 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:

> . . . watched a resident place another resident in a choke hold from behind and choked him until he (the victim) fell to the floor, where he laid for several seconds. After your observation, you failed to report the incident and to seek medical attention for the resident who had been assaulted. The assault was not discovered until after [the Assistant Superintendent for Security] had walked into the unit (shortly after the assault) and began inquiring as to why the victim's eyes were appearing to be dilated. After briefly talking to the victim, [the Assistant Superintendent] escorted him to the infirmary, where he (the victim) reported that he had been choked-out (assaulted) by another resident. A review of the Rapid Eye camera system clearly shows the assault, as well as you watching the assault take place. Your actions in failing to make a prompt request for assistance and to obtain medical attention for the assaulted resident had serious potential ramifications for the resident's health and well-being. He was transported for emergency medical attention and diagnosed with a concussion. If [the Assistant Superintendent] had not intervened, the resident may have had potentially life-threatening outcomes due to your failure to act appropriately. In addition, your actions after the incident were improper and in direct violation of [] IOP #100-Incident Reports as you failed to notify the Shift Commander of the assault when it occurred. IOP #100 states: On-duty staff that observe or become aware of an incident occurring in a JCC should immediately notify their security supervisor of the facility and complete an IIR.

Agency Exh. C. As for circumstances considered, the Written Notice referenced the severity of this offense and the potential impact of this lapse. The circumstances considered also referenced the active Group II Written Notice and other Notices of Needs Improvement that weighed against mitigating the discipline to less than termination. *Id*.

The Assistant Superintendent and the Shift Commander both testified to events consistent with those described in the Written Notice.

The Grievant testified to the circumstances, and he did not challenge the basic facts and the corroborating video from the Rapid Eye camera. The Grievant testified that he was "in shock" following this incident, causing him slurred speech, and that this condition, combined with being busy with other obligations, caused his lapse in reporting. The Grievant testified that he had never had the shock reaction before. The Grievant also testified that he has worked almost continuously since January 2012, with only three days off, because of the Agency's staffing shortage. The Grievant also presented a copy of the decision from the Virginia Employment Commission granting him benefits and finding that his conduct did not rise to the level of misconduct that would bar unemployment benefits. Grievant's Exh.

The Assistant Superintendent testified that he did not observe any slurred speech by the Grievant following this incident.

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 failed to act or respond properly under the reporting policy. Further, I find that the offense is appropriately a Group III offense. The Grievant's account of being "in shock" after this incident is not supported by the evidence. There is no evidence, particularly no medical evidence, that this incident, while serious for the victim, presented such an unexpected, sudden and overwhelming event that could cause shock for a senior officer with 7 years experience. The Grievant's lapse of not reporting the assault was a clear, definitive breach of policy and expected conduct for a senior corrections officer. Thus, the Agency has borne its burden of showing a Group III offense.

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 presents a position in advance of its obligation and 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 of reporting and obtaining assistance in this instance put a resident at significant risk. While termination is necessarily a harsh result, I find that the Agency has demonstrated a legitimate business reason and acted within the bounds of reason in its ultimate discipline of the Grievant. The Grievant has provided no mitigating factors that permit the hearing officer to reduce the level of discipline.

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]

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

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

Cecil H. Creasey, Jr.
Hearing Officer