

Issue: Group III Written Notice with Termination (conduct that undermines the agency's effectiveness); Hearing Date: 03/30/16; Decision Issued: 04/24/16; Agency: DOC; AHO: Lorin A. Costanzo, Esq.; Case No. 10762; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER
In the matter of: Grievance Case No. 10762

Hearing Date: March 30, 2016
Decision Issued: April 24, 2016

PROCEDURAL HISTORY

Written Notice:

On December 18, 2015 Grievant was issued a Group III Written Notice with termination (effective 12/18/15). The Written Notice provided:

On 11-4-15 you went to court for Assault and Battery against a Family Member. The Court's judgment was deferred until November 2017 and you were placed on First Offender Treatment, or probation, for a period of two years. If you comply with all terms and conditions set by the Court on 11-4-15 and in no way violate probation, you will be found not guilty of the charge on November 15, 2017.

Operating Procedure 040.1, Litigation, stated "Charges that result in a court finding that "there is sufficient evidence for a finding of guilty" demonstrated factually proven conduct, even in those instances where the imposition of action is held in abeyance for a period of time."¹

Attached documentation referenced to OP 135.1 providing, "employees who are criminally charged may be administratively charged based on the same conduct and the disciplinary action can move forward rather than waiting for the criminal charges to be processed".

Timeline and events:

The grievance hearing was initially set, for February 26, 2016. However, on February 22, 2016, issues concerning exhibits and witnesses arose and, on joint motion of the parties, the 35 day time for the grievance hearing to be held was extended and the grievance hearing was continued to March 22, 2016.

Witness Orders were issued, at request of Grievant, for 5 witnesses to appear at the March 22, 2016 hearing.

On March 18, 2016 Grievant notified Hearing Officer his advocate was hospitalized and he requested a continuance as he was securing a new advocate. Agency advocate did not object and, on motion of Grievant, the grievance hearing was continued from March 22, 2016 to March 30, 2016.

On March 30, 2016 grievance hearing was held at Facility. At hearing certain documents were addressed and agreed to be provided after the hearing concluded. The parties agreed to present closing argument orally, via conference call, after the documents were received. The documents were e-mailed 3/31/16 and closing arguments were made, via conference call, on April 5, 2016.

ISSUES

1. Whether the Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?

¹ Agency Tab 1.

3. Whether the disciplinary action taken by the Agency was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense).
4. Whether there were mitigating circumstances justifying reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its action against 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. Grievant has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline.²

HEARING

The following appeared at hearing held at Facility on March 30, 2016:

Grievant
Grievant's Advocate
Agency Advocate
Agency Party Representative at Hearing
Witnesses

The following exhibits admitted into evidence:

1. Grievant's Exhibits - one folder of exhibits tabbed A through F.
2. Agency's Exhibits - one binder of exhibits tabbed 1 through 8.
3. Three Joint Exhibits - admitted at hearing by agreement.

FINDINGS OF FACT

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

01. Facility is a correctional facility operated by Agency and charged with providing a continuum of mental health services to male offenders in a safe and secure environment.³

02. Grievant has been employed by Agency for approximately 14 years as has worked at Facility as a Correctional Officer since 2003. As a Correctional Officer, Grievant provides for the security and supervision of adult offenders at Facility and while in transport. His duties can include supervision of offender activities, observing and recording both the behavior and movement of offenders, and providing for their safe and secure confinement. Prior to his post transfer on or about 11/4/15 he supervised inmate work crews.⁴

² Office of Employment Dispute Resolution, DHRM, *Grievance Procedure Manual*, Sections 5.8 and 9.

³ Grievant Tab A.

⁴ Testimony and Grievant Tabs A. and E.

03. Grievant, while employed by Agency, was charged with a violation of Code of Virginia § 18.2-57.2, assault and battery against a family or household member, a class 1 misdemeanor. On November 4, 2015 he was tried in the General District Court on such charge.”⁵

04. Grievant reported to Agency his being charged with a violation of § 18.2-57.2 in September of 2015 and informed Agency of his 11/4/15 trial results. Grievant was subject to 3 protective orders which he kept Agency informed of also.⁶

05. At trial Grievant entered a plea of not guilty and, following a trial with 4 witnesses, including Grievant, the judge entered a “*Record of Proceeding & Disposition in Accordance with § 18.2-57.3*” in which judge found there were “facts which would justify a finding of guilt”. Additionally, with the consent of Grievant, without entering a judgment of guilt, the judge deferred further proceedings. The deferral was done upon terms and conditions ordered by the judge including Grievant being placed on probation for a period of two years, [Community Corrections] supervising his probation (which converts to inactive when counseling completed), and his being of good behavior for the two year period. The matter was continued to November 15, 2017 for final disposition, unless sooner reinstated upon the docket for good cause shown.⁷

06. After his 11/4/15 trial, Grievant provided Warden a copy of the court’s *Record of Proceeding & Disposition in Accordance with § 18.2-57.3* (“*Record of Proceeding & Disposition*”) as was requested by Warden. Upon notification of the trial disposition Warden reassigned his post from *Offender Work Crew* to inside the institution pending further investigation.⁸

07. Warden was kept aware of matters by Grievant, received and reviewed a copy of the court’s *Record of Proceeding & Disposition*, and received and reviewed other documents, including a letter from Grievant’s attorney. Warden, in her investigation, discussed matters with Grievant, Grievant’s Attorney, Probation Officer, and Agency management.⁹

08. § 18.2-57.2 of the Code of Virginia provides that any person who commits an assault and battery against a family or household member is guilty of a Class 1 misdemeanor.

09. § 18.2-57.3 of the Code of Virginia, 1950, as amended, sets forth requirements and authority for a court to defer the proceedings, without a finding of guilt, if the court found “facts which would justify a finding of guilt” and the person charged meets certain requirements. This statute provides the person charged with violating § 18.2-57.2 be placed on probation.¹⁰

CONCLUSIONS

OP 135.1

The Department of Corrections, pursuant to Va. Code §53.1-10, has promulgated its own *Standards of Conduct* patterned on the state Standards, but tailored to the unique needs of the Department. The *Standards of Conduct* (Operating Procedure Number 135.1, Effective Date: October 1, 2015) divide unacceptable behavior into three groups according to the severity of the behavior, Group I being the least severe and Group III being the most severe.

⁵ Testimony and Agency Tab 2.

⁶ Testimony.

⁷ Agency Tab 3.

⁸ Grievant Tab E-2 and testimony.

⁹ Testimony.

¹⁰ Agency Tab 6.

Group III offenses include acts and behavior of such a serious nature that a first occurrence normally would warrant termination. Examples of Group III offenses listed in OP 135.1 include violations of OP 40.1 (considered a Group III depending upon the nature of the violation) and charges or situations that involve crimes against a person.¹¹

OP 135.1 also provides that the list of offenses contained therein is illustrative and not all-inclusive. An action or event occurring either during or outside of work hours that, in the judgment of the agency head, undermines the effectiveness of the employee or of the agency may be considered a violation of these Standards of Conduct and may result in disciplinary action consistent with the operating procedure based on the severity of the offense.¹²

This OP 135.1 addresses employees facing criminal charges or convictions and provides that a conviction is not necessary to proceed with disciplinary action. OP 135.1 provides, in pertinent part:

Charges or situations that involve crimes against persons are subject to a disciplinary charge that could include termination.

A conviction is not necessary to proceed with a disciplinary action. The Unit Head must determine whether the evidence is sufficient to have an impact on the DOC, its employees, and the public and its perception of the DOC.

Attachment 1-OP 135.1 (effective date: October 1, 2015) addresses convictions, criminal charges, and charges that result in a court finding that there is sufficient evidence for a finding of guilt and the imposition of action being held in abeyance. Attachment 1 provides, in pertinent part:

Misdemeanor convictions may result in a Group III charge and termination. ...

Charges that result in a court finding that "there is sufficient evidence for a finding of guilt and the imposition of the action is held in abeyance for a period of time", may be dealt with on an administrative basis, not as a conviction but as conduct which has been factually proved.

Additionally, employees who are criminally charged may be administratively charged based on the same conduct (if the DOC has the evidence to prove it) and the administrative disciplinary action can move forward rather than waiting for the criminal charges to be processed.¹³

DOC Procedure No. 5-45 and Operating Procedure 040.1

DOC Procedure No 5-45 (dated 6/1/99) provided for actions that may be taken by Agency upon an employee receiving a charge or conviction of a criminal offense and provided for Agency to determine if continuing the employee in his position would be in the best interest of Agency. No provisions addressed charges resulting in a court finding that there is sufficient evidence for a finding of guilty and the imposition of action is held in abeyance.¹⁴

DOC Procedure Number 5-45 was superseded by OP 040.1 which included provisions addressing instances where there are charges that result in a court finding that there is sufficient evidence for a finding of guilty and the imposition of action is held in abeyance for a period of time. OP 040.1 provided this situation could be dealt with on an administrative basis, not as a conviction, but as conduct which has been factually proved.

Operating Procedure Number 040.1 (effective November 1, 2015) provides:

Charges that result in a court finding that "there is sufficient evidence for a finding of guilty" demonstrate factually proven conduct, even in those instances where the imposition of action is held in abeyance for a period of time. These situations should be handled based on the nature of the charge and evidence presented and consideration should be given to whether the criminal

¹¹ Joint Exhibit #3.

¹² Joint Exhibit #3.

¹³ Agency Tab 5.

¹⁴ Agency Tab 7.

charge is of such a nature that to continue the employee in their assigned position would be in the best interest of the DOC.

§ 18.2-57.2

§ 18.2-57.2 of the Code of Virginia provides any person who commits an assault and battery against a family or household member is guilty of a Class 1 misdemeanor. It additionally provides that whenever a warrant for a violation of this section is issued, the magistrate shall issue an emergency protective order as authorized by § 16.1-253.4.

§ 18.2-57.3.

§ 18.2-57.3 of the Code of Virginia allows the court, in cases involving persons charged with a first offense of assault and battery against a family or household member, to defer proceedings, without make a finding of guilt, and place the person on probation.

To be eligible for such deferral the court finds, among matters, the person consents to such deferral, has not previously been convicted of any offense relating to assault and battery against a family or household member, and has not previously had a proceeding dismissed pursuant to § 18.2-57.3. If the person does not enter a guilty plea the court must have also determined the evidence is sufficient to find the person guilty of a violation of § 18.2-57.2 before proceeding on as provided for in this statute.

The matter is, by statute, only considered a conviction for the purposes of applying this section in subsequent proceedings and for the purposes of Article 6.1 (§ 18.2-307.1 et. seq.) of Chapter 7 of the Code of Virginia, which addresses concealed weapons.

If the terms and conditions set forth in the court order are fulfilled, the person is discharged and the proceedings dismissed without an adjudication of guilt. However, if the person violates a term or condition of supervised probation or of the period of good behavior, the court may enter an adjudication of guilt and proceed as otherwise provided by law.

18 U.S.C. § 922:

Federal law, 18 U.S.C. § 922 (g)(9), enacted 1996, prohibits a person convicted of a misdemeanor crime of domestic violence from possessing firearms, ammunition, or explosives.

Grievant:

It is not contested Grievant was charged with a class 1 misdemeanor of assault and battery against a family or household member and tried for such offense. Grievant doesn't contest the entry by the judge of a *Record of Proceeding & Disposition in Accordance with § 18.2-57.3* and that, upon trial, the court found facts which would justify a finding of guilt. It is not contested the judge, without entering a judgment of guilt, deferred further proceedings and continued matters to November 15, 2017 upon terms and conditions ordered by the judge, including ordering Grievant:

- being evaluated, enter into, and complete counseling;
- being placed on active probation for a period of two years;
- being on probation supervised by [Community Corrections] and converted to inactive when counseling completed; and
- being of good behavior for two years.

Grievant challenges Agency's discipline against him and contends:

- a. He was not found guilty of any criminal offense and should not have been disciplined with a Group III Written Notice and termination.
- b. He was subject to unfair/unequal/misapplication of policy in that he was treated differently than other employees in the same or similar circumstances were treated.

c. Mitigation is warranted and appropriate.

a. Grievant contends *he was not found guilty of any criminal offense and should not have been disciplined with a Group III Written Notice and termination.*

Grievant doesn't contest he was charged with violating § 18.2-57.2 and, without a finding of guilt, the proceedings were deferred under terms and conditions set by the court, as was provided for in § 18.2-57.3. He does not contest the judge "*found facts which would justify a finding of guilt*".

Grievant testified to having 3 Protective Orders entered against him, one in January of 2015, one in July of 2015, and one in August of 2015. He indicated, as to the July matter, his wife was charged with assault, the matter dropped, and the January and July protective orders were dropped.

A conviction may give rise to disciplinary action but a conviction is not necessarily a prerequisite for Agency to take disciplinary action. Grievant correctly asserts he was not convicted of the charge. The court did not find Grievant to be either *guilty* or *not guilty* but found facts which would justify a finding of guilt and deferred further proceedings for approximately 2 years and placed him on probation.¹⁵

Agency Policy, OP 040.1, addresses criminal charges resulting in a court finding "there is sufficient evidence for a finding of guilty" and provides this finding demonstrates factually proven conduct, even when the imposition of action is held in abeyance for a period of time. This policy provides these situations should be handled based on the nature of the charge, evidence presented, and consideration should be given to whether the charge is of such a nature that to continue the employee in his assigned position would be in the best interest of the DOC.¹⁶

Attachment 1 to OP 135.1 states that charges resulting in a court finding that "there is sufficient evidence for a finding of guilt and the imposition of the action is held in abeyance for a period of time", may be dealt with on an administrative basis, not as a conviction, but as conduct which has been factually proved.

Attachment 1 also provides employees who are criminally charged may be administratively charged based on the same conduct (if the DOC has the evidence to prove it) and the administrative disciplinary action can move forward rather than waiting for the criminal charges to be processed.

Warden was aware of matters and she discussed matters with Grievant, his lawyer, and his probation officer. Agency secured a copy of the court's *Record of Proceeding & Disposition* which provided Agency evidence of the charge, trial, and disposition. Agency was aware of and received evidence of the terms, and provisions set forth in the *Record of Proceeding & Disposition*. Agency was aware of Grievant's employment as a Correctional Officer, the duties and responsibility of a Correctional Officer, Grievant's length of service (approximately 14 years), and his EWPs (indicating an overall rating earned of "Exceeds Contributor" for the last four periods).

Agency's action was not based upon Grievant having been convicted of a domestic violence charge. Agency's action was based upon the court having found, at trial on the charge, there were "facts which would justify a finding of guilt". Agency action was based upon OP 040.1 and OP 135.1 which indicates it may take disciplinary action concerning charges that result in a court finding that "there is sufficient evidence for a finding of guilty" and providing these situations demonstrate factually proven conduct, even when the imposition of action is held in abeyance for a period of time.

¹⁵ Agency Tab 3 and 6.

¹⁶ Agency Tab 4.

Policy, OP 040.1, provides Agency should give consideration to whether the charge is of such a nature that to continue the employee in their assigned position would be in the “best interest of the DOC”.¹⁷ Furthermore, per policy, violations of OP 040.1 may be considered a Group III offense.¹⁸ Grievant’s charge involved an assault and battery, a charge involving a crime against a person, and related to domestic violence.

Agency is charged with the responsibility of providing for the security and safety of offenders placed in its charge and the security and safety of the public and its employees. Grievant was employed by Agency to assist in carry out Agency’s duties and responsibilities. Management is charged with taking into consideration the best interest of Agency. Grievant presented a situation in which a Correctional Officer was charged with a crime of assault and battery against a family or household member, the trial judge had found facts which would justify a finding of guilt, and a Correctional Officer, who supervised offenders, being on probation.

Policy states management should give consideration to whether the nature of the charge is such that continuing Grievant in his position would be in the best interest of the Agency. Management has the duty and responsibility to managing the affairs and business of Agency. Warden, on being notified of Grievant’s trial results, changed his post and investigated matters. Grievant’s situation was discussed within Agency and management made a determination to issue a Group III Written Notice and terminate after investigation and discussion.

Policy, law, and the nature of the charge and court findings were considered. There is a valid business concern as to possible effects on Agency’s reputation and public image as well as possible effects on work relationships with offenders.

Consideration is given to all the evidence and the demeanor and testimony of the witnesses. Upon consideration whereof, for the reasons stated herein, Hearing Officer finds that Agency’s discipline was warranted and appropriated under the circumstances.

b. Grievant contends he was subject to unfair/unequal/misapplication of policy in that he was treated differently that other employees in the same or similar circumstances were treated.

Grievant contends he was subject to unequal, unfair, or misapplication of policy and contends other employees in the same or similar circumstances were not terminated. Testimony was received of various witnesses as to their having heard or their being aware of employees involved in domestic violence and not terminated.

Per OP 135.1, employees criminally charged may be administratively charged based on the same conduct and the disciplinary action can move forward rather than waiting for the criminal charge to be processed. Furthermore, OP 135.1 indicates violations of OP 40.1 may be considered a Group III, depending upon the nature of the violation. In both of these matters, the policy is permissive not mandatory.

Grievant testified he had been told of several Agency employees who have a charge/conviction for domestic violence and who kept their positions. He also addressed one employee working and being on probation for DUI however, nothing was presented to establish his basis of knowledge, if Agency knew of the DUI, or other surrounding circumstances concerning matters. Additionally, while both a DUI and an assault and battery against a family or household

¹⁷ Agency Tab 4.

¹⁸ Agency Tab 4.

member charge are serious matters, a DUI, not being a crime against a person, is not of the same nature as an assault and battery against a family or household member.

Grievant testified he heard a hearing officer "up the road" was moved to the regional office after convicted of domestic violence. No clarification as to what was meant by "up the road" or "regional office" was offered. There is no basis to clarify these references and no evidence to determine if the hearing officer referenced was a Correctional Officer or employed by Agency.

Witnesses addressed Employee #1 had a conviction involving domestic violence in the 1970's and was within about two years of retirement when the federal statute forbidding weapon possession by persons convicted of domestic violence came into existence in the mid 1990's. After this federal law was enacted Agency moved Employee #1 from a Correctional Officer position to a maintenance position, not requiring access to weapons, to finish out to retirement.

Lt addressed Employee #1 having a domestic violence conviction which was over twenty years old when the federal law came into effect. Lt testified, at the time, DOC had not incorporated the domestic violence law with law enforcement and security personnel but when the law came into effect Employee #1 was transitioned into a maintenance position which he retired out of. He also indicated this was the only situation involving domestic violence and employees remaining employed he was aware of.

Testimony as to Employee #2 addressed him being involved in an incident of domestic violence and keeping his job. Testimony indicated he was believed either convicted or receiving a deferred proceeding/judgment for domestic violence. Grievant believed this was around approximately 1998 or 1999 with Captain indicating he believed this was maybe in the early 2000's and the employee was convicted and placed on supervised probation. Captain indicated he knew what was told him and heard word of mouth as to the matter. He did not know any details.

Testimony addressed Employee #3 being involved in domestic violence and keeping his job. He was believed to be on probation for 2 years regarding domestic violence around early 1990's to mid-1990's. Grievant indicated he had talked to Employee #3. Captain address this employee being maybe in the early 2000's convicted for a domestic violence which he thought may have been reduced to malicious wounding and may have been taken under advisement. Testimony was not clear and presented inconsistencies as to matters. Captain related not know details but just word of mouth and what he had heard. He had talked to Employee's #2 and #3. Testimony further addressed Employees #1, #2, and #3 being now retired. However, Warden testified Employee #3 was not retired but was later terminated for an issue not related to domestic violence.

Insufficient evidence has been presented to determine that the employees raised as being treated differently were treated differently under the same or similar circumstances. Concern is expressed as to the basis for the knowledge and the evidence indicating a lack of knowledge as to surrounding circumstances, times, and events. Furthermore, circumstances surrounding Grievant and Employees #1, #2, and #3 were a significant period of time apart.

Circumstances surrounding the three Employees were addressed in broad and general terms. Witnesses identified the time of the Agency's/Court's actions being generally, during the 1990's or early 2000's (with Employee #1 having a conviction in the 1970's). The events related as to the three employees occurred around 15± years ago. The events occurred well before Warden took over at facility. Also the events appear to have occurred near or recently after the time Agency began addressing the federal statute concerning domestic violence convictions and weapons and matters authorized by §18.2-57.3 of the Code of Virginia.

Testimony indicated Agency had knowledge of Employee #1's having an old criminal conviction for domestic violence and that he was transferred to a maintenance position. No evidence addressed if the transfer was a result of a disciplinary action. Testimony as to Employee #1 appears to be more consistent and more detailed than other employees addressed in testimony.

No evidence was presented as to whether or not Agency took disciplinary action concerning Employee #2 and #3, what that action was, or even if Agency knew they had charges/convictions. The evidence concerning Employee #2 and #3 is not sufficient to determine the circumstances and facts involved in their situations and whether they are the same or similar to the facts in Grievant's case.

Concern is given to the time the events and matters presented in this case arose, the nature of the evidence presented, weight that can be given that evidence, and the basis for the testimony presented. The period of time from when Grievant's action arose to when matters arose as to Employee #1, #2, #3 is also of concern in this cause.

Other than as to Grievant, no documents were presented addressing employment matters, court matters, or Agency matters related to any of the employees addressed by witnesses. None of the employees referenced as being treated differently in the same or similar circumstance appeared, testified, or provided statements. Witnesses at hearing indicated they were relating what they had heard or what was told them. The facts, circumstances, or timeframes presented as to these employees were general and broad.

In determining if Grievant was treated differently than other employees in the same or similar situation, consideration is given to timelines concerning enactment of laws, policy, and the alleged actions of the referenced employees, the courts, and Agency. The federal law addressing domestic violence convictions and weapon possession was enacted in the mid 1990's. Virginia enacted § 18.2-57.3 in the late 1990's and Agency policy added provisions addressing the court finding facts which would justify a finding of guilt and the court deferring proceedings as provided for in § 18.2-57.3.

Upon review of the totality of the evidence, and for the reasons stated above, there is insufficient evidence to find that management violated a mandatory provision of policy or to find Agency's discipline was so unfair as to amount to a disregard of the intent of the applicable policy. Furthermore, there is insufficient evidence to find that Grievant was subject to an unfair, unequal, or misapplication of policy in that he was treated differently than other employees in the same or similar circumstances were treated.

c. Grievant contends mitigation is warranted and appropriate.

§ 2.2-3005 of the Code of Virginia provides Hearing Officers shall have the power and 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 Human Resource Management pursuant to § 2.2-1202.1.

The hearing officer is to determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. To do this, the hearing officer reviews the evidence de novo (afresh and independently, as if no determination had yet been made) to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct; and (iii) whether the disciplinary action taken by the agency was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense). If the hearing officer finds that (i) through (iii) above, the agency's discipline must be upheld and may not be mitigated, unless under the record evidence, the discipline exceeds the limits of reasonableness.

If the agency prevails on all three elements, the hearing officer must then consider whether the grievant has shown, by a preponderance of the evidence, that there were nevertheless mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether any aggravating circumstances exist which would overcome the mitigating circumstances. Furthermore, in reviewing agency-imposed discipline, the hearing officer must give due consideration to the management's right to exercise its good faith business judgment in employee matters, and the agency's right to manage its operations.

As more fully discussed above, the Hearing officer finds that Grievant engaged in the behavior described in the Written Notice, his behavior constituted misconduct, and Agency's discipline was consistent with law and policy. Consideration is given to the evidence admitted including Grievant's length of service and otherwise satisfactory work performance. His last four Employee Work Profiles ("EWP") (effective date: 11/1/11;, 11/1/12 - 10/31/13, 11/1/13 - 10/31/14, and 11/1/14 - 10/31/15 each indicate an *Overall Rating Earned* of "Exceeds Contributor".¹⁹ Consideration is also given to the responsibilities and duties owed to the public and to offenders by a Correctional Officer and by Agency, the nature of Grievant's charge, and the court, without a finding of guilt, finding there were facts which would justify a finding of guilt and placing him on probation.

Under the EDR's Hearing Rules, the hearing officer is not a "super-personnel officer." Therefore, the hearing officer should give the appropriate level of deference to actions by Agency management that are found to be consistent with law and policy, even if he disagrees with the action.

Upon consideration of all the evidence presented in this cause, the Hearing Officer concludes that Agency's disciplinary action was within the tolerable limits of reasonableness and mitigation is not found to be warranted and appropriate under the circumstances.²⁰

Due Process:

By letter of December 15, 2015 Agency provided Grievant with notification of the offense alleged, its proposed disciplinary action, an explanation of evidence in support of the charge, and a reasonable opportunity to respond. He was notified he was being placed on pre-disciplinary leave, effective immediately.

In its 12/15/15 letter Agency indicated its intent to issue a Group III Offense with discharge. Agency addressed the assault and battery against a family or household member charge, the court's disposition deferring the proceedings, its finding of facts which would justify a finding of guilt, Grievant's probation, and OP 040.1 indicating charges that result in a court finding that "there is sufficient evidence for a finding of guilt" demonstrating factually proven conduct. Agency also address OP 135.1 provisions and in the letter Grievant was afforded until close of business (5:00 p.m.) 12/17/15 to present in writing, factors for consideration in mitigation or denial of the charges. Grievant responded in writing to Agency by his letter of 12/17/15 and Agency took into consideration his response, in addition to giving consideration to other matters, in determining to issue the Group III Written Notice issued 12/18/15.²¹

¹⁹ Grievant's Tabs A-1, A-2, A-3, A-4.

²⁰ Cf. *Davis v. Dept. of Treasury*, 8 M.S.P.R.317, 1981 MSPB LEXIS 305, at 5-6 (1981) holding that the Board "will not freely substitute its 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.'"

²¹ Grievant Exhibit E-2 and E-3.

The evidence indicates Grievant, prior to issuance of the Written Notice and termination, was afforded notification of the offense, and explanation of the Agency's evidence in support of the charge, and a reasonable opportunity to respond.

DECISION:

For the reasons stated above, based upon consideration of all the evidence presented in this cause the Hearing Officer finds:

1. Grievant engaged in the behavior described in the Written Notice.
2. The behavior constituted misconduct.
3. The disciplinary action taken by the Agency was consistent with law and policy.
4. Mitigating circumstances justifying reduction or removal of the disciplinary action are not found.
5. Agency has met its burden that the action against Grievant was warranted and appropriate under the circumstances.

For the reasons stated above, based upon consideration of all the evidence presented in this cause, the Agency's issuance to Grievant of a Group III Written Notice with termination is ***Upheld***.

APPEAL RIGHTS

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 Director of DHRM. 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 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

copies e-mailed to: Grievant's advocate
Agency Advocate
EDR