Issues: Group II Written Notice with Suspension (failure to follow policy) and Group III Written Notice with Termination (verbal abuse of a resident); Hearing Date: 03/17/13; Decision Issued: 04/15/13; Agency: DJJ; AHO: John V. Robinson, Esq.; Case No. 10007; Outcome: Partial Relief; **Administrative Review: EDR Ruling Request received 04/22/13; EDR Ruling No. 2013-3593 issued 05/31/13; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 04/22/14; DHRM Ruling issued 05/23/13; Outcome: AHO's decision affirmed.**

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 10007

Hearing Officer Appointment: December 27, 2012
Hearing Date: March 27, 2013
Decision Issued: April 15, 2013

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge termination of her employment effective December 17, 2012, pursuant to a Group II Written Notice and a Group III Written Notice issued by Management of the Department of Juvenile Justice as described in the Grievance Form A dated December 6, 2012. The Grievant is seeking the relief requested in her Grievance Form A and in her exhibits admitted into evidence.

The hearing officer was appointed on December 27, 2012. The hearing was delayed while the Grievant started a new job and sought to retain legal counsel. Ultimately, the Grievant did retain an attorney (the "Attorney") and the hearing was scheduled during a pre-hearing conference call for March 13, 2013. On February 8, 2013, the hearing officer issued at the request of the Grievant, by counsel, an Order for Witness and an Order for Documents.

On March 6, 2013, the Grievant, by counsel, asserted to the hearing officer that the Grievant had not received any response to the document orders and the Grievant also filed with the hearing officer a Motion to Compel Discovery and a Motion for a Dismissal for the Grievant.

On March 8, 2013, the Agency provided proof to the hearing officer and the Attorney that it had supplied the Grievant with documents responsive to the sought production on January 17, 2013. The Agency's document response to the Grievant was acknowledged by the Attorney on March 10, 2013.

The parties held an additional prehearing conference call at 2:00 p.m. on March 12, 2013. In view of the Agency's response of January 17, 2013 to the Grievant's request (and the hearing officer's order) for documents, the Grievant, by counsel, admitted that her Motion to Compel Discovery and Motion for a Dismissal for the Grievant were both moot. Because of the storm the previous week and the Grievant's confusion over the documents previously delivered to her on January 18, 2013, for which the Attorney apologized, the parties agreed to reschedule the hearing to March 27, 2013.

Following the pre-hearing conference, the hearing officer issued an Amended Scheduling Order entered on March 15, 2013, which is incorporated herein by this reference.

In this proceeding the Agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances. The Grievant bears the burden of proof concerning her affirmative claim of retaliation.

At the hearing, the Grievant was represented by her Attorney and the Agency was represented by its Advocate. Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing, namely the Agency's exhibit binder and exhibits 1-14 in the Grievant's exhibit binder although nothing was inserted behind Tabs 1 and 2.[1]

No open issues concerning non-attendance of witnesses or non-production of documents remained by the conclusion of the hearing.

APPEARANCES

Representative for Agency
Grievant
Witnesses

FINDINGS OF FACT

1. The Grievant was a juvenile corrections officer ("JCO"), Security Officer III, formerly employed by the Agency at a juvenile detention center (the "Facility").

2. The Grievant was so employed on September 16, 2012.

3. At approximately 12:52 p.m. on September 16, 2012, the Grievant and another JCO ("C") were trying to get a resident to return to her room after she had taken a shower.[2]

[1] References to the grievant's exhibits will be designated GE followed by the exhibit number. References to the agency's exhibits will be designated AE followed by the exhibit reference. Instead of closing argument, both parties filed briefs supporting their respective positions.

[2] Protagonists are referred to by initials to preserve privacy.

4. The location of the incident was Unit 59, a unit reserved for particularly aggressive residents who could not be placed among the general population of the Facility.

5. The resident, who by all accounts is troublesome and difficult, continued to refuse to go to her room and was oppositional even after repeated requests by the two JCOs.

6. Matters began to get out of hand when the resident called the Grievant dumb. The Grievant admits that this comment got under her skin because the Grievant had been called dumb in the earlier part of her childhood.

7. The Grievant admits that the comment by the resident that the Grievant was dumb hurt the Grievant's feelings and that the Grievant intended to cause the resident some pain by saying "you got beat" to the resident as payback for the resident causing the Grievant some pain. Tape.

8. The Grievant was in a custodial role at the time and when asked on cross-examination by the Advocate whether this constituted emotional abuse the Grievant responded that she did not know. Tape.

9. The comment "you got beat" referred to an earlier incident at the Facility in which the resident, according to hearsay within the Facility, was assaulted by another resident.

10. The Grievant's comment incensed the resident who began to walk towards the Grievant. C stood between the two antagonists and credibly testified that the Grievant kept taunting, provoking and antagonizing the resident.

11. The resident was trying to get to the Grievant and the resident was swinging at the Grievant who was behind C. Eventually the resident hit the Grievant in the face and the Grievant needed medical treatment for the injury.

12. While the resident was trying to get to the Grievant and C was trying to keep the resident from doing so, C directed the Grievant at least three (3) times to get off the hallway or remove herself from the situation. However, the Grievant did not follow the direction even though the Grievant admitted that she was not then providing any benefit to her partner and could have moved away and not lost sight supervision. Tape.

13. The Grievant admits that the Grievant's comment "you got beat" which the Grievant admits she made to the resident, was not appropriate. The Grievant admits that she put C in danger and admits that she apologized to C.

14. The Grievant admits that her words set off the resident's attack and battery.

15. The Grievant admitted on direct examination that she was familiar with the standards of conduct and all policies and procedures, which would include the Agency's active extinction and de-escalation protocols.

16. The Grievant did not follow Agency protocols and policies.

17. On cross-examination the Grievant admitted that nine times out of ten she would not handle the situation the way she had been trained to.

18. The Grievant received training in various forms (including hands-on training and post-orders) concerning how to handle maladaptive behavior of residents.

19. The testimony of the witnesses called by the Agency was both credible and consistent on the material issues before the hearing officer. The demeanor of such Agency witnesses at the hearing was candid and forthright.

ADDITIONAL FINDINGS OF FACT, APPLICABLE LAW AND POLICY, ANALYSIS AND DECISION

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).

Va. Code § 2.2-3000(A) 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.

In disciplinary actions, the Agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department

of Human Resource Management promulgated Standards of Conduct Policy No. 1.60 (the "SOC"). The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Pursuant to the SOC, the Grievant's infraction could clearly constitute a Group III offense, as asserted by the Department. Offenses in this category 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.

The Group III Written Notice issued to the Grievant was for patient/inmate/client abuse:

> No. #81 - Juvenile Offender Abuse. On 09/16/12, you violated Department of Juvenile Justice Policies: 05-009.1-Code of Ethics for Employees of the Virginia Department of Juvenile Justice and Staff Code of Conduct-05.009.2, when your verbal taunting of a juvenile offender in your care created a hostile and potentially explosive environment for a coworker, yourself and the juvenile offender. On said date, an Internal Investigation revealed that you made several inappropriate statements to a juvenile offender which enraged the juvenile offender and caused the offender to become hostile. By your own admission, you made at least three verbal inappropriate statements which cause the offender to become so enraged that the offender had to be physically restrained by another officer. Your actions constitute verbal and mental abuse which violates established written policy. Your conduct is unbecoming of a corrections employee. Your conduct irreparably damages your ability to serve as an effective corrections employee and undermines the mission and activities of this agency. You failed to treat a juvenile offenders [sic] in your care with dignity, respect and in a humane manner by making comments directed to the offender that were humiliating, degrading and threatening.

As previously stated, the Agency's burden is to show upon a preponderance of evidence that the discipline was warranted and appropriate under the circumstances. However, the Grievant bears the burden of persuasion concerning her claim of retaliation.

The Grievant has alleged retaliation but has failed to carry her burden of proof in this regard. An agency may not retaliate against its employees. To establish retaliation, a grievant must show he or she (1) engaged in a protected activity; *See Va. Code § 2.2-3004(A)(v) and (vi)* (2) suffered a materially adverse employment action; *See EDR Ruling Nos. 2013-3446* and *2013-*

3447 and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse employment action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, retaliation is not established unless the grievant's evidence raises a sufficient question as to whether the agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual. *See, EDR Ruling No. 2007-1530, page 5* (Feb. 2, 2007) and *EDR Ruling No. 2007-1561* and 1587, page 5 (June 25, 2007).

The Grievant maintains that W retaliated against her, increasing the level of discipline, because the Grievant filed a Discrimination Complaint in March 2012 against W. However, W credibly testified that he was out on disability leave for seven (7) months from December 2011 through June 8, 2012 and was not aware of this complaint at the time of the subject discipline.

The Grievant did not prove a causal link between the adverse employment action and the protected activity.

Additionally, concerning the Group III Written Notice, the Agency has articulated and proven by overwhelming evidence legitimate, non-retaliatory reasons for its actions necessary to maintain safety within the Facility, discipline and orderly operations.

In response to a question from the hearing officer during the Acting Superintendent's rebuttal testimony, the Acting Superintendent confirmed to the hearing officer that the Group II Written Notice and the Group III Written Notice were issued concerning the same conduct. The same conduct cannot under applicable policy and procedure give rise to two (2) separate written notices and, accordingly, the Group II Written Notice should be rescinded and removed. The forty (40) hours of pay which the Grievant claims she was docked concerning the Group II Written Notice and any other lost benefits associated with the Group II Written Notice should also be restored to the Grievant.

However, the hearing officer decides for each offense specified in the Group III Written Notice (i) the Grievant engaged in the behavior described in the Written Notice; (ii) the behavior constituted serious misconduct; (iii) the Department's discipline was consistent with law and policy and that there are no mitigating circumstances justifying a further reduction or removal of the disciplinary action. The hearing officer undertakes a more detailed analysis of the mitigation component of his decision below.

The Attorney correctly points out that disciplinary actions must be administered promptly under the SOC and the Attorney goes on to argue that the termination three (3) months after the serious infraction should be voided because it is not prompt and violates the Grievant's rights of due process.

While the hearing officer is troubled by the delay, the facts in this case and the hearing officer's legal research into the matter support the termination. For example, in EDR Ruling

2006-1157 concerning the same agency the discipline was upheld by EDR in a case where the record evidence showed that the Grievant was disciplined on November 21, 2004 for conduct that occurred between June 28, 2004 and October 15, 2004.

The reasonableness of such time frames is based on the circumstances of each case. EDR Ruling 2001-162. In this case there was a change of superintendents in the intervening period with the previous superintendent leaving unexpectedly on or about October 26, 2012.

The Attorney also argues that the Agency is estopped from disciplining the Grievant because of the Grievant's Virginia Employment Commission and worker's compensation claims. However, EDR has held that such claims have no bearing on the hearing decision because whether the Grievant is entitled to relief through the grievance process is different from the standard used to establish whether the Grievant is entitled to unemployment or worker's compensation benefits. *See. e.g., Ruling No. 2003-129* and *2012-3054.*

The Grievant, by counsel, asserts that the discipline is too harsh. DHRM has previously ruled that there is no requirement under an earlier version of DHRM Policy 1.60 that an agency even consider mitigating circumstances. DHRM Policy Ruling, Grievance No. 8636, September 19, 2007.

However, this DHRM ruling does not negatively impact the Grievant's position under the facts and circumstances of this proceeding because under Va. Code § 2.2-3005, this hearing officer is charged with the duty to "[r]eceive 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". EDR's *Rules for Conducting Grievance Hearings* provide in part:

> DHRM's *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances" such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance." . . . A hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. 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. *Rules* § VI(B) (alteration in original).

If the Department does not consider mitigating factors, the hearing officer should not show any deference to the Department in his mitigation analysis. In this proceeding the Department did consider mitigating factors in disciplining the Grievant, including the Grievant's service to the Department since June 21, 2010.

The normal sanction for one (1) Group III violation is termination.

Accordingly, because the Department assessed mitigating factors the Rules only allow this hearing officer to mitigate the discipline further if this hearing officer upon consideration of the evidence finds that the Department's discipline exceeded the limits of reasonableness.

While the Grievant might not have specified all of the mitigating factors below, the hearing officer considered many factors including those specifically referenced above and all of those listed below in his analysis:

1. the Grievant's service to the Agency;

2. the delay in disciplining the Grievant discussed above;

3. the fact that the Agency also issued a Group II Written Notice for the same conduct, as discussed above;

4. the assault on the Grievant by the resident and the Grievant's attendant injuries;

5. the difficult circumstances of the Grievant's work environment; and

6. the Grievant received an overall rating as "Contributor" in her performance evaluation dated December 26, 2012.

In EDR Case No. 8975 involving the University of Virginia ("UVA"), a grievant received a Group III Written Notice with removal for falsifying records on five (5) separate dates. Although the evidence supported only one of those instances, the hearing officer upheld the disciplinary action. The grievant appealed to EDR asserting that the disciplinary action was inappropriate in that the grievant did not engage in as much misconduct as alleged by UVA. The Director upheld the hearing officer's decision:

> The grievant's arguments essentially contest the hearing officer's determinations of fact as they relate to the proper sanction for the misconduct. Such determinations are within the hearing officer's authority as the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate. In this case, while it appears that the hearing officer did find that the grievant did not engage in as much misconduct as alleged by the University, it was still determined that the grievant had falsified a state record with the requisite intent, generally a Group III offense under the Standards of Conduct. [footnote omitted] Upon review of the record, there is no indication that the hearing officer abused his discretion in making these findings or that the facts were not supported by the hearing record. Consequently, this Department has no basis to disturb the hearing decision.

EDR Ruling Number 2009-2192; February 6, 2009.

EDR has previously ruled that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. *Id.*

Here the offense was very serious and could obviously constitute a Group III offense. The Grievant, as the Agency stresses, was given a written counseling by the Agency on July 17, 2012 for an inappropriate comment to another resident in Unit 59 and was warned "[i]f any further actions of this nature occur again it will be forwarded to be reviewed for disciplinary actions in accordance with the Standards of Conduct." Clearly, the mitigation decision by the Department was within the permissible zone of reasonableness.

The Grievant asserts that the termination should be undone because the Grievant was assigned to Unit 53 after the infraction and for a period came into contact with the resident again. The Facility did not intend this to happen and at the hearing was unaware that this had happened. However, the hearing officer finds nothing in DHRM policy which allows the result the Grievant seeks because of a bureaucratic mistake. The Grievant makes numerous other arguments to support her case but the hearing officer finds no merit in them.

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 DHRM Policy 1.60, Standards of Conduct, and the SOC, management is given 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.*

In this proceeding, the Department's actions concerning the Group III Written Notice were clearly consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer. *Id.*

DECISION

The Department has sustained its burden of proof in this proceeding and the action of the Department in issuing the Group III Written Notice and in terminating the Grievant's employment is affirmed as warranted and appropriate under the circumstances. Accordingly, the Department's action in terminating the Grievant's employment pursuant to the Group III Written Notice is hereby upheld, having been shown by the Department, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy. The Group II Written Notice which was issued for precisely the same conduct is not in accord with applicable policy and procedure. The Group II Written Notice is hereby rescinded and any and all salary and benefits lost by the Grievant associated with such Group II Written Notice are ordered to be restored to the Grievant.

APPEAL RIGHTS

As the *Grievance Procedure Manual* 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.

Administrative Review: This decision is subject to two types of administrative review, depending upon the nature of the alleged defect of the decision:

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

2. **A challenge that the hearing decision does not comply with grievance procedure** as well as a request to present newly discovered evidence is made to EDR. This request must refer to a specific requirement of the grievance procedure with which the decision is not in compliance. EDR's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219, faxed or e-mailed to EDR.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of original hearing decision**. (Note: the 15-day period, in which the appeal must

occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days.) A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or

2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of EDR before filing a notice of appeal.

ENTER: 4 / 15 / 2013

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John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail transmission where possible and as appropriate, pursuant to *Rules for Conducting Grievance Hearings*, § V(C)).