Issue: Group II Written Notice (failure to follow policy) and Termination (due to accumulation); Hearing Date: 02/20/13; Decision Issued: 02/26/13; Agency: DJJ; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 10023; 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. 10023

Hearing Date: February 20, 2013
Decision Issued: February 26, 2013

PROCEDURAL HISTORY

Grievant was a sergeant with the Department of Juvenile Justice ("the Agency"), and he challenges the Group II Written Notice issued on November 19, 2012 , for failure to comply with applicable policy and procedure on April 27, 2012. The Grievant has a prior active Group II Written Notice, for inappropriate or unacceptable behavior (sexually suggestive comments to a co-worker).

Grievant timely filed a grievance to challenge the Agency's disciplinary action of termination. On January 23, 2013, 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 January 24, 2013. The hearing was ultimately scheduled for February 20, 2013, on which date the grievance hearing was held, at the Agency's facility.

Both sides submitted documents for exhibits that were 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
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, 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 Administrative Directive No. 05-009.2, Staff Code of Conduct, lists among prohibited conduct:

> Engaging in sexual behavior directed toward wards, probationers, or parolees, including sexual abuse, sexual assault, sexual harassment, physical behavior of a sexual nature (e.g., hugging, kissing, fondling), sexual obscenity, invasion of privacy, and conversations or correspondence of a romantic or intimate nature

Agency Exh. 5.

Institutional Operating Procedure (IOP) No. 210, *Management of Resident Behavior*, provides, at 210-4.1, that prohibited actions include, "Any action, which his humiliating, degrading or abusive." Agency Exh. 6.

Institutional Operating Procedure (IOP) No. 108, *Resident Discipline Procedure*, provides, at 108-4.5, that public masturbation is major offense for residents. Agency Exh. 7.

The State Standards of Conduct, DHRM Policy 1.60, provides that Group II offenses include acts of misconduct of such a more serious and/or repeat nature, including violations of policies, procedures, or laws. A second active Group II Notice normally should result in termination. Agency Exh. 4.

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 15 years. The Written Notice charged:

> On 4/27/12 an allegation of staff on resident sexual harassment was made. The matter was investigated and concluded that you admitted making inappropriate comments of a sexual nature to a resident and admitted making residents take their boxer shorts in the shower even though policy, procedure and post orders do not stipulate that the residents have to. Therefore, the allegation of sexual misconduct was founded. Your actions were in violation of Administrative Directive 05-0092: Staff Code of Conduct and RDC IOP 210-4.1 Prohibited Actions and warrants the issuing of a Group II Notice. With the issuance of this Group Notice you have two active Group II Notices. As a result, your employment with the Department of Juvenile Justice, Reception and Diagnostic Center is terminated.

Agency Exh. 2. As for circumstances considered, the Written Notice referenced the prior, active Group II Written Notice. *Id*.

The Agency's psychology associate testified that during a treatment session with Resident B on April 27, 2012, the resident related to her that he felt unsafe and angry, and that he was having thoughts of harming the Grievant. The resident told the psychology associate that these feelings came from interaction with the Grievant during shower time. The resident reported that the Grievant forced him to remove his boxer shorts for showering (which is not required by policy), and that the Grievant said things to him like, "We all have pickles. Some are big. Some are small. If you want to go in the corner and pump up your pickle, that's okay." The psychology associate independently filed an incident report regarding this accusation. Agency Exh. 9. The Grievant used the word pickle as a euphemism for penis.

The Agency's internal investigator testified concerning his investigation and consistently with the allegations contained in the incident report. The investigator interviewed Resident B, other residents, and others, including the Grievant. The Grievant admitted to the investigator the facts of his statements to Resident B and all residents during his supervision of residents' showers. The investigator's report, in pertinent part, states:

> When residents enter the shower area he tells them they have to remove their boxer shorts to take a shower and since most residents are embarrassed to shower naked he always makes a statement like "we are all men, we all have pickles, some are big pickles, some are small pickles, but they are all pickles, take off your boxers and let 'em swing, if you want to go into the corner and pump your pickle that is ok."

Agency Exh. 12, p. 6. The Agency presented an audio recording that corroborates the Grievant's description of his words to the residents.

The Agency's assistant superintendent for security testified that security sergeants are the first line supervisor of the juvenile corrections officers, and a sergeant serves as a role model. He testified that the Grievant's statements constitute improper comments of an intimate nature

and is contrary to training given to all staff, including the Grievant. The training includes proscriptions against such comments that are sexually improper. The assistant superintendent testified that the Grievant and all security staff are to maintain constant sight supervision of residents and considered the Grievant's behavior humiliating, degrading or abusive to the resident.

The superintendent at the time of the offense testified to the Agency's paramount mission to protect and rehabilitate the juveniles in the Agency's custody. Their obligation is to do no harm. She testified that the staff, including the Grievant, received extensive training in this subject area of conduct since 2007 (when PREA[1] became effective), which emphasized the prohibition of looks, comments, gestures, and body language that are inappropriate and outside the boundaries of professional conduct, even at the level of mere suggestion. Agency Exh. 14.

The Grievant testified to the circumstances of giving his "pickle speech" as something he has been telling every resident for years, spoken to ease anxiety among residents and not for any improper purpose. The Grievant denied that he was talking about masturbation, but he admitted that he used the word pickle for penis. The Grievant testified that his comments were not intended to be sexual and that he was encouraging residents to "pump up their minds," not encouraging them to self-stimulate their penises. The Grievant, in his recorded interview and in his grievance hearing testimony, denied and admitted the exact content of his remarks. Ultimately, the Grievant reluctantly testified that he could see how his comments could be construed to refer to masturbation. The Grievant also conceded that his remarks were not appropriate for mixed gender audiences. The Grievant testified that he actually gives training to other juvenile corrections officers, explaining hygiene procedures and the showering process. The Grievant testified that co-workers have certainly heard him repeatedly deliver his shower speech, but he was unsure whether higher-ranking staff have plainly heard his "pickle speech" before. The Grievant testified that his comments were not intended to be an invitation to masturbate and that no resident has ever actually masturbated in his presence.

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

[1] Prison Rape Elimination Act.

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 made the offending comments and that the comments constitute improper conduct, *i.e*., conduct prohibited by Agency policy and training. Further, I find that the offense is appropriately a Group II offense. The Grievant's account of his statements is inconsistent; he admitted the statements and denied them, both during his recorded investigative interview and at the grievance hearing. The Grievant insisted that he has given the same speech to all residents when supervising showers over the 14 years of his tenure. He was equivocal on the issue of whether his supervisors were aware of or observed this exact shower speech to residents. While this raises a question of supervision during those years, the Grievant's consistent conduct over time, alone, does not amount to the Agency's condoning the conduct. The conduct was discovered during a resident's treatment session—not as a formal complaint against the Grievant—and the Agency responded, accordingly. The Grievant admitted at the grievance hearing that his statements were inappropriate, and that he had notice that such statements were considered inappropriate or prohibited. Although I find no predatory intent, the Grievant's lapse of continuing the shower speech, despite intervening training on PREA that started in 2007, was a clear, definitive breach of policy and expected conduct for a corrections officer sergeant—a supervisor and role model for others. Thus, the Agency has borne its burden of proving the offending behavior, that the behavior was misconduct, and that it rose to the level of a Group II 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 Office 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 position as a sergeant placed him in a position of being a role model to residents and others under his supervision. The Grievant's lack of judgment in what he communicated in this incident, and apparently on multiple occasions, put a resident at significant risk, as well as the Agency. This offense, having a sexually suggestive content, is in a vein similar to the prior active Group II Written Notice. While termination is necessarily a harsh result, it is the normal result of two Group II Written Notices. 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 II Written Notice with termination (for accumulation of two Group II Written Notices) 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.[2]

[2] 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