Issues: Group II Written Notice (failure to follow policy), Group II Written Notice (failure to follow policy) and Suspension; Hearing Date: 07/11/13; Decision Issued: 07/23/13; Agency: DJJ; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 10062; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 08/02/13; EDR Ruling No. 2014-3576 issued 09/16/13; Outcome: AHO's decision affirmed.**

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 Nos. 10062(A) and 10062(B)

Hearing Date: July 11, 2013
Decision Issued: July 23, 2013

PROCEDURAL HISTORY

Grievant is a lieutenant with the Department of Juvenile Justice ("the Agency"), and he challenges two Group II Written Notices issued on October 2, 2012 [#10062(A)], and January 9, 2013 [#10062(B)], for failure to comply with applicable policy and procedure on June 23/24, 2013, and November 23, 2012. The latter Written Notice included 30 days suspension.

Grievant timely filed grievances to challenge the Agency's disciplinary actions. On May 8, 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 May 13, 2013, at which time the grievance hearing was scheduled for June 12, 2013. Because of witness unavailability for the scheduled hearing, by agreement of the parties, the hearing was ultimately re-scheduled for July 11, 2013, on which date the grievance hearing was held, at the Agency's facility. For such good cause, the time for completing the grievance hearing and decisions was extended, accordingly.

EDR had previously consolidated these two grievances for hearing. During the course of several pre-hearing conferences to address the numerous witnesses, manage the hearing process, eliminate cumulative testimony, etc., it became apparent that these two consolidated grievances did not involve the same factual background or the same policies (as referenced as a condition for consolidation in Rule III(C) of the Rules for Conducting Grievance Hearings). Management of the consolidated hearing required—essentially—two separate grievance hearings to complete in one day. EDR revised the consolidation order to provide for two grievance hearings that could be held on the same day, which is what occurred, with the parties' agreement. The two hearings lasted a combined twelve hours.

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 parties also

submitted written closing arguments on July 16, 2013, which are made a part of the record.[1] 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 or reduction of the Written Notices, rescission of the suspension, 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,

[1] The Grievant notes in his written closing argument that an exhibit may not have been formally admitted into the grievance record. The Grievant is correct, and the exhibit, concerning the Agency's disciplinary review process, is admitted into the grievance record as Grievant Exh. 17.

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.

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. 3.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

> While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy..."the hearing officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

The Offenses

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions.

A. October 2, 2012, Group II Written Notice

The Grievant is a long time employee for the Agency—a lieutenant and shift commander. The Written Notice charged:

> On June 25, 2012, the Gang/Internal Management Unit conducted an investigation into the suicide attempt that occurred on your shift on June 23, 2012. The investigation found you in violation of a directive by Captain [D] written June 20, 2012. It stated that "Staff are to remain in the pod at all times." It also stated that supervisors would be held accountable under the Standards of Conduct if they had any knowledge of residents left unsupervised. The investigation revealed that on two occasions that 8 JCO's were on break at the same time, leaving pods unsupervised. This warrants the issuance of this Group II written notice. Any further disciplinary action could result in termination.

Agency Exh. 10. As for circumstances considered, the Written Notice referenced the Grievant's work performance and longevity. *Id*.

During the Grievant's shift on June 23, 2012, there were 15 Juvenile Corrections Officers ("JCO's"), the Grievant, and three Officers in Training ("OIT's"). There were three buildings open, two with four pods, and one with three pods. This means that in the buildings, 11 pods were occupied and thus, there was a need for 11 JCO's to maintain supervision. In addition, there were two pods occupied in detention (a/k/a "ASU") and then at or about 11:00 p.m., there was also a resident housed in that same area in Isolation. Thus, there needed to be at least two JCO's at all times in this area, and possibly three. Finally, there needed to be one staff at all times in Master Control. Thus, while there were 15 JCO's working, there was an immediate need for 14 JCO's to comply with Agency policy and procedure that residents be supervised at all times.

Between 11:00 and 11:15 pm on the night of June 23, 2012, there were ten adults leaving the building. The exact identity of the individuals was not possible from the video, so assuming that all three OIT's took their breaks at this time, and one was the Grievant, that left six JCO's leaving the building at one time. JCO N testified that he might have been doing perimeter check, or he might have been taking a break, but the documented perimeter check indicated it was done about one hour later. Agency Exh. 16. JCO N was not certain about his whereabouts that night, but he agreed he was not assigned to any particular unit and, thus, was an available "floater" for the evening, and could have been used wherever leadership put him, including coverage for JCO's taking their breaks.

There were a total of 19 staff in the facility (15 JCO's, the Grievant, and three OITs) the night of June 23, 2012. To determine the number of JCO's left in the facility, the Agency asserts that one need only to look at the total number of adults in the facility and subtract the number leaving on video (while giving the Grievant the benefit of the doubt by not counting the 3 OIT's). Thus, the Agency submits, between 11:00 and 11:15, the following is shown:

On video, 10 adults leave between 11:00 and 11:15. Assuming all 3 OIT's are on video leaving then and account for the Grievant leaving as well, at least, 6 JCO's leave the facility between 11:00 and 11:15.

10 adults leaving – (3 OIT's + Grievant) = 6 JCOs leaving.

There were 15 JCO's on duty that evening. Six (6) JCO's leave the facility. This left 9 JCO's in the facility.

15 JCO's on duty – 6 JCO's leaving = 9 JCOs in facility.

There were 14 spots to staff (11 in the buildings, 2 in detention and one in Master Control). If there were 2 JCO's in detention and 1 in master control, as everyone testified there had to be, it would leave 6 JCO's left to cover 11 pods.

9 JCO's left in facility – (2 JCO's in detention + 1 JCO in master control) = 6 JCO's available.

Thus, at best, 6 JCO's were supervising 11 pods, leaving, at least, 5 pods unattended.

11 pods – 6 JCO's available = 5 pods unattended.

This same scenario happened at the 2:00 hour when nine adults exited the front of the building. The Agency asserts it is highly unlikely and improbable that three of those leaving were OIT's again, and indeed the Grievant seemed to have been able to identify all of them as JCO's. But, even giving the Grievant the benefit of the doubt, the Agency asserts the following is shown:

9 adults leave minus 3 OIT's = 6 adults who left, minus the Grievant = 5 JCOs out of the building at or about 2:00 a.m. JCO N testified that he was a third man in detention at this time of the evening due to the resident being in isolation, although there is no evidence that a third man was required.

This means that of the 15 JCO's that night, three were stationed in detention and one was in master control.

15 JCO's - 4 JCO's (three in detention and one in master control) = 11 JCO's left to man the 11 pods in the three buildings. At least five of those eleven exited through the front door, leaving six JCO's to cover 11 pods in 3 buildings.

11 JCOs in the buildings – 5 JCOs who walked out the front door = 6 JCOs to supervise 11 pods.

This is without question, and unequivocally, a violation of the Agency's Standard Operating Procedures and policy, and Captain D's orders of June 20, 2012.

The Standards of Conduct require:

- Employees must perform their assigned duties and responsibilities with the highest degree of public trust.
- They must make work related decisions and/or take actions that are in the best interest of the agency.
- They must comply with the letter and spirit of all state and agency policies and procedures.

Agency Exh. 3. In addition, the Agency's Conditions of Employment states that, "Each staff member is required to follow the COC and all written and verbal instructions given by supervisors." Agency Exh. 4.

Post Order 1 states that the responsibility of the Shift Commander is to "Ensure staff and residents are in compliance with the [Facility] Program and related security procedures, standards and expectations" and "Perform any and all duties as assigned by your supervisor or higher authority." Agency Exh. 5 at 4.

Agency Standard Operating Procedure and policy, IOP 212, states that the pods must be directly supervised at all times. Agency Exh. 11. The policy requires that all staff must maintain the sight and supervision of the areas assigned. *Id*. at 2. In addition, and important to this case, is that staff cannot leave their assigned area without notifying the shift commander, the Grievant. *Id*.

The Grievant was reminded of the policy and that the facility would, in the future, maintain strict compliance on February 29, 2012 (Agency Exh. 12), April 25, 2012 (Agency Exh. 13), and on June 20, 2012, in a memo from his direct supervisor, Captain D (Agency Exh. 14). The Grievant was aware of the supervisor's instructions since, on that very night, the Grievant read the June 20th memo to his staff. Agency Exh. 15.

The Asst. Superintendent admitted in the hearing that the concurrent breaks shown on the video demonstrated a violation of policy. He acknowledged that the math that night did not support compliance with the Agency's requirements and expectations for supervision of the pods and residents. Given there was a floater that night, the pods did not need to be left unattended for the JCO's breaks. However, the Agency asserts that mathematically there were not three JCO's in all the buildings at all times.

The Grievant asserted that he was unaware that pods were unattended and unsupervised. However, the evidence established that JCO's do not leave their assigned posts without the shift supervisor's (the Grievant's) permission. Agency Exh. 11 at 2. There is no policy that allows an officer in master control to relieve a JCO from his or her post for breaks. Post Order 1 requires that the shift commander (the Grievant) "Be alert, attentive, and observant at all times." Agency Exh. 5 at 2. To the extent the Grievant asserts he was unaware of the breaks taken and number of staff on duty, such a contention is not credible.

A lieutenant and a sergeant both testified that they maintain coverage at all times, and only if there is no floater would they even consider leaving a pod unattended, and even then it would be one at a time and with the permission of the Administrator on Call. These witnesses corroborated the expectation that all pods will be covered at all times absent exceptional circumstances, and with exceptions only with approval from a higher authority, such as the Captain.

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 knowingly allowed an excessive number of JCO's to take concurrent breaks and leaving pods unsupervised and that the conduct constituted 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 supervision and knowledge of the breaks is inconsistent. The justification for dismissing the validity of Captain D's directive is unpersuasive. Assuming a prior directive allowed leaving pods unsupervised while JCO's took breaks together, that is not justification for failing to follow a subsequent directive prohibiting such conduct. 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 suspension 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 lieutenant placed him in a leadership position of being a role model to those under his supervision. The Grievant's lack of judgment and/or supervision was in direct conflict with known, stated policy. I find that the Agency has demonstrated a legitimate business reason and acted within the bounds of reason in its discipline of the Grievant. The Grievant has alleged irregularities in the Agency's chain of command related to the policy instruction on

JCO's taking breaks and leaving residential pods unsupervised, but he has provided insufficient proof of mitigating factors that permit the hearing officer to reduce the level of discipline.

DECISION – A.

For the reasons stated herein, the Agency's issuance of the Group II Written Notice is **upheld**.

B. January 9, 2013, Group II Written Notice

As expressed above, the Grievant is a long time employee for the Agency—a lieutenant and shift commander. The Written Notice charged:

> On November 23, 2012 at approximately 2010 hours, you were called by an officer to Special Housing Unit for assistance. After talking with officers via radio and telephone, you still failed to respond to the Unit to assist, assess, and de-escalate. This is a direct violation of Post Order 1 which states "Intervene in crisis or emergency situations," as well as your Employee Work Profile which states "Crisis Intervention—to control physical disturbances." Your failure to act allowed a resident time to cause damage in the amount of $2,225.64. This warrants the issuance of the GP II written notice and your placement on suspension for 30 days. Any further disciplinary action could result in termination.

Agency Exh. 21. As for circumstances considered, the Written Notice referenced the Grievant's work performance and longevity. *Id*. The seriousness of this offense for a shift commander was also considered, with reference to the Group II Written Notice issued on October 2, 2012, which grievance was addressed above.

On November 23, 2012, Resident F walked out of his room on Side B of his housing unit and found an unsecured door and entered into Side A, where he remained unsecured for approximately 65 minutes until the shield team finally was able to secure him. Resident F was considered a dangerous felon, and he was destroying property, breaking sprinkler heads and flooding the unit, passing glass to residents under their doors, and wielding a rod with a metal end as he stood in water on the floor with exposed electric wires in the ceiling. The incident and staff response was fully captured on video. Agency Exh. 27. The investigation concluded that the Grievant, the shift commander on duty, failed to provide direct supervision and guidance to staff and the sergeant during the incident. The Grievant failed to observe physically the situation to determine the most effective action plan to restrain the resident and provide guidance to staff. During the entire incident from 2010 to 2059, the Grievant was present in command alley for a total of approximately 5 minutes. Agency Exh. 25.

While this emergency was in its late stages, and still not under control, the Grievant was at the vending machine obtaining a drink. The Grievant testified that he was pre-diabetic and needed sugar. The Grievant admitted that he did not know during the emergency the extent of the situation. The Grievant delegated the direct response to a sergeant who did not effectively respond and who did not have the keys to the shield team equipment. The Grievant admitted that it took too long and that the video would be an embarrassment to the public if the video was revealed.

JCO N contacted the Grievant at least two times early on to seek assistance and to advise that the matter had escalated from the resident merely refusing to go back into his room to a resident out of control. The Grievant suggested in the initial investigation that he did not know about any of this until well after it was over, and this audio was played at the hearing. Agency Exh. 25. However, during the hearing the Grievant had notice that a dangerous resident was creating an emergency incident, and the resident needed to be taken into custody immediately.

While there were other incidents that night to which the Grievant responded directly during the shift, the Grievant admitted that Resident F was the most important and serious matter going on at that time. The investigation interview audio played during the hearing confirmed the Grievant's belief that no other responsibility trumped the heightened risk presented by Resident F's rampage. Agency Exh. 26, Grievant Interview #1 at 10:39 to 11:16. The only "incident" noted on the Supervisor's Daily Activity Report is the incident involving Resident F. Agency Exh. 23 at 2.

The Grievant's EWP requires that he, "Intervene in crisis to control physical disturbances and altercations initiated by juvenile offenders though the use of appropriate intervention techniques." Agency Exh. 9. The Grievant did not directly respond to the situation, assess it, intervene or exercise appropriate leadership over an emergency in the facility. The Standards of Conduct are clear. Employees must perform their assigned duties and responsibilities with the highest degree of public trust. They must make work related decisions and/or take actions that are in the best interest of the agency. They must comply with the letter and spirit of all state and agency policies and procedures. Agency Exh. 3.

Post Order 1 states that the shift commander, the Grievant, is responsible for the security of the facility and ensuring the institution operates in a secure, safe and sanitary manner. Agency Exh. 5. It requires that the Grievant "Be alert, attentive and observant at all times." Agency Exh. 5 at 2. It requires that the Grievant, "Intervene in crisis or emergency situations." *Id*. at 3. It also requires that the Grievant "Perform any and all duties as assigned by your supervisor or higher authority." *Id*. at 4. It also outlines "Emergency Procedures" for the Grievant, stating: "In the event of an institutional emergency (1) The shift Commander is the officer in charge until relieved by a higher authority; (2) Assess the situation to determine the course of action and proceed according to the Emergency Response Plan." *Id*. at 7. Furthermore, IOP 209 states, "Shift commanders shall be designated as response coordinators – under direction of Administrators." Agency Exh. 22.

IOP 218 authorizes physical force "when necessary due to self-defense, the defense of others,….to protect a resident from harming himself and to prevent the commission of a crime."

Agency Exh. 34. It also states that the "shift commander or Asst. Shift Commander shall attempt to reason with the disruptive resident and assess the situation." *Id.* There was no need for the Grievant to delay, or even contact Captain D. This policy exists for these very situations, so that leadership can use its good judgment and handle an emergency on the spot. In this case, the situation became progressively more serious each minute, with Resident F unrestrained and more and more sprinklers broken and flooding the floor.

After Resident F went amok, no one spoke to him until over 50 minutes, after five sprinkler heads were broken, the area was flooding and residents were given shards of broken glass. The Grievant failed to respond or exert adequate leadership during a prolonged incident that continued to escalate. To the extent the Grievant asserts he was not aware of the seriousness of the incident, it is because of his lack of direct response.

JCO Newman also acknowledges that at no point did anyone come into the control room to assess the situation. *Id*., JCO N Interview at 12:30. He stated, "It was a while" before anyone came down there to assist. *Id*. at 13:30 to 14:12. And, he admitted that he felt the response should have been more prompt. He said that from when he made the initial call, there was no turning back and they needed to get him. *Id*. at 18:30 to 20:00.

Captain D testified that Resident F had multiple felony charges pending and was highly dangerous. The Captain testified that the Grievant did not perform his duties. Upon reviewing the Rapid Eye video, the facility superintendent testified that she was "dumbfounded" at the response and that the Grievant did not follow policy and instruction for the response to such an incident.

The Grievant's job as shift commander is to be a leader in times of crisis. The lack of response demonstrated above constituted misconduct. The Grievant was the most senior leader onsite, and had ultimate responsibility for the situation. 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

The standard for applying mitigation that is stated above is incorporated herein.

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 lieutenant placed him in a leadership position of being a role model to those under his supervision. The Grievant's lack of judgment and/or supervision was in direct conflict with known, stated policy. I find that the Agency has demonstrated a legitimate business reason and acted within the bounds of reason in its discipline of the Grievant. The Grievant has provided no mitigating factors that permit the hearing officer to reduce the level of discipline.

The Grievant complains he did not received adequate due process, and that the Agency did not follow appropriate disciplinary protocol. GPM, at § 6, provides the proper manner for

raising such alleged defects in the grievance process prior to the actual grievance hearing. The grievance hearing is a *de novo* review of the charges and evidence, and it provides due process.

The Grievant also suggests retaliation as a motive for the discipline. On this issue, the Grievant has the burden to prove that the disciplinary action resulted from retaliation. The Grievant offered insufficient evidence of retaliation.

The conduct as stated in the written notice occurred. The Grievant was disciplined for failing to respond appropriately in accord with policy. The normal result of two active Group II Written Notices is termination. Here, with the suspension the Agency took a measured approach, and the matter has already been mitigated. There are no other bases giving the hearing officer authority to mitigate further.

DECISION – B.

For the reasons stated herein, the Agency's issuance of the Group II Written Notice with 30 days suspension 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]

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

Cecil H. Creasey, Jr.
Hearing Officer

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