

Issue: Group I Written Notice (unsatisfactory performance and excessive tardiness);  
Hearing Date: 07/10/14; Decision Issued: 07/30/14; Agency: DOC; AHO: Teron  
Galloway Lee, Esq.; Case No. 10362; Outcome: No Relief – Agency Upheld;  
**Administrative Review: DHRM Ruling Request received 08/07/14; DHRM Ruling  
issued 08/19/14; Outcome: AHO's decision affirmed.**

## **AMENDED DECISION OF HEARING OFFICER**

**In the matter of**

**Case Number: 10362**

**Hearing Date: July 10, 2014**

**Decision Issued: July 30, 2014**

**Amended Decision to Correct Clerical Error Issued: July 31, 2014**

---

### **SUMMARY OF DECISION**

The Agency had found that Grievant's work performance was unsatisfactory due to several incidents between September 9, 2013, and November 14, 2013. The Agency then issued Grievant a Group I Written Notice. The Hearing Officer found Grievant engaged in the misconduct as alleged and the discipline is consistent with policy and law. Thus, the Hearing Officer upheld the Agency's discipline.

### **HISTORY**

On January 28, 2014, the Agency issued Grievant a Group I Written Notice for unsatisfactory job performance. On February 10, 2014, Grievant timely filed his grievance to challenge the Agency's action. Thereafter, the Office of Employment Dispute Resolution ("EDR") assigned the undersigned as the hearing officer to this appeal, effective May 13, 2014. A prehearing conference ("PHC") was held on May 27, 2014, and an order addressing topics discussed during that PHC was issued on May 30, 2014. It set the hearing for July 10, 2014.<sup>1</sup>

On the date of the hearing and prior to commencing it, the parties were given an opportunity to present matters of concern to the Hearing Office. Then the Hearing Officer admitted Agency Exhibits 1 through 8 which had been provided to Grievant in advance of the hearing pursuant to the scheduling order. In contrast, Grievant had not disclosed any exhibits to the Agency prior to the hearing; however, he offered 6 exhibits as evidence during the hearing. After giving the Agency's Advocate an opportunity to review these exhibits, she noted no objections to them. Hence, the Hearing Officer admitted them as evidence. The Hearing Officer's exhibit, containing 13 pages, was also admitted.

At the hearing, both parties were given the opportunity to make opening and closing statements and call witnesses. Also, each party was provided the opportunity to cross examine any witnesses presented by the opposing party.

Regarding the issuance of witness orders, by email dated July 3, 2014, Grievant had requested witness orders for 11 individuals that he identified as Agency employees. On information from the Agency and not contradicted by Grievant, the Hearing Officer found that two of the individuals Grievant named as witnesses were no longer employed by the Agency. Grievant had provided no contact information for these individuals other than their employment with the Agency. Hence the Hearing Officer did not issue witness orders for these two

---

<sup>1</sup>This was the first date the parties were available for the hearing due to witness unavailability. Thus, the Hearing Officer found good cause to schedule the hearing beyond 35 days after her appointment

individuals. Grievant did not object to this ruling. Moreover, prior to the hearing date, the Agency reported that three other individuals identified as witnesses by Grievant on his request were on medical leave. Thus, by witness order issued on July 8, 2014, the Hearing Officer found they were not available for the hearing and no order was issued for their appearance at the hearing. Subsequent to that ruling and at the conclusion of the grievance hearing, Grievant reported that one of the witnesses reported as being on medical leave had returned to work on July 9, 2014, the night before the grievance hearing. Grievant further stated that he had observed this individual working that shift as he also is assigned the night shift. The Agency provided no information contrary to Grievant's representation regarding this witness returning to work prior to the scheduled hearing. Accordingly, the Hearing Officer found this witness was available to testify at the hearing. Hence, Grievant was then allowed to proffer the testimony of this witness.

During the proceeding, the Agency was represented by its advocate and the Grievant represented himself.

### **APPEARANCES**

Advocate for Agency  
Witnesses for the Agency (3 witnesses)  
Grievant  
Witnesses for Grievant (7, including Grievant)

### **ISSUE**

Was the written notice warranted and appropriate under the circumstances?

### **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual (GPM) § 5.8(2). A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

### **FINDINGS OF FACT**

After reviewing all the evidence presented and observing the demeanor of each witness who testified in person at the hearing, the Hearing Officer makes the following findings of fact:

1. The Agency is a prison within the Department. Grievant has been employed for eight (8) years with the Department as a correctional officer. For the past two (2) years, he has worked in that capacity at the Agency. His scheduled work period is the night shift. (Testimony of Grievant).
2. The Agency is also classified as a therapeutic cognitive community center. As such, its mission is not simply to detain inmates, but to help change their criminal thinking. Such that upon returning to society, recidivism will be less likely. (Testimony of Major). In promoting

the referenced mission, a cardinal objective of the Agency is for staff to provide four (4) positive encounters with an inmate for every one (1) confrontational interaction. Moreover, under Agency policy all individuals within the premises of the Agency, including inmates, are to be treated with respect. To foster the Agency's mission, employees, to include correctional officers, are expected to be rational in their dealings with the inmates and support the Agency's therapeutic goal. (Testimony of Major; A Exh. 7, p. 4).

3. In 2013, management determined that at least some of Grievant's interactions with inmates failed to promote the Agency's mission. For example on August 3, 2013, while Grievant was on patrol and checking the bathroom during the course of his duty, he came upon an inmate using the commode. The inmate reported that Grievant stared at him while the inmate was engaged in "doing his business." Also, management received reports from inmates of Grievant trying to talk to them while they were in the act of using the bathroom facilities to relieve themselves. (Testimonies of Captain and Major).

Without doubt, correctional officers are expected to check the bathroom as a precaution to prevent prison rape and homosexual activities under the Prison Rape Elimination Act. But officers have been directed to not gaze at or talk to an inmate while he is using the bathroom. (Testimonies of Captain and Major).

In addition to Grievant's interactions/reported interactions with inmates that are referenced above, on September 4, 2013, Grievant frisked an inmate who was reporting to work in the kitchen. The inmate became confrontational and asserted that while Grievant was patting him down, Grievant groped the inmate's private parts. Further, inmates asserted Grievant was verbally abrupt with them. Also, Grievant generally was not liked by the inmates. To demonstrate, management received more complaints from inmates about him than any other correctional officer. (Testimonies of Sergeant 1, Major, and Captain; A Exh. 2, p. 6).

### **September 9, 2013 Meeting**

4. As a result of the complaints lodged against Grievant by the inmates, on September 9, 2013, management met with Grievant and issued him a Notice of Improvement Needed/Substandard Performance for poor communication skills, lack of objectivity, and unsatisfactory problem solving skills with respect to his negative interactions with inmates. (A Exh. 1, pp. 16-17). This notice also established an improvement plan that indicated that Grievant would be paired with a Senior Field Training Officer (FTO) for at least one month. The plan also specified that even during the 30 day plan period, if there were further problems regarding appropriate conduct with inmates, Grievant would receive a referral for disciplinary action. (A Exh. 1, pp. 16-17).

The FTO shadowed Grievant for only three (3) days due to staffing shortages. During those 3 days, the FTO assessed Grievant as properly frisking inmates. However, the FTO did not observe the August 3 and September 4, 2013 above-referenced incidents reported by inmates. (Testimony of Grievant and proffered testimony of FTO).<sup>2</sup>

---

<sup>2</sup> The Hearing Officer notes that Grievant had requested a witness subpoena for the FTO. None was issued because prior to the hearing date, the Agency represented that the FTO was on medical leave and therefore unavailable.

## **Tardiness**

5. Subsequent to management placing Grievant on the improvement plan, he was cited for excessive tardiness. On his shift, Grievant was required to report to muster at 1745 or 5:45 p.m. From October 17, 2013, to October 27, 2013, Grievant was tardy to muster on four (4) occasions. As such on November 9, 2013, Captain and Sergeant II counseled Grievant verbally and in writing about his excessive tardiness. (Testimonies of Grievant and Captain; A Exh. 1, pp. 10 – 14).

## **Roving Patrol Incident Leaving Chits and Weapon's Card**

6. Additionally, during the very early hours of the morning on November 14, 2014, while Grievant was assigned roving patrol duty, the alarm to one of the building's gates sounded repeatedly. Grievant was instructed to inspect the situation. Grievant made at least two (2) laps around the building and failed to observe the open gate that set off the alarm. Once Grievant eventually located the open gate door, he was unable to inform his superior of his specific location. Particularly, when asked by Lieutenant where Grievant was, Grievant responded that he was by a generator. This information was not helpful, because numerous generators are located on the Agency's premises. (Testimonies of Lieutenant and Sergeant I; A Exh. 1, pp. 6-8).

7. The Agency's premises include 18 zones and a correctional officer is expected to know the area he is located in by its zone number as well as the front and back of any buildings in the zone. Grievant did not know the zone he was in nor was he familiar with the back of the building where the gate was opened. Hence, when asked to identify the location of the alarm by his superior, Grievant could only provide the general response previously noted. (Testimonies of Sergeant I and Lieutenant).

8. In addition, when Grievant's shift ended on November 14, 2014, he failed to retrieve his chits and weapon's card at master control. They were discovered and confiscated by the Warden when he was making his rounds and noticed Grievant's items were unaccompanied and exposed such that others could have obtained them. Grievant stated that he forgot to get them because he was helping a fellow officer by giving that officer a ride home. (A Exh. 1, p.8; Testimonies of Grievant and Officer AC).

9. A chit is a coin bearing a specific number that has been assigned to a particular employee, such as a correctional officer. For each item an employee obtains from the Agency, the employee must surrender a chit in exchange for the item. When the item is returned, the employee receives his chit back. Similarly, a weapon's card is assigned to each officer. When

---

During the hearing Grievant testified that FTO had been on medical leave, but the FTO had returned from that leave the night before the hearing and worked on the same shift as Grievant. Grievant reported personally observing the FTO on that shift. Grievant's account of the FTO returning to work prior to the hearing. was not contradicted. This is so even considering the Agency's Representative reiterating that Human Resource personnel had previously informed him that the FTO was on medical leave. Hence, the Hearing Officer found the FTO was an available witness for the hearing. She then accepted as evidence Grievant's proffer regarding FTO's expected testimony. (Testimony of Grievant).

obtaining a weapon from the Agency, the employee's weapon's card is exchanged for it. (Testimony of Lieutenant; A Exh. 7, p. 2). At all times, officers are expected to account for and secure equipment they have retrieved or their chits. (Testimony of Major).

10. Grievant's performance on November 14, 2013, was a significant security breach. One of the cardinal reasons for rover patrol duty is to maintain security and prevent the escape of inmates. If an escape had been in progress, the time it took Grievant to locate the open gate would have significantly hindered preventing the getaway. Likewise, Grievant's inability to identify his location once finding the source of the alarm precluded others from timely arriving there if back up help was needed. (Testimony of Lieutenant).

11. Because of Grievant's performance regarding the roving patrol incident, on November 24, 2013, Sergeant I, Grievant's immediate supervisor, issued Grievant a performance memorandum for poor performance while conducting rover patrol duty.<sup>3</sup> (A Exh. 1, p. 8).

12. Grievant was also counseled in writing on November 14, 2013, for leaving his chits and weapon's card unattended. (Exh. 1, p. 8).

### **November 28, 2013 Chit Incident**

13. Following the November 14, 2013, roving patrol duty incident, on November 28, 2013, Grievant became loud and agitated at the master control window. An argument ensued when the master control officer refused to return his chits to him. Upon Lieutenant hearing the commotion and intervening to resolve that matter, it was determined that Grievant had left the vehicle keys and fuel card unsecured in the roving patrol vehicle. Grievant therefore did not have these items to exchange for his chits. (Testimonies of Lieutenant and Officer 5; A Exh. 1, p.4).

14. When Lieutenant inquired of Grievant why he left the vehicle keys and fuel card in the vehicle, Grievant stated that he thought that was where they were supposed to be left. Grievant was then instructed to retrieve the keys as anyone, including an inmate, could have picked up the keys and had access to the rover patrol vehicle. Grievant's failure to return the keys in exchange for his chit was a severe security breach. (Testimony of Lieutenant).

### **Referral for Discipline and Group Notice**

By memorandum dated December 2, 2013, Captain referred Grievant to Major for discipline due to the abovementioned offenses occurring on November 14 and 28, 2013. In addition, the referral mentioned the September 9, 2013, and November 9, 2013 counseling provided to Grievant for unsatisfactory performance and excessive tardiness. Grievant was provided a copy of the memorandum. In a memorandum dated December 12, 2013, Major informed the assistant warden of the contents of the December 2, 2013 memorandum. (Testimony of Captain; A Exh. 1, pp. 4-7).

15. On January 28, 2014, Assistant Warden issued Grievant a Group I Written Notice. The

---

<sup>3</sup>Rover patrol duty means patrolling the grounds of the Agency, mainly by rover vehicle, to maintain security. (A Exh. 1, p. 8).

notice cited Grievant for unsatisfactory job performance, describing the nature of the offense as follows:

You were issued a substandard performance notice for poor communication skills, reporting to work late on five separate occasions, failing to retrieve your chest and weapons card for master control after turning in your equipment along with having poor observation skills while assigned to the roving patrol. Per operating procedure 135.1. Standards of Conduct: section V-B, First Group of Offenses, 2a Unsatisfactory attendance or excessive tardiness and 2c; Inadequate or unsatisfactory job performance on 9/9/13, 11/ 9/13 and 11/14/13.

(A Exh. 1, p. 1).

### **Standards of Conduct Operating Procedure Number 135.1**

16. Under Policy 135.1, unsatisfactory attendance or excessive tardiness is a Group I offense. (A Exh. 8, p. 7).

Also under Policy 135.1, failure to follow a supervisor's instructions and comply with applicable established policy are Group II offenses. (A Exh. 8, p. 8).

### **Policy on Attendance**

17. Under the Agency's Attendance Policy 110A, within a 6 month period security staff reporting to work tardy 2 times shall receive a written counseling notice. On the third occurrence the employee shall receive a substandard performance notice. On the fourth occurrence, the employee shall receive a disciplinary referral. (A Exh. 5, p. 13).

### **Roving Patrol Policy**

18. Agency policy Post Order 43 is applicable to roving patrol duty. In summary, under this policy, an employee such as a correctional officer assigned this job is responsible for surveillance of all activities in the immediate and outlying areas of his designated post assignment. This includes inside and outside the area's perimeter. Further the officer is required to ensure that adequate security, supervision and control is maintained to prevent escape, bodily injury, property damage, and introduction of contraband. He must pay particular attention to any suspicious or unusual activity. (A Exh. 7, p. 2).

Specific job duties while on roving patrol include, but are not limited to, the following:

- (i). Surrendering the officer's chit to obtain keys, equipment, and tools;
- (ii). Returning keys, equipment, and tools to retrieve officer's chits and weapon's card;
- (iii). Being polite, courteous and respectful at all times when in the presence of and when dealing with others including employees, citizens, family, and inmates; and

- (iv). accounting for equipment issued by the officer;
- (v). using common sense and good judgment.

(A Exh. 7).

Moreover, the post order alerts officers on patrol roving duty that the order cannot cover every incident that may occur. Hence for any situation encountered, an officer's behavior should be consistent with the tenets of the post order. (A Exh. 7, pp. 2-5; Testimony of Major).

19. Grievant failed to comply with Post Order 43 when he did not retrieve his chits and weapon's card on November 14, 2013. He also failed to comply with Post Order 43 on November 28, 2013, when he left the keys to the rover vehicle in the rover. (Testimonies of Lieutenant, Captain, Sergeant 1, and Major; A Exh. 7, p. 3).

### **Grievant's Disciplinary History**

20. Grievant's disciplinary history consisted of 2 active group notices at the time he received the Group I Written Notice on January 28, 2014. Those 2 active notices included a group I for excessive tardiness and a group I for disruptive behavior. (A Exh. 4, pp. 3 – 4; Testimony of Major).

### **Discipline of other workers**

21. Officer 1 was disciplined for taking off too many days. (Testimony of Officer 1).

22. Officer 4 had an attendance problem at one time and was given the choice of receiving a group notice or changing her shift from the night shift. She elected to change her shift. (Testimony of Officer 4).

23. On September 14, 2012, Grievant received a recognition for outstanding performance memorandum from Captain, Lieutenant, and Sergeants 1, 2, and 3. (G Exh. 1).

24. Grievant's father was terminally ill during the fall of 2013. (Testimony of Grievant).

25. Grievant's March 4, 2013 Quarterly Performance Review and October 17, 2013 annual performance evaluations rated him "a contributor." (G Exhs. 5 and 6).

26. Grievant completed the Cognitive Community Staff Training at the Law Enforcement Training Academy on March 28, 2014. (G Exh. 6, p. 1).

27. The evidence establishes that Grievant was familiar with expectations and policies regarding attendance, roving patrol duty, and Post Order 43 prior to the date of the alleged misconduct in the January 28, 2014 group notice. (Testimony of Grievant; A Exhs. 7 and 8).

## **DETERMINATIONS 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/her 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 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.<sup>4</sup>

The Commonwealth of Virginia Department of Corrections Operating Procedure sets forth the Commonwealth's Standards of Conduct and disciplinary process that the Department of Corrections ("DOC") must employ to address unacceptable behavior, conduct, and related employment problems in the workplace.<sup>5</sup>

These standards group offenses in three categories – Group I, Group II, and Group III offenses. The least severe are noted as Group I violations of workplace conduct; Group II offenses are more severe; and Group III offenses are the most severe normally warranting termination for a first offense.<sup>6</sup> When circumstances warrant it, management may mitigate discipline if in its judgment it is proper to do so.<sup>7</sup>

As stated previously, Agency management issued Grievant a Group I Written Notice. The Hearing Officer examines the evidence to determine if the Agency's discipline was warranted and appropriate under the circumstances.

## **I. Analysis of Issue before the Hearing Officer**

**Issue: Whether the discipline was warranted and appropriate under the circumstances?**

**A. Did the employee engage in the behavior described in the Group I Written**

---

<sup>4</sup> Grievance Procedural Manual §5.8

<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.1

<sup>6</sup> Virginia Department of Corrections Operating Procedure 135.1V.

<sup>7</sup> *Id.*

## **Notice and did that behavior constitute misconduct?**

The Agency contends that Grievant's work performance was not satisfactory. The group notice described the nature of the offense as set forth in "Finding of Fact" 15 here. Now, the Hearing Officer examines whether Grievant engaged in the conduct alleged.

On September 9, 2013, Grievant's superiors counseled him and issued Grievant a Notice of Improvement Needed for issues relating to his negative interactions with inmates. Then, Grievant was counseled that any further conduct issues with inmates would result in his being referred for disciplinary action. Indeed a reasonable extrapolation from this warning, placed Grievant on notice that further performance problems on the job could likely lead to disciplinary action being taken against him.

While the evidence does not indicate Grievant had continuing issues relating to inmates, testimony and documentation of record demonstrate deficiencies in other areas of Grievant's job performance. For one, Grievant arrived tardy to work on at least 4 occasions in October 2013. In consequence, on November 9, 2013, Grievant received a counseling memorandum regarding his excessive tardiness. Grievant does not challenge his attendance problem, only how late he was on those days. He also explains that he was going through a lot during the time as his father was very ill. Secondly, on November 14, 2013, Grievant failed to illustrate the level of observation and familiarity with his post as required by a correctional officer assigned roving patrol duty under Post Order 43. This can be seen by it taking Grievant at least 3 laps around his post before he was able to detect the open gate that set off the alarm. Once Grievant found the opened gate, he was unable to identify with specificity his location. Moreover, Grievant informed his superior he was looking for animals and was not knowledgeable about the back of the building in proximity to the opened gate. The evidence shows that a critical purpose for roving patrol is to maintain security and prevent any escapes from the prison. Officers assigned this duty must be keenly observant. The Agency's safety and ability to prevent an inmate from escaping was exceedingly undermined by the length of time it took Grievant to find the source of the alarm and his lack of knowledge about the premises.

In addition, on November 14, 2014, when Grievant's shift ended, he failed to retrieve his chits and weapon's card upon. They were exposed such that others could have obtained them. Indeed, the Warden was making his rounds, discovered them, and confiscated them. Grievant explanation for leaving them behind was he was distracted when a co-worker asked him for a ride and he forgot them. Grievant's action was also a violation of Post Order 43 which requires officers to retrieve their chits upon returning equipment and to account for their chits and weapon's card at all times. Similarly, on November 28, 2013, Grievant left the keys to the roving patrol vehicle he was using unattended. Grievant then attempted to obtain from master control the chit that he had surrendered when he obtained the keys to the vehicle. When the master control officer would not return his chit because Grievant did not have the keys to exchange for the chit, Grievant became upset and caused a commotion. When Lieutenant intervened to resolve the matter he determined Grievant had left the roving patrol vehicle keys unsecured. Grievant was instructed to retrieve them. The fact that Grievant left the keys unattended was a severe security breach as anyone, including an inmate, could have retrieved the keys. In addition, Grievant's conduct on November 28, 2013, was a violation of Post Order 43

directive to:

- (ii). Return keys, equipment, and tools to retrieve officer's chits and weapon's card;
- (iii). Be polite, courteous and respectful at all times when in the presence of and when dealing with others including employees, citizens, family, and inmates; and
- (iv). account for equipment issued by the officer.

Having considered all of the above, the Hearing Officer finds that Grievant engaged in the behavior alleged and it was misconduct or unsatisfactory job performance.

### **B. Was the discipline consistent with policy and law?**

The standards of conduct indicate that excessive absences or tardiness is a group I offense. During the month of October 2013 Grievant was late to work at least 4 times. His tardiness occurred subsequent to Grievant receiving a Notice of Improvement Needed and being warned that any further problems would result in a disciplinary referral.

Further, the standards of conduct note that failure to follow instructions or policy is a group II offense. Agency policy Post Order 43 requires officers to account for their chits and weapon's card at all times. Moreover, this policy directs officers to return keys and equipment and retrieve their chits exchanged for those items. Grievant failed on November 14 and 28, 2013, to follow Post Order 43.

In addition, on November 14, and 28, 2013, Grievant engaged in behaviors that constituted a severe breach of security as noted above. Under the standards of conduct, offenses of a severe, serious nature normally warrant a group III Written Notice and removal.

The evidence demonstrates Grievant engaged in conduct at all three offense levels. Yet, the Agency mitigated Grievant's discipline and only issued him a Group I Notice. Considering the above, the Hearing Officer cannot find the Agency's discipline is inconsistent with policy and law.

Having made this finding, the Hearing Officer is cognizant of the fact that one of Grievant's witnesses, another correctional officer, testified that she had accumulated excessive absences and was given the option to receive a group notice or to change her work shift. And she chose to change her shift. As presented this officer's only offense was excessive absences. Grievant's misconduct consisted of several various infractions – excessive tardiness, security breaches, violation of Post Order 43. Hence, the Hearing Officer affirms her finding that the Agency's discipline is consistent with policy and law.

## **II. Mitigation**

Under statute, hearing officers have the power and duty to “[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with

the rules established by the Office of Employment Dispute Resolution [“EDR”].”<sup>8</sup> EDR’s *Rules for Conducting Grievance Hearings* provides that “a hearing officer is not a super-personnel officer” therefore, “in providing any remedy, 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.”<sup>9</sup> More specifically, the *Rules* provide that in disciplinary, grievances, if the hearing officer finds that;

- (i) the employee engaged in the behavior described in the Written Notice.
- (ii) the behavior constituted misconduct, and
- (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.<sup>10</sup>

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

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. Indeed, the “exceeds the limits of reasonableness” standard is a high standard to meet, and has been described in analogous Merit Systems Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionable disproportionate, abusive, or totally unwarranted.<sup>11</sup>

The Hearing Officer has found that Grievant engaged in the conduct described in the group notice, the behavior was misconduct, and the Agency’s discipline was consistent with policy and law.

Next, the Hearing Officer considers whether the discipline was unreasonable and therefore should be mitigated. To advance his claim of mitigation, Grievant claims retaliation, hostile work environment, and inconsistent application of policy/procedure. The evidence is not sufficient to support hostile work environment or retaliation. Grievant also asserts inconsistent application of policy or disparate treatment. As previously discussed, this claim has no merit. Moreover, Grievant presents performance evaluations that have rated him a “contributor,” as well as a letter dated September 14, 2012 recognizing him for outstanding performance. The Hearing Officer has considered all Grievant’s evidence offered for mitigation purposes, as well

---

<sup>8</sup> Va. Code § 2.2-3005 and (C )(6)

<sup>9</sup> *Rules for Conducting Grievance Hearings* VI(A)

<sup>10</sup> *Rules for Conducting Grievance Hearings* VI(B). The Merit Systems Protection Board’s approach to mitigation, while not binding on EDR, can be persuasive and instructive, serving as a model for EDR hearing officers. *E.g.*, EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040; EDR Ruling No. 2011-2992 (and authorities cited therein).

<sup>11</sup> *E.g., id.*

as all other evidence of record. Accordingly, she finds the Agency's discipline lenient and far from being unreasonable.

Having undergone this thoughtfulness, the Hearing Officer cannot find the Agency acted without reason.

### **DECISION and ORDER**

As noted, the Hearing Officer has considered all the evidence of record whether specifically mentioned or not. For the reasons provided here, the Agency's Group I Written Notice 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, Departmental of Human Resource Management  
101 N. 14th St., 12<sup>th</sup> 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 N. 14th St., 12<sup>th</sup> Floor  
Richmond, VA 23219  
or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>12</sup>

Entered this 31<sup>st</sup> day of July, 2014.

---

Ternon Galloway Lee, Hearing Officer

cc: Agency Advocate  
Grievant  
EDR

---

<sup>12</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.