Issue: Group III Written Notice with Termination (unsatisfactory job performance, failure to follow policy and interference with operations); Hearing Date: 12/15/14; Decision Issued: 12/17/14; Agency: DJJ; AHO: John V. Robinson, Esq.; Case No. 10503; Outcome: No Relief - Agency Upheld.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 10503

Hearing Officer Appointment: November 12, 2014
Hearing Date: December 15, 2014
Decision Issued: December 17, 2014

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge termination of his employment effective October 2, 2014, pursuant to a Group III Written Notice issued on October 2, 2014 by Management of the Department of Juvenile Justice (the "Department" or "Agency"), as described in the Grievance Form A dated October 31, 2014.

The hearing officer was appointed on November 12, 2014.

The hearing officer scheduled a pre-hearing telephone conference call at 1:30 p.m. on November 17, 2014. The Grievant, the Agency's attorney and the hearing officer participated in the pre-hearing conference call. The Grievant is challenging the issuance of the Group III Written Notice for the reasons provided in his Grievance Form A and is seeking the relief requested in his Grievance Form A. Following the pre-hearing conference, the hearing officer issued a Scheduling Order entered on November 18, 2014, 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.

At the hearing, the Grievant represented himself and the Agency was represented by its attorney. 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 exhibits 1-14 in the Agency's exhibit binder.[1]

[1] References to the agency's exhibits will be designated AE followed by the exhibit number. The Grievant did not offer any exhibits.

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 sergeant/housing unit manager, formerly employed by the Agency at a juvenile detention center (the "Facility").

2. The Grievant was so employed on September 7, 2014.

3. The Facility was concerned that contraband was being imported into the Facility during visitations from the public.

4. The contraband takes the form of tobacco, drugs, weapons, "kites" (communications between gang members concerning "hits" or assaults to be perpetrated on residents or staff), etc.

5. Accordingly, the contraband poses a direct and significant threat to the safety and security of the staff and residents of the Facility.

6. To counter this threat, the Facility conducts searches of inmates and their rooms to find such contraband. Water is shut off during these searches to prevent residents flushing contraband down the toilets.

7. On September 7, 2014, the Chief of Security at the Facility and the Shift Commander directed the Grievant, who is a sergeant, housing unit manager and supervisor of several juvenile correctional officers ("C/Os"), to conduct a search of certain housing units.

8. Instead of keeping this information to himself as required by policy, the Grievant warned Resident P that there was going to be a search. The Grievant admitted this to the SIU investigators and to the Superintendent and Assistant Superintendent. AE 6 and Tape. The Grievant did this to help Resident P. AE 6.

9. Resident P proceeded to warn the other residents in his housing unit, many of whom quickly began to flush contraband down the toilets.

10. The Grievant's actions constituted a breach of trust to both his superior and subordinate officers. The Grievant's superior officers obviously trust him not to thwart searches by revealing the confidential time of searches to residents. The C/Os are accountable to the Grievant for their actions and inactions and expressed at the hearing a sense of betrayal when the Grievant warned Resident P, who is a dangerous individual per the Assistant Superintendent.

11. The Grievant's warning constituted a direct and serious threat to the safety and security of the Facility.

12. The investigation was independent, thorough and professional and was reasonably relied upon by the Assistant Superintendent. The investigators did not coerce the Grievant as he asserts.

13. The Grievant received significant education and training concerning the need to follow the post orders and policies applicable in this proceeding. AE 7 and 8. The Grievant admitted that the knew the policies. AE 8.

14. The Department has fully accounted for all mitigating factors in determining the corrective action taken concerning the Grievant. This finding is discussed in greater detail below.

15. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.

16. The Department's actions concerning this grievance were reasonable and consistent with law and policy.

17. 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. By contrast, the Grievant after making outright admissions to the investigators, the Superintendent and the Assistant Superintendent, changed his story in material respects when he realized his job was in jeopardy.

APPLICABLE LAW, 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, violate safety rules (where threat of bodily harm exists), 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. AE 9 & 10.

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.

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).

The Grievant asserts that the discipline is too harsh. The Assistant Superintendent did consider mitigating factors, including the Grievant's past good service to the Agency over almost 19 years. However, the Assistant Superintendent reasonably concluded that what the Assistant Superintendent characterized as the Grievant's breach of trust in consciously warning Resident P of the search with its attendant institutional safety risks, left him with little options but termination after input from the Agency's central office. It should also be noted that further

precluding any chance of mitigation and further eroding the element of trust, are the Grievant's attempted *ex post facto* changes to his earlier outright admissions, freely made, a significant aggravating factor.

EDR's *Rules for Conducting Grievance Hearings* provide in part:

> The *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.

The Grievant has specifically raised mitigation as an issue in the hearing and in his Form A. While the Grievant might not have specified for the hearing officer's mitigation analysis all of the mitigating factors below, the hearing officer considered a number of factors including those specifically referenced herein, in the Written Notice and all of those listed below in his analysis:

1. the Grievant's exemplary service to the Agency of almost 19 years;

2. the often difficult and stressful circumstances of the Grievant's work environment; and

3. the fact that the residents were very fond of and trusted the Grievant;

4. the fact that the Grievant was employee of the month for April 2014;

5. the fact that the Grievant has no prior formal discipline; and

6. the fact that the Grievant has served well as a sergeant since 2001.

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; and EDR Ruling 2010-2368. 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. Of course, there were also aggravating factors in play including the fact that as a supervisor, the Grievant is held to a higher standard. *See* EDR Case No. 9872. Clearly, the hearing officer would not be acting responsibly or appropriately if he were to reduce the discipline under the circumstances of this proceeding.

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.

In this proceeding, the Agency's actions were consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer.

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.

The hearing officer decides for the offenses specified in the 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.

DECISION

The Agency has sustained its burden of proof in this proceeding and the action of the Agency in issuing the written notice and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the Agency's action concerning the Grievant is hereby upheld, having been shown by the Agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

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: 12/ 17/ 14

John W. Robinson

John W. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail and/or facsimile transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).