

Issue: Group III Written Notice with demotion and pay reduction (safety rule violation);
Hearing Date: 08/27/14; Decision Issued: 10/25/14; Agency: DOC; AHO: Lorin A.
Costanzo, Esq.; Case No. 10426; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In the matter of: Grievance Case No. 10426

Hearing Date: August 27, 2014
Decision Issued: October 25, 2014

PROCEDURAL HISTORY

On May 23, 2014 Grievant was issued a Group III Written Notices (Offense Date: 1/9/14) with demotion to lower pay band and 10% disciplinary pay reduction for "Safety Rule Violation" (Written Notice Offense Code "14"). The *Nature of Offense and Evidence* provided, in part:

On 1/9/14 *[Officer]* was accidentally shot by *[Grievant]* who was in possession of a Glock Model 23 Firearm. An analysis of the weapon by the Department of Forensic Science indicated that there was no malfunction of the weapon. Based upon this evidence and evidence collected by Special Investigations Unit, it was concluded that *[Grievant]* accidentally pulled the trigger while trying to ensure that the magazine to the weapon was secure. Investigative findings also identified that *[Grievant]* failed to handle the weapon in accordance with VADOC Training (Academy for Staff Development Firearms Safety Rules, A. 1-4) and the Safety Manual for Glock Model 23. The Safety Manual for the Glock Model 23 and the ASD Firearms Safety Rules instruct staff to "never point a weapon where an unintentional discharge may do harm." Additionally, both the safety rules and weapons manual advise to "always treat every weapon as if it were loaded." ...

Grievant timely grieved issuance of the Group III Written Notices. The grievance proceeded through the resolution steps and, when the outcome was not satisfactory to Grievant, he requested a hearing. The matters were qualified for a hearing and the undersigned was appointed hearing officer effective August 4, 2014 by the Department of Human Resources Management, Office of Employment Dispute Resolution.

Hearing was held 8/27/14, written closing arguments submitted 9/29/14, and written Agency rebuttal submitted on 10/6/14.

HEARING

a. **Hearing, Written Closings, and Written Rebuttal:** Grievance Hearing was held on August 27, 2014 at Facility. The parties submitted closing arguments, in writing, on September 29, 2014 and, as Agency requested, Agency submitted a written rebuttal to Grievant's closing on October 6, 2014.

Appearances at hearing: Grievant (who was also a witness)
Grievant's attorney
Agency Advocate
Agency party representative
Witnesses (one witness testified via speakerphone)

b. **Exhibits:** Exhibits were admitted *en masse* by agreement of the parties. Agency Exhibits consists of one three ring binder tabbed 1-6. Grievant's Exhibits consists of one three ring binder tabbed 1-28. "Agreed Exhibit # 1" was admitted at hearing by agreement of the parties.

ISSUES

Whether the issuance to Grievant of the Group III Written Notice with demotion to lower pay band with 10% disciplinary pay reduction was warranted and appropriate?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action was warranted and appropriate under the circumstances. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence more convincing than the opposing evidence.

The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline.¹

FINDINGS OF FACT

After reviewing the evidence admitted and observing the demeanor of the witnesses, the Hearing Officer makes the following findings of fact:

01. Grievant has been employed by Agency since April of 2009. At the date of the offense, January 9, 2014, Grievant was employed as a Sergeant at Facility but had been notified that, effective January 10, 2014, he was being offered a promotion to Lieutenant.²

02. On January 9, 2014 Grievant and Officer transported an inmate for medical treatment from Facility to a Security Care Unit at a Hospital in Richmond, VA. As transportation officers, each was issued and authorized to carry a Glock 23 firearm in the performance of their duties.³

03. On January 9, 2014 Officer went to Facility Armory and drew, among other items, a Glock Model 23 pistol, a holster, three loaded magazines, and a duty belt for himself and a second similar set of equipment for Grievant. Officer later went to meet Grievant at the Sally Port but Grievant was inside the Facility retrieving the inmate. Weapons were not permitted inside the secure area where the inmate was being held. Officer handed both of the weapons to Watch Commander, who held the weapons and magazines while Officer and Grievant loaded the inmate into the vehicle. When ready to depart Facility, Officer and Grievant retrieved their weapons and magazines from Watch Commander.⁴

04. Grievant and Officer departed Facility to transport an inmate to a Richmond Hospital. Grievant drove the Agency vehicle. Officer assembled Grievant's duty belt while the vehicle was in transit.⁵

¹ Office of Employment Dispute Resolution, DHRM, *Grievance Procedure Manual*, Sections 5.8 and 9.

² G. Tab 18. and Testimony.

³ Testimony.

⁴ A. Tab 5, pg. 4, 5, 25 and 41.

⁵ G. Tab 24, pg. 2; A. Tab 5, pg. 2, 27, and 31.

05. Grievant and Officer arrived at the Secure Care Unit of Hospital in Richmond at approximately 8:00 A.M., after about a 5 hour trip. Officer and Grievant went directly to the Sally Port at the Secure Care Unit and turned the inmate over to two officers at the site. Officer and Grievant then took their Agency vehicle to a hospital satellite parking lot where their vehicle was required to park, parked their vehicle in the "lower parking lot", and both Officer and Grievant walked to the "upper parking lot" to catch a shuttle back to the hospital.⁶

06. Grievant put on his duty belt with holstered weapon after parking their Agency vehicle in the satellite parking lot (lower lot). Grievant and Officer proceeded to the upper parking lot to catch the shuttle back to the hospital.⁷

07. While at the parking lot waiting for a shuttle bus to take them back to the Hospital, Officer and Grievant utilized the two portable toilet units (Porta Johns), which stood side-by-side in the NW corner of the parking lot. Officer entered the Porta John unit on the left and Grievant entered the unit on the right.⁸

08. While inside the Porta John unit Grievant, having noticed the magazine in his weapon not to be fully seated, removed his pistol from its holster, held it in his hand, and tapped the bottom of the magazine with his other hand to seat the magazine properly in the magazine well of his weapon. At this point Grievant's weapon discharged. A bullet went through the wall of the Porta John unit Grievant was in and entered the adjacent Porta John unit where it struck Officer in the lower back. Grievant went to Officer's aid and asked the parking lot attendant to call an ambulance.⁹

09. As a result of the discharge of Grievant's weapon, Officer was shot in his lower back. Officer was admitted to Hospital in critical but stable condition. Officer has bullet lodged near his spine and is on Long Term Disability.¹⁰

10. Investigations of matters relating to Grievant's discharge of his firearm were conducted by Agency and Police Department. The Special Investigations Unit issued a Report of Investigation (signed March 24, 2014 and approved by Assistant Chief 4/9/14) concerning matters.¹¹

11. The Virginia Department of Forensic Science was requested to conduct an examination of Grievant's Glock 23 firearm. Grievant's firearm with the expended cartridge case and his magazine were submitted to the Virginia Department of Forensic Science (received 1/15/14). On March 6, 2014 the Virginia Department of Forensic Science issued a Certificate of Analysis finding Grievant's firearm to be in mechanical operating condition with the safety features functioning properly. Grievant's weapon was test fired with his submitted magazine. The cartridge case submitted for testing was identified as having been fired from the firearm.¹²

12. The Safety Manual for the Glock Model 23 contains instructions for seating a magazine into the magazine well and instructs officers to tip the weapon ejection port slightly to the right and then to tap the magazine forcefully with the base of the hand to ensure the magazine is properly seated. An Investigation

⁶ A. Tab 5, pg. 2-3, 14, 15, 31, & 32.

⁷ A. Tab 5, pg. 14, 15, & 31.

⁸ A. Tab 5, pg. 15, 16, & 32.

⁹ A. Tab 5, pg. 13-15, & 32.

¹⁰ A. Tab 5, pg. 11. Testimony.

¹¹ G. Tab 1; A. Tab 5.

¹² A. Tab 5, pg. 43-44.

Report Agent's Note indicated, "It appears [*Grievant*] was following these instructions when the accidental discharge occurred."¹³

13. Agency instructs its employees to not carry a weapon with a chambered round and not to chamber a round unless there is an intention to fire.¹⁴

14. The incident involving discharge of Grievant's weapon occurred on January 9, 2014. Grievant returned to work as a Sergeant on January 13, 2014. On this date Warden informed Grievant the offered position of Lieutenant had been held due to the serious nature of the 1/9/14 incident and due to the fact an investigation was being conducted by SIU. On January 17, 2014 Grievant was notified no charges were being filed by the Commonwealth Attorney. Grievant continued to be employed with Agency as a Sergeant until the effective date of the demotion indicated in the Group III Written Notice.

(There appears to be a clerical error indicating the demotion effective date listed in the Written Notice. It appears the demotion effective date, indicated as May 25, 2013, should have been indicated as May 25, 2014.)¹⁵

15. Grievant completed firearm safety training. He completed Glock Transition training on May 20, 2013. Post Orders for Transportation Officer were finalized on September 1, 2013 and placed on posts thereafter.¹⁶

CONCLUSIONS

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 of Virginia. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging, and training state employees. It also provides for a grievance procedure. Code of Virginia, §2.2-3000 (A) sets forth the Virginia grievance procedure and provides, in 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 employee disputes which may arise between state agencies and those employees who have access to the procedure under §2.2-3001.

OP 135.1-Standards of Conduct:¹⁷

The Department of Corrections ("DOC"), pursuant to Va. Code §53.1-10, has promulgated its own *Standards of Conduct* patterned on the state Standards, but tailored to the unique needs of the Department.

The *Standards of Conduct* (Operating Procedure Number 135.1, Effective Date: April 1, 2011) divide unacceptable behavior into three groups, according to the severity of the behavior. Group I offenses include types of behavior less severe in nature, but which require correction in the interest of maintaining a

¹³ A. Tab 5, pg. 3.

¹⁴ A. Tab 2, pg. 4; A. Tab 5, pg. 14.

¹⁵ A. Tab 1; A. Tab 2; G. Tab 18; Testimony.

¹⁶ A. Tab 2, pg. 4 & 5; A. Tab 4.

¹⁷ G. Tab 28; A. Tab 5.

productive and well-managed work force. Group II offenses include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal. Group III offenses include acts and behaviors of such a serious nature that a first occurrence normally should warrant removal.

Standards of Conduct, Operating Procedure 135.1 states, in pertinent part:

IV. GENERAL

- C. The standards of conduct outlined in this procedure are designed to protect the well-being and rights of all employees, to assure safe, efficient government operations, and to assure compliance with public law.
- D. The Standards of Conduct
 - 1. Establish a fair and objective process for correcting or treating unacceptable conduct or work performance
 - 2. Distinguish between less serious and more serious actions of misconduct, and provide corrective action accordingly
- E. The list of offenses in this procedure is illustrative, not all-inclusive. An action or event occurring either during or outside of work hours that, in the judgment of the agency head, undermines the effectiveness of the employee or of the agency may be considered a violation of these *Standards of Conduct* and may result in disciplinary action consistent with the provisions of this procedure based on the severity of the offense.

V. GROUPS OF OFFENSES AND MITIGATING CIRCUMSTANCES

- D. Third Group Offenses (Group III)
 - 1. These offenses include acts and behaviors of such a serious nature that a first offense normally should warrant removal.
 - 2. *Group III* offenses include, but are not limited to:
 - g. Violating safety rules where there is a threat of physical harm.
 - 3. Procedures for Issuing a *Group III* Notice
 - a. When issuing an employee a *Written Notice* for a *Group III* offense, management should issue such notice as soon as practical. Discipline should normally take the form of the *Notice* and removal or *Notice* and up to 30 work days maximum suspension without pay in lieu of removal. ...
NOTE: Mitigating circumstances may result in an employee's demotion or transfer and a disciplinary salary action as defined in this operating procedure, and/or suspension as an alternative to removal

***Operating Procedure: 401.1 provides:*¹⁸**

- 33. ALL ARMED POST'S POST ORDERS CONTAIN FIREARMS SAFETY PROCEDURES/OPERATORS MANUAL(S) FOR WEAPONS ASSIGNED TO THE POST AND A COPY OF THE USE OF FORCE POLICY. ALL OFFICERS MUST READ AND BECOME FAMILIAR WITH THESE ATTACHMENTS.

***Operating Procedure: 411.1 provides:*¹⁹**

¹⁸ A. Tab 4, pg. 5.

¹⁹ A. Tab 5, pg. 112.

VIII. PREPARING FOR THE TRANSPORTATION ASSIGNMENT

A. Officer's Personal Equipment Checklist – The following equipment must be obtained and readied for use:

3. Duty belt ...
4. DOC handgun fully loaded with holster
5. Additional ammunition...

XI. WEAPONS

B. Transportation Officers must be familiar with Firearms Safety Procedures, currently trained, and certified/qualified with the DOC authorized handgun, rifle, and shotgun and any other weapons, munitions or devices issued.

D. Firearms and less lethal weapons will be secured in the appropriate holster or secure storage device when not actively in use.

I. Firearms

1. All transportation Officers shall be armed with the DOC handgun and extra ammunition.

Virginia Department of Corrections Firearm Safety Rules state:²⁰

A. CARDINAL RULES OF FIREARMS SAFETY:

1. Treat all firearms as though they are loaded.
2. Keep your finger outside the trigger guard until you are on target and have decided to fire.
3. Point the muzzle in a safe direction at all times.
4. Be sure of your target and what is beyond it.

SAFETY MANUAL GLOCK MODEL 23 provides:²¹

1. FIREARMS SAFETY RULES

- a. Treat every weapon as if it was loaded
- b. Never point a weapon at anything or anybody that you do not intend to shoot, or in a direction where and unintentional discharge may do harm. "LASER RULE."
- c. Never place your finger into the trigger guard until ready to fire. "INDEXING."
- d. Be sure of your target, backstop and beyond.

3. RENDERING WEAPONS SAFE

Caution:

THIS FIREARM LIKE MOST MODERN REVOLVERS OR AUTO LOADING PISTOLS ARE DESIGNED WITHOUT AN EXTERNAL MANUAL SAFETY. THEREFORE IT SHOULD BE CONSIDERED AS LOADED AND READY TO FIRE. UNLESS FIRST THE MAGAZINE HAS BEEN REMOVED AND THEN THE CHAMBER CHECKED AND VERIFIED AS EMPTY/UNLOADED.

CAUTION:

IT IS POSSIBLE THAT A ROUND MAY BE IN THE CHAMBER WHEN A LOADED OR EMPTY MAGAZINE IS BEING REMOVED OR INSERTED. ANY ROUND IN THE CHAMBER WILL DISCHARGE UPON PULLING THE TRIGGER WITHOUT THE MAGAZINE INSERTED OR REMOVED FROM THE PISTOL. THEREFORE THE USER SHALL NEVER LEAVE THE PISTOL UNATTENDED, EVEN IF THE MAGAZINE IS REMOVED AND SHOULD EXERCISE EXTREME CAUTION AFTER REMOVING THE MAGAZINE AND PERSONALLY MUST VERIFY THAT THE CHAMBER IS ALSO EMPTY BEFORE FIELD-STRIPING THE FIREARM FOR CLEANING OR ANY OTHER REASON.

²⁰ A. Tab 6.

²¹ A. Tab 5, pg. 69-72.

Weapon discharge:

It is not contested that the firearm in Grievant's possession discharged unintentionally and Officer was shot in the lower back by the discharge. Grievant stated he initiated this grievance, "because I feel that the disciplinary action given was excessive, if not unnecessary, for what was a very unfortunate accident."

Agency does not contend the weapon discharge was an intentional act. However, Agency is concerned Grievant's action violated safety rules where there was a threat of physical harm and he was not following established firearm safety rules and procedures when his firearm discharged. Agency is also concerned Officer was seriously injured, is experiencing significant medical issues since the shot, and is unable to return to work as a result of the discharge.

The Safety Manual for Glock Model 23 and the ASD Firearms Safety Rules instruct officers to treat all weapons as if they were loaded, to keep their finger outside the trigger guard unless ready to fire, and to never point a weapon where an unintentional discharge may do harm.

Grievant was attempting to seat the magazine in his weapon's magazine well when it discharged. The Safety Manual for the Glock Model 23 calls for the officer to tip the weapon ejection port slightly to the right and then to tap magazine forcibly with base of the hand to ensure the magazine is properly seated. Agency believes Grievant caused his weapon's discharge when he accidentally touched the trigger while thus seating the magazine in his weapon's magazine well.

While a round had to be chambered for the discharge to occur, the investigation was not able to establish with certainty a specific point at which the round was chambered or who chambered the round.

Agency policy provides the Glock 23 will be carried with a loaded magazine inserted in the magazine well but without a cartridge being chambered in the weapon.²² Grievant stated to Investigator he did not know there was a round in the chamber and stated he was not sure why the weapon discharged. Grievant further indicated he believes his finger was not on the trigger when the discharge occurred.

Evidence indicated the Glock Model 23 firearm having three safety mechanisms to prevent the weapon from firing unless the trigger is pulled. These three firing safety mechanisms include a trigger safety, firing pin safety, and the safety function of the trigger mechanism housing. Subsequent to the 1/9/14 discharge, Grievant's weapon was sent to the Virginia Department of Forensic Science for testing and examination. Their examination concluded Grievant's weapon to be in mechanical operation condition with the safety features functioning properly.

Grievant indicated he did not know why the weapon discharged. He first thought it was mechanical but after the weapon examination/testing results were returned he was thinking the weapon discharge could have been because the trigger caught on something, clothing, gear, or chain.²³

Grievant also raised concern about a ricochet. Copies of two photographs by Police Department were admitted, each showing walls of a Porta John unit with an arrow pointing to what is marked as "bullet holes". Grievant raises concern as to a height difference existing between the point the bullet left through

²² A. Tab 5, pg. 19.

²³ Testimony.

the wall of Grievant's Porta John and entered into Officer's Porta John unit. Grievant indicated he believes his firearm was safely pointed up while he was seating the magazine and the weapon discharged but the round ricocheted.

In the copy of the two photographs admitted into evidence (A. Tab 5, pg. 16) there is a tab marked "Bullet Holes" with two arrows pointing to places in the 2 photographs. While one photograph appears to have a bullet hole shown (Officer's Porta John Unit) the other is not as clear as to the location of the hole. No evidence was presented as to measurements related to the bullet holes. Neither photo provides any scale to determine height of the holes or their relationship to each other.

There is insufficient evidence to find a ricochet occurred. However, even if a ricochet were found to have occurred, there is no evidence addressing what the change in trajectory of the bullet was and/or what effect, if any, the change in trajectory may have had on the impact of the bullet striking Officer.

Weapon and Safety:

After investigation into matters Agency determined Grievant failed to follow established firearm safety rules and instructions, including instructions to:

- Treat every weapon as if it was loaded
- Never point a weapon at anything or anybody that you do not intend to shoot, or in a direction where and unintentional discharge may do harm
- Never place your finger into the trigger guard until ready to fire.
- Consider a firearm as loaded and ready to fire unless first the magazine has been removed and then the chamber checked and verified as empty/unloaded.

Investigators determined there is inconclusive evidence as to who chambered the round or when the round was chambered. Evidence addressed Grievant's weapon and its handling from the time of the weapon's issuance in the Armory to the time it was unintentionally discharged while being held by Grievant. There is conflicting evidence as to certain matters related to the prior handling of Grievant's weapon.

Grievant's and Officer's weapons were issued in the Armory to Officer, both weapons were held by Watch Commander, and while in transit Officer assembled Grievant's duty belt and handled Grievant's weapon. Officer indicated, on interview, he was "fuzzy" on whether he may have accidentally chambered a round into Grievant's weapon.

On 1/9/14 Armory Officer gave Officer both Officer's and Grievant's Glock 23 firearms and 6 loaded magazines (3 magazines for Officer and 3 for Grievant). Armory Officer indicated that Grievant told him to give his Glock to Officer. There was no policy prohibiting this.

Armory Officer noted that Grievant witnessed Officer clearing, holstering, and loading Grievant's weapon. Armory Officer issued Officer both weapons with no rounds in the chamber of either weapon. Officer was observed to administratively clear each weapon in the clear barrel and administratively load a magazine into both his weapon and Grievant's weapon which was secured in Grievant's holster.²⁴

Weapons were not permitted inside the secure area holding the inmate. Officer handed both weapons and all magazines off to the Watch Commander so he could help Grievant secure and load the

²⁴ A. Tab 5, pg. 38.

inmate. Watch Commander held both weapons while Officer and Grievant took custody of inmate and loaded inmate into the vehicle.

Watch Commander indicated he did not observe a magazine in either weapon, when the weapons were handed him the slides on the weapons were closed, and at no time did he pull the slides to the rear or chamber a round. He stated to investigators the slides were still closed when he returned the weapons and he observed the officers insert the magazines into the magazine wells before they drove off.²⁵

Officer stated the slide was closed on his weapon but still open on Grievant's weapon when he handed it over to Watch Commander.²⁶

Officer told Detective:²⁷

- He checked out his weapon and Grievant's weapon from Armory while Grievant checked out the inmate.
- Both weapons were handed to him unloaded, with the slide back, with a magazine for each weapon given to him separately.
- He released the slide on his weapon and put it in his holster and then inserted the magazine. His weapon was NOT charged.
- He did the same for Grievant's weapon and put it in his holster.
- He was "fuzzy" on whether he may have accidentally chambered a round into Grievant's weapon.

Grievant indicated he never handled his weapon until Officer handed to him, already holstered and on his duty belt, when he was in the satellite parking lot in Richmond.²⁸ While in the Porta John unit he notice the magazine was not fully inserted and after attempting to administratively seat the magazine, removed the weapon from the holster to properly seat the magazine. The weapon accidentally discharged while in his hand and while he was seating the magazine. Grievant contends his finger was not in the trigger housing or on the trigger when the weapon discharged."²⁹

While there may be conflicting statements or inconclusive evidence as to certain matters involving the handling of the weapon, who chambered a round, and when a round was chambered, it is not contested, and the evidence indicates, Grievant was in sole possession and control of his weapon when it discharged injuring Officer. He drew his weapon from the holster and was in control of where the weapon in his hand was pointed when is discharged.

Agency Investigator and Agency believe Grievant, while tapping the magazine with the palm of his hand to seat the magazine unintentionally allowed his finger inside the trigger guard, his finger to touch the trigger, and his finger to depress the trigger of his firearm which held a chambered round.

There is no evidence indicating Grievant chambered a round or knew a round was chambered in his weapon. However, while the discharge may not have been intended act, it occurred. Grievant did not follow Agency established safety rules and policies. These rules and policy were implemented to address safety matters, including the unintended or accidental discharges of a firearm. Grievant was required to treat his weapon as if it were loaded, never point a weapon in a direction where and unintentional

²⁵ A. Tab 5, pg. 40-41.

²⁶ A. Tab 5, pg. 28.

²⁷ A. Tab 5, pg. 18.

²⁸ A. Tab 2, pg. 3-4

²⁹ A. Tab 2, pg. 3-4.

discharge may do harm, never place his finger into the trigger guard until ready to fire, and to consider a firearm as loaded and ready to fire unless first the magazine has been removed and then the chamber checked and verified as empty/unloaded.

These rules and procedures were implemented for the safety of Grievant, other employees, and the public and implemented to prevent unintended discharges of a firearm and/or prevent an unintended discharge of a firearm from injuring someone.

Grievant had received safety training for the Glock 23 and was aware or should have been aware of the safety rules and procedures for the Glock 23. Grievant knew Officer was in the other Porta John unit and he was charged with never pointing a weapon in a direction where an unintentional discharge may do harm. When Grievant's weapon was discharged it was pointed at and did in fact harm Officer severely. Grievant was further charged with not place his finger into the trigger guard until ready to fire, and to consider a firearm as loaded and ready to fire unless first the magazine has been removed and then the chamber checked and verified as empty/unloaded. Grievant's weapon had a round chambered, unknown to Grievant, and the weapon in Grievant's hand did unintentionally discharge injuring Officer.

While other Correctional Officers had earlier handled Grievant's weapon, once it was in Grievant's control the weapon was his responsibility. He was responsible for how he handled his weapon and for following established safety rules and procedures. Grievant's duties included carrying a firearm and he had received Glock Transition training and training on Agency safety rules and procedures.

Demotion:

Grievant contends that if the Group III Written Notice with demotion to lower pay band with 10% pay reduction were to be upheld he should not be subject to a demotion to Correctional Officer as provided in the Written Notice but be subject to a demotion to Sergeant. Grievant contends that a demotion to Correctional Officer is improper and amounts to a two band demotion.

Grievant was scheduled for a promotion, effective Friday 1/10/14, from his then rank of Sergeant to the rank of Lieutenant. The incident occurred prior to the effective date of the promotion and Agency held off implementing Grievant's promotion to Lieutenant wanting matters investigated first. Subsequently, on Monday January 13, 2014 when Grievant returned to work, he was informed by Agency of their decision to hold the promotion. Grievant indicated no reason was given for holding up the promotion however Agency indicated the promotion was withheld due to the serious nature of the 1/9/14 incident and the fact an investigation was being conducted into matters by the Special Investigation Unit.³⁰ The Agency Incident Report confirms that on 1/9/14 SIU was notified of matters, dispatched, was questioning Grievant at the HQ, and SIU was in charge of the investigation.³¹

Grievant was tendered a letter dated 1/7/14 addressed to him as a "Sergeant" and congratulating him on his promotion to Lieutenant. The letter further noted "Your promotion will be effective January 10, 2014 ...". Below Warden's signature block on the letter were printed options for Grievant to initial, one above the other. The top printed option provided a line for Grievant to initial with the printed statement, "I accept the offer, as stated above". Grievant's handwritten initials appear on this line. Below this is the line, left blank and not initialed, is the printed statement of "I do not accept the offer." Below both these statements is a line bearing Grievant's handwritten signature with the date of "1/11/14" written in. Also,

³⁰ A. Tab 2.

³¹ A. Tab 5, pg. 11-12.

the word “voided” was handwritten diagonally across the page.³² Warden testified he did not know who wrote the word “voided” across the page.

Grievant’s promotion to Lieutenant was to be effective 1/11/14. In light of the 1/9/14 incident management made the determination to hold Grievant’s promotion to Lieutenant and did not implement the promotion. Grievant continued to work as a Sergeant for a number of months following the 1/9/14 incident until his demotion to Correctional Officer as provided in the Written Notice.

The evidence indicates Grievant was not promoted to Lieutenant. Any demotion or disciplinary pay reduction is therefore not related to the rank of Lieutenant or the wages of Lieutenant. He is not subject to a two band demotion and demotion to Correctional Officer from Sergeant is not improper.

Due Process:

Grievant was aware of the allegations, investigation, and facts related to the discharge of his firearm and the disciplinary action of Agency. He had had on a number of occasions over time been given opportunity to provide information and actually provided his input both to investigators and management. Grievant had a due process meeting with Warden on May 19, 2014 and was told of proposed disciplinary action, evidence in support of the charge, and afforded reasonable opportunity to present his input. At this meeting he disputed that he touched the weapon in the Sally Port at Facility as the investigative report noted. Grievant stated overall he understood the disciplinary action although he still did not believe that he accidentally pulled the trigger and thought he was placing the weapon in a safe direction when he tapped the magazine.³³

Mitigation:

Va. Code § 2.2–3005.1 authorizes a hearing officer to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with the rules established by the Department of Human Resources Management ..." .³⁴ The hearing officer must receive and consider evidence in mitigation or aggravation of any offense charged by an agency.³⁵ The *Rules for Conducting Grievance Hearings* provide that a hearing officer is not a “super-personnel officer” and, 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.

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. Grievant has the burden to raise and establish mitigating circumstances that justify altering the disciplinary action consistent with the “exceeds the limits of reasonableness” standard. The Agency has the burden to demonstrate any aggravating circumstances that might negate any mitigating circumstances.³⁶

Agency took into consideration both mitigating and aggravating circumstances. Agency took into consideration mitigating circumstances, including, but not limited to, Grievant’s length service and his record as being an excellent employee who has maintained an exemplary record until the current event. Agency also took into consideration Grievant having unintentionally fired his weapon, Officer having been

³² G. Tab 18.

³³ G. Tab 25 and Testimony.

³⁴ Va. Code § 2.2-3005.

³⁵ Va. Code § 2.2-3005 (C)(6).

³⁶ Rules for Conducting Grievance Hearings, § VI. (B.)(2.).

shot, Officer having sustained very seriously injuries, and Officer having to be placed on Long Term Disability as a result.

Agency mitigated its disciplinary action in this cause. OP 135.1 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal. However, Grievant was not terminated from employment but was issued a Group III Written Notice with demotion to lower pay band and 10% disciplinary pay reduction.

Upon consideration of the evidence, the Hearing Officer finds that Agency's discipline *does not* exceed the limits of reasonableness.

DECISION

For the reasons stated above, based upon consideration of all the evidence presented at hearing, Hearing Officer finds that:

1. Grievant engaged in the behavior described in such Group III Written Notice.
2. The behavior constituted misconduct.
3. The Agency's discipline was consistent with law and policy.
4. The disciplinary action of issuing a Group III Written Notice with demotion to lower pay band (New Roll Title: Correctional Officer) with a 10% disciplinary pay reduction was warranted and appropriate under the circumstances.
5. There are not mitigating circumstances justifying a reduction or removal of the disciplinary action and Agency's discipline of issuing a Group III Written Notice with demotion to lower pay band (New Roll Title: Correctional Officer) with a 10% disciplinary pay reduction does not exceed the limits of reasonableness. *and*
6. Agency's issuance of a Group III Written Notice with demotion to lower pay band (New Roll Title: Correctional Officer) with a 10% disciplinary pay reduction is **UPHELD**.

APPEAL RIGHTS

As the *Grievance Procedure Manual (effective date: July 1, 2012)* 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.

A. Administrative Review:

A hearing officer's decision is subject to administrative review by both EDR and Director of DHRM based on the request of a party. Requests for review may be initiated by electronic means such as facsimile or e-mail. A copy of all requests for administrative review must be provided to the other party, EDR, and the Hearing Officer.

A party may make more than one type of request for review. All requests for administrative review must be made in writing and **received by** the reviewer within 15 calendar days of the date of the original hearing decision. "**Received by**" means delivered to, not merely postmarked or placed in the hands of a delivery service.

1. A challenge that the hearing decision is inconsistent with state or agency policy is made to the Director of DHRM. This request must refer to a particular mandate in state or agency policy with which the hearing decision is inconsistent. The Director's authority is limited to ordering the hearing officer to revise

the decision to conform it to written policy. Requests must be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, VA 23219 or faxed to (804) 371-7401 or e-mailed.

2. Challenges to the hearing decision for noncompliance with the grievance procedure and/or the Rules for Conducting Grievance Hearings, as well as any request to present newly discovered evidence, are made to EDR. This request must state the specific requirement of the grievance procedure with which the hearing decision is not in compliance. The Office of Employment Dispute Resolution's ("EDR's") authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests must be sent to the Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, VA 23219, faxed to EDR (EDR's fax number is 804-786-1606), or e-mailed to EDR (EDR's e-mail address is edr@dhrm.virginia.gov).

B. Final Hearing Decisions:

A hearing officer's 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.

C. Judicial Review of Final Hearing Decision:

Once an original hearing decision becomes final, either party may seek review by the circuit court on the ground that the final hearing decision is contradictory to law. A notice of appeal must be filed with the clerk of the circuit court in the jurisdiction in which the grievance arose within 30 calendar days of the final hearing decision.

S/Lorin A. Costanzo

Lorin A. Costanzo, Hearing Officer

copies e-mailed to:
Grievant's attorney
Grievant c/o Grievant's attorney
Agency's advocate
EDR