Issues: Group II Written Notice (failure to follow policy) and Termination due to accumulation; Hearing Date: 12/04/18; Decision Issued: 12/11/18; Agency: DHP; AHO: Cecil H. Creasey, Jr.; Case No. 11281; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management
Office of Equal Employment and Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 11281

Hearing Date: December 4, 2018
Decision Issued: December 11, 2018

PROCEDURAL HISTORY

Grievant was a case intake investigator with the Virginia Department of Health Professions (the Agency) since 2009, and has been employed with the Agency since 2000. On September 13, 2018, the Agency issued to the Grievant a Group II Written Notice with termination based on the accumulation of active written notices (two prior Group II offenses).

Grievant timely grieved the Agency's disciplinary actions, and the grievance qualified for a hearing. On October 16, 2018, the Office of Equal Employment and Dispute Resolution, Department of Human Resource Management (EEDR), appointed the Hearing Officer to hear the grievance. During the pre-hearing conference, the grievance hearing was scheduled for December 4, 2018, the first date available for the parties, on which date the grievance hearing was held, at the Agency's designated location.

Both the Grievant and the Agency submitted documents for exhibits that were accepted into the grievance record, and they will be referred to as Agency's or Grievant's exhibits as numbered, respectively. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant
Counsel for Grievant
Agency Representative
Counsel for Agency
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

Within her grievance filings, the Grievant asserts:

1. Discrimination on the basis of disability; and
2. Unfair application or misapplication of state and agency personnel policies, procedures, rules, and regulations.

She seeks the following relief:

1. Rescission of the September 13, 2018, Group II Written Notice;
2. Reinstatement;
3. Restoration of all leave balances and VRS accruals;
4. Payment of attorney's fees; and
5. Assurances of no future retaliation.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency. Grievance Procedure Manual* (GPM) § 5.8. However, § 5.8 states *"[t]he employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline*." A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .
> To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

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

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

The State Standards of Conduct, DHRM Policy 1.60, provides that Group II offenses include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action. This level is appropriate for offenses that have a significant impact on business operations and/or constitute neglect of duty, and, specifically, failure to follow supervisor's instructions or comply with written policy. Agency Exh. 3. The policy allows offenses typically associated with one offense category to be elevated to a higher level offense. The Standards of Conduct provides:

> Employees who contribute to the success of an agency's mission:
>
> - Perform assigned duties and responsibilities with the highest degree of public trust.
>
> . . .
>
> - Meet or exceed established job performance expectations.

Agency Exh. 3, p. 2.

The Offense

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

The Agency employed the Grievant since 2000, most recently as a case intake investigator since 2009. Other than the currently grieved Group II Written Notice, there are two other active Group II Written Notices (Agency Exh. 25).

The Group II Written Notice issued September 13, 2018, detailed the offense:

> **Failure to follow instructions and/or policy** – On May 4, 2018 and May 25, 2018, you interviewed sources, logged the calls and indicated you completed verbal interviews. Upon a review of the complaint database there were no records of either complaint and no record of you sending either complaint to the ENFComplaints email box. On May 18, 2018, upon the receipt of a phone call regarding a complaint you interviewed the source, logged the call and indicated you had completed a verbal interview with the source. On August 30, 2018, the source called the agency requesting an update on his complaint. Upon review, there was no record of the complaint in our system and no record of you sending the complaint/interview to the ENFComplaints email box. Your failure to submit these three complaints within 24 hours of receipt is in direct violation of the instructions/guidelines outlined to you by the Case Intake Manager in an email dated 10/25/2016.

Agency Exh. 2.

The manager (Grievant's direct supervisor) testified consistently with the allegations in the Written Notice. He testified to the procedures and expectations within his section and that the three instances detailed in the Written Notice could support multiple Group II Written Notices. The requirement for intake interviews to be submitted within 24 hours was well established, and even referenced in one of the Grievant's prior Group II Written Notices. Agency Exhs. 7 and 25. The current offenses came to light when a complainant followed up on a complaint that was not documented by the Grievant. Then, following this error, the manager performed an audit of the Grievant's activity and discovered the other two instances of not documenting complaints for the Agency's investigative system. Also, one of the prior, active Group II Written Notices was conduct similar to the current offense. The Grievant's employment was not terminated with the prior two Group II Written Notices because the Agency exercised mitigation, providing the Grievant with a chance to correct and improve. He testified that the current Written Notice could not be mitigated to less than termination because of the Agency's obligation to the public, and that the Agency actually mitigated by issuing just one written notice instead of three. The manager testified that the Grievant's known issue with migraine headaches did not affect or cause the problem cited in the Written Notice. He considered the busy state of the Agency and other mitigating factors.

The human resources client manager testified that the disciplinary process was appropriately progressive and considered mitigation. She noted that the offenses combined in this single written notice could have supported three separate written notices. As to the Grievant's situation with migraine headaches, she testified that the Agency's accommodation for the Grievant's medical condition was allowing leave, as needed. The HR client manager stressed that employees, when at work, are expected to work satisfactorily. On cross-examination, the HR client manager acknowledged the Grievant had consistent performance evaluations through the years of strong contributor and contributor.

The Agency's director of enforcement testified that the Agency, when evaluating the discipline and mitigation, considered the Grievant's long tenure, prior evaluations, and her response to the due process notification. The director testified to the Agency's statutory mandate to investigate all complaints, and the three instances of the Grievant not documenting her complaint interviews constituted a breach too serious, especially considering the two active Group II Written Notices, to mitigate to less than job termination. She testified that even one instance would have justified the Agency's discipline.

The Grievant testified that her job was busy and that her migraine headaches made it difficult to concentrate. The medical documentation shows that the Grievant's migraine headaches require intermittent leave from work. Grievant Exhs. 26 and 27. She testified that she would come to work with headaches because she would rather come to work than not. She testified that she had to modify the lighting at her work cubicle and requested a telephone headset so she could try to type her interview notes more contemporaneously. The Agency provided a headset, but the battery was dead and the Agency never provided a working headset. She testified that she believed the headset would have made her more efficient.

The Grievant, on cross-examination, admitted the truth of the essential facts of the Written Notice. For one of the omissions, she asserted the public caller did not sufficiently express a complaint. However, for the other two instances, she simply forgot to document the complaint interviews in the Agency's system. They would not have been discovered but for the manager's audit. Her position in defense is that her disability was not properly accommodated and mitigates the offense.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to applicable policy, management has the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer

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. DHRM Policy 1.60. As long as it acts within law and policy, the Agency is permitted to apply exacting standards to its employees.

EEDR's *Rules for Conducting Grievance Hearings* (*Rules*) 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." *Rules* § VI(A). 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.

Rules § VI(B).

In sum, the grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. The Agency has the burden to prove that the Grievant is guilty of the conduct charged in the written notice. Such decision for discipline falls within the discretion of the Agency so long as the discipline does not exceed the bounds of reasonableness. Based on the manner, tone, and demeanor of the testifying supervisor and other Agency witnesses, I find that the Agency has reasonably described behavior concerns that the Agency and the supervisor are positioned and obligated to address. Accordingly, I find that the Agency has met its burden of showing the Grievant's conduct as charged in the Written Notice. The evidence preponderates in showing that the Grievant was aware of her responsibilities to document her complaint interviews timely so that the Agency can fulfill its statutory mandate. Further, I find that the offense is appropriately considered a Group II offense under the Standards of Conduct that provide the Agency with discretion to impose progressive discipline.

I find the circumstances support the Agency's election to issue a Group II Written Notice. The Agency, conceivably, and within its discretion, could have imposed lesser discipline or even hastened termination after the second prior active Group II Written Notice. It only imposed termination after this, the third, Group II Written Notice, well within its discretion. Thus, the Agency has borne its burden of proving the offending behavior, the behavior was misconduct, and Group II is an appropriate level for the offense.

Disability and Mitigation

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Office of Employment Dispute Resolution." Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline

exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Mitigating circumstances were specified in the Written Notices, and the Agency expressed restraint by not electing termination after the second prior Group II Written Notice. The Grievant asserts she has a disability and the Agency has failed to make proper accommodation. The medical evidence indicates the Grievant need intermittent leave, and the Agency apparently accommodated the leave. The headset, however, is not shown to be an accommodation for the Grievant's migraines. Thus, the Grievant's disability is not shown to be a factor in her discipline.

While the hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances, the hearing officer is permitted to mitigate a disciplinary action if, and only if, it exceeds the limits of reasonableness. There is no authority that requires an Agency to exhaust all possible lesser sanctions or, alternatively, show that the discipline imposed was its only option. Even if the hearing officer would have levied a lesser discipline, the Agency has the management prerogative to act within a continuum of discipline as long as the Agency acts within the bounds of reasonableness.

On the issue of mitigation, EEDR has ruled:

> Importantly, because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management. Rather, mitigation by a hearing officer under the Rules requires that he or she, based on the record evidence, make findings of fact that clearly support the conclusion that the agency's discipline, though issued for founded misconduct described in the Written Notice, and though consistent with law and policy, nevertheless meets the Rules "exceeds the limits of reasonableness" standard. This is a high standard to meet, and has been described in analogous Merit System Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.

EEDR Ruling No. 2010-2483 (March 2, 2010) (citations omitted). EEDR has further explained:

> When an agency's decision on mitigation is fairly debatable, it is, by definition, within the bounds of reason, and thus not subject to reversal by the hearing officer. A hearing officer "will not freely substitute [his or her] judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"

EEDR Ruling No. 2010-2465 (March 4, 2010) (citations omitted).

The Agency presents a position in advance of its obligation and need to manage the important affairs of the Agency. The hearing officer accepts, recognizes, and upholds the Agency's important responsibility for its mission to the Agency's community. The Grievant's position placed her in a responsible role, and the Grievant's conduct as documented by the Agency, was contrary to the Agency's expectations and instructions. I find that the Agency has demonstrated a legitimate business reason and acted within the bounds of reason in its discipline of the Grievant.

The Americans with Disabilities Act ("ADA") prohibits employers from discriminating against a qualified individual with a disability on the basis of the individual's disability. 42 U.S.C. § 12112. Under the ADA, the term "disability" means, "with respect to an individual—(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2). To be "substantially limited" in a major life activity, the grievant must be significantly restricted in performing the activity. *Toyota Motor Mfg., Ky., Inc., v. Williams,* 534 U.S. 184, 196-97 (2002). Major life activities include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2 (i). Refusing to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability" is a prohibited form of discrimination under the ADA. 42 U.S.C. § 12112(b)(5)(A). However, the employer will not be required to offer the accommodation if it would "impose an undue hardship on the operation of the business" of the employer. *Id.* Assuming the Grievant's migraine headaches render her a qualified individual, there is insufficient evidence that the inadequate performance at issue was the result of the Grievant's migraine headaches.

Job termination is a harsh result, but the Agency has demonstrated mitigation and restraint since it could have imposed termination after just the second prior Group II Written Notice. While the Agency could have justified or exercised lesser discipline, a hearing officer may not substitute his judgment for that of Agency management. I find no mitigating circumstances that render the Agency's issuance of the Group II Written Notice, with termination from accumulation of active written notices, outside the bounds of reasonableness. The conduct as stated in the written notice occurred.

Accordingly, I find no mitigating or other circumstances that allow the hearing officer to reduce the Agency's action.

DECISION

For the reasons stated herein, I uphold the Agency's discipline of the Group II Written Notice and job termination based on the accumulation of three active Group II Written Notices.

APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.[1]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

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

Cecil H. Creasey, Jr.
Hearing Officer

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