Issue: Group II Written Notice (leaving work without permission); Hearing Date: 09/11/17; Decision Issued: 09/22/17; Agency: DHP; AHO: Cecil H. Creasey, Esq.; Case No. 11046; 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. 11046

Hearing Date: September 11, 2017
Decision Issued: September 22, 2017

PROCEDURAL HISTORY

Grievant is a manager with the Virginia Department of Health Professions (the Agency), with many years of service. On March 24, 2017, the Agency issued to the Grievant a Group II Written Notice, for leaving work without permission. The Grievant has no prior disciplinary record.

Grievant timely filed a grievance to challenge the Agency's disciplinary action, and the grievance qualified for a hearing. On June 26, 2017, the Office of Equal Employment and Dispute Resolution, Department of Human Resource Management (EEDR), appointed the Hearing Officer. During the pre-hearing conference, the grievance hearing was scheduled first for August 17, 2017, but, on the Grievant's motion, rescheduled for September 11, 2017, 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
Agency Representative
Counsel for Agency
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized 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?

Through her grievance filings and presentation, the Grievant requested rescission or reduction of the Written Notice.

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, leaving work without permission. Agency Exh. 3.

DHRM Policy 1.25, Hours of Work, provides management with the right to establish and adjust the work schedules of employees in the agency, being mindful of the hours of public need or to meet operational need. Agency Exh. 17.

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 as a manager, with a long tenure at the Agency, and without an active disciplinary record. The current Group II Written Notice detailed the offense:

> Leaving Work Without Permission. On March 9, 2017 a few minutes after 5:00 pm you left the public Formal Hearing being held by the Board of [___] which was still in progress without permission.

Agency Exh. 2.

The supervisor testified consistently with the allegations in the Written Notice. The Grievant was assigned the "lead" staff role for the Agency's Formal Hearing scheduled on March 9, 2017, a proceeding that may continue past normal business hours, as required, sometimes until midnight or after. In this case, the Formal Hearing continued past 5:00 p.m., when the Grievant left without notifying her supervisor (who was present at the Formal Hearing) or requesting permission. The Grievant's walking out of the hearing caused the Agency some disorder of the proceedings and embarrassment. The supervisor testified that she discussed this assignment with the Grievant, including the potential uncertain time commitment, and the assignment was confirmed through various email messages. Agency Exh. 7. The Grievant had

participated in a prior Formal Hearing and was given permission to leave the prior hearing early. The Agency witnesses corroborated the supervisor's testimony.

The Grievant was assisting with the managerial role of another division that handled Formal Hearings, and she was helping during the transition period of a new hire for the managerial role for Formal Hearings. Formal Hearings are infrequent, and the Grievant was not deeply experienced in handling the procedures for Formal Hearings. The Grievant has a school age daughter who was at home alone after school on March 9, 2017. The Grievant admitted the truth of the Written Notice allegation. She testified, however, that she was not aware that she would have to stay past her normal quitting time of 4:30 p.m., and that she was not adequately informed of the expectation for her to stay until the end of the Formal Hearing. She also testified that she was unable to approach her supervisor during the hearing to discuss her desire or need to leave.

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

Pursuant to applicable policy, management has the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is 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, I find that she has reasonably described a behavior concern that she, as the supervisor, is positioned 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 lead role for the Formal Hearing, and that she was on notice that such responsibilities required her presence throughout the Formal Hearing. The Grievant's prior conduct during a Formal Hearing—requesting to leave the hearing early—belies her contention that she was not on notice of Formal Hearing requirements. Even if the Grievant had been unaware that her attendance at the Formal Hearing could extend beyond her normal work day, she became aware during the hearing and did not inform her supervisor or request permission to exit. The claimant's contention that her supervisor was somehow unavailable during the Formal Hearing on March 9, despite the supervisor's presence throughout the Formal Hearing, is not credible. Further, I find that the offense is appropriately considered a Group II offense under the Standards of Conduct. Leaving work without permission is a policy designated Group II offense.

Thus, the Agency has borne its burden of proving the offending behavior, the behavior was misconduct, and Group II is an appropriate level offense.

Mitigation

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Office of Employment Dispute Resolution." Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

In the Written Notice, for circumstances considered, the Agency stated:

> In taking this disciplinary action, consideration has been given to your length of state service, your previous performance evaluations, your current performance and work contributions, and your response to the advance notice of discipline. Please understand that any future incidents of the same or similar nature could result in further disciplinary actions consistent with DHRM Policy 1.60 "Standards of Conduct" including termination.

Agency Exh. 2.

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 health professions community. The Grievant's position placed her in a responsible role, and the Grievant's conduct as documented by the Agency, and admitted by the Grievant, 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.

A Group II Written Notice is arguably a harsh result, but the Agency has demonstrated mitigation and restraint since it could have imposed up to ten days suspension. Regardless,

however, there is no requirement for an Agency to exhaust all possible lesser sanctions or, alternatively, to show that the chosen discipline was its only option. 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 action of a Group II Written Notice, without suspension, outside the bounds of reasonableness. The conduct as stated in the written notice occurred. The normal result of the offense is a Group II Written Notice. Here, the Agency credibly asserts that it has exercised reasonable discretion and has already mitigated the discipline. While lesser discipline was within the discretion of Agency management, the Agency acted within its discretion by issuing a Group II Written Notice.

Accordingly, I find no mitigating 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 a Group II Written Notice.

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.