Issues: Group I Written Notice (violating safety rule) and Termination (due to accumulation); Hearing Date: 03/24/08; Decision Issued: 04/03/08; Agency: UVA; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 8817; Outcome: No Relief – Agency Upheld in Full.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case Nos. 8817

Hearing Date: March 24, 2008
Decision Issued: April 3, 2008

PROCEDURAL HISTORY

On January 8, 2008, Grievant, a housekeeper employed by the University of Virginia, was issued a Group I Written Notice of disciplinary action with removal based on the accumulation of disciplinary action. The January 8, 2008, written notice was for failing to wear proper personal protective equipment (eye protection) when working with a chemical cleaner. On January 24, 2008, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On March 12, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 24, 2008, a hearing was held at the Agency's office.[1]

[1] When the hearing convened, the grievant requested a continuance of the hearing, and the agency objected to the motion. Upon careful consideration of the issue, the hearing officer denied the request for a continuance, being made for the first time when the hearing was convening. The hearing officer is responsible for scheduling the time, date, and place of hearing and granting continuances for "just cause." *See Grievance Procedure Manual*, § 5.2, page 13 and *Rules for Conducting Grievance Hearings*, § III(B), pages 2-3. Circumstances "beyond a party's control such as an accident, illness, or death in the family" generally constitute "just cause" for a continuance. *Rules for Conducting Grievance Hearings*, § III(B), pages 2-3. Here, the grievant agreed to the hearing date, and she asked for a continuance for the first time at the convened hearing, to obtain an attorney. The grievant admitted that she had not tried or even thought about obtaining the services of an attorney before the hearing convened, and she also admitted she had not reviewed the grievance procedure or grievance hearing rules. The hearing officer summarized the grievance process for the Grievant during a pre-hearing telephone conference, and stressed that any requests needed to be made before the convening of the scheduled hearing. The hearing officer specifically advised her to review all of the grievance procedure information and to advise before the convened hearing whether she elected to have any witness orders, etc. Despite well documented experience with the disciplinary procedure, including three active written notices, the claimant expressed at the hearing that she lacked familiarity with the grievance process. On the Friday before the scheduled hearing, the Grievant, through her daughter, sent by e-mail a letter to the hearing officer expressing her side of the grievance story. At the hearing officer's request, the same letter was also sent via e-mail to the agency's counsel. The grievant ultimately had her daughter act as her advocate at the hearing, and the advocate performed well.

APPEARANCES

Grievant
Grievant's Advocate
Agency Party Designee
Agency Representative
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?

BURDEN OF PROOF

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

FINDINGS OF FACT

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

The University of Virginia employed Grievant as a housekeeper with Facilities Management. She worked for the Agency for five years. Grievant has prior active disciplinary actions:[2]

- July 12, 2006; Group I for abuse of state time
- January 10, 2007; Group II for failure to report to work as scheduled
- April 11, 2007; Group II for leaving work without permission

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2 Agency Exhibit Nos. 10, 11, 14.

On January 23, 2008, Grievant received a Group I Written Notice for violation of safety rules—failure to wear protective eyewear while working with cleaning chemicals.

The agency showed that it provided to the grievant the safety glasses and training on when to use them. The grievant did not challenge the training or contend she did not know the rule about wearing eye protection when cleaning bathrooms.

On January 8, 2008, Grievant was cleaning a bathroom, specifically a toilet, using Foamy Q&A. Foamy Q&A is a product for cleaning scum from showers—not intended for disinfecting a toilet. Grievant was using protective gloves. After cleaning the toilet, Grievant's eye itched or became irritated from exposure to the cleaning product. Somehow, the Grievant's eye became irritated by, presumably, exposure to the cleaning product. The Grievant contends that her eye itched and that the irritation occurred when she used her gloved hand to touch her eye.

The Grievant's supervisor obtained a statement signed by the claimant on January 8, 2008, in which the claimant wrote "lost my glasses did ask for more Thank you." The Grievant signed a workers' compensation report on January 8, 2008, that stated, "I was in the bathroom and I was using the chemical Foamy Q and A and I sprayed it and it got into my eye. I wasn't wearing my safety glasses."

The lead housekeeper and the Grievant's direct supervisor both testified that the Grievant told them that she was not wearing her safety glasses while cleaning the bathroom.

The Safety Officer conducted an investigation, including an interview of the Grievant. He stated that the Grievant told him that she was cleaning the bathroom and was wearing rubber gloves but was not wearing safety glasses. He testified that the Grievant told him that, after cleaning the bathroom, she rubbed her right eye with her glove still on and then her eye began to burn. The Grievant ultimately went to the hospital Emergency Room for treatment. The Safety Officer concluded that the Grievant was using the wrong chemical product as well as not using the required safety glasses.

In her grievance form, signed January 28, 2008, the Grievant wrote:

> I was wearing my safety glasses. I just took them off after I finished my bathroom. I just rubbed my eye and it started itching. My supervisor said that I was not wearing my glasses. This is not true.

At the grievance hearing, the Grievant testified that all of the Agency's witnesses were wrong. The Grievant stated that she has reading glasses, and that she was wearing her reading glasses when she was cleaning the bathroom on January 8, 2008, and that her safety glasses were on her cart. (Wearing regular eyeglasses meets the safety rule of required eye protection.) The Grievant forgot her reading glasses and did not have them for the hearing. I find that the Grievant's testimony at the hearing was inconsistent and contradictory to her own prior accounts, both oral and written. I find, therefore, that the Grievant was guilty of the conduct described in the Written Notice and that her conduct constituted misconduct.

CONCLUSIONS OF POLICY

I further find that the Agency's discipline was consistent with applicable law and policy. Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees. Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal."[3] One example of a Group III offense identified in the Standards of Conduct is violation of a safety rule where there is a threat of physical harm.

The Agency contends Grievant should receive a Group I Written Notice for this offense. I find the Agency has met its burden to show the claimant failed to comply with the safety rule requiring eye protection. The testimony of all of the Agency's witnesses consistently showed the grievant was not wearing protective eyewear as required. Their testimony was all based on what the grievant told them orally and in writing. The Grievant's contention at the grievance hearing, that she was wearing protective eyewear at the time, is not credible.

The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice. Disciplinary action is cumulative. An employee with two active Group II Written Notices and an active Group I Written Notice who receives additional disciplinary action may be removed from employment. Accordingly, the Agency's decision to remove Grievant from employment is consistent with law and policy.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution…."[4] Under the *Rules for Conducting Grievance Hearings*, "[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. 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.

[3] Agency's Exhibit No. 2.
[4] *Va. Code § 2.2-3005.*

The Grievant contends that her supervisors dislike her, and that the disciplinary action of termination is unwarranted or excessive. I find, however, that the Agency acted with restraint when issuing a Group I Written Notice when a violation of a safety rule with actual injury could have supported a more severe level. That restraint, when combined with the Grievant's record of active disciplinary Written Notices, renders the Agency's action well within the standard of reasonableness. In light of the standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

While the Grievant contends that the Agency and supervisor hold some grudge against her, based on the evidence presented I cannot find that any such grudge or bias, if it exists, negates the actual conduct and disciplinary record. Because there is credible evidence to support the Group I Written Notice, I find the Grievant has not shown that the disciplinary action and termination from accumulated discipline are grounded in retaliation.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**. Grievant's removal from employment is **upheld** based upon the accumulation of disciplinary action.

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 three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

2. **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 cite 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.

3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director'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 EDR Director, One Capitol Square, 830 East Main Street, Suite 400, Richmond, VA 23219 or faxed to (804)786-0111.

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 the 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 the Director before filing a notice of appeal.

I hereby certify that a copy of this decision was sent to the parties and their advocates by certified mail, return receipt requested.

Cecil H. Creasey, Jr.
Hearing Officer