Issues: Group II Written Notice (failure to follow instructions), Transfer and Pay Reduction; Hearing Date: 12/01/08; Decision Issued: 12/03/08; Agency: DEQ; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 8982; 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 No. 8982

Hearing Date: December 1, 2008
Decision Issued: December 3, 2008

PROCEDURAL HISTORY

On August 15, 2008, Grievant was issued a Group II Written Notice of disciplinary action with disciplinary transfer carrying a 5% disciplinary pay reduction. The offense was failure to follow instructions and/or policy on July 19, 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 he requested a hearing. On October 29, 2008, the Hearing Officer received the appointment from the Department of Employment Dispute Resolution ("EDR"). A pre-hearing conference was held by telephone on November 12, 2008. The hearing was scheduled at the first date available between the parties and the hearing officer, December 1, 2008. The grievance hearing was held on December 1, 2008, at a mutually agreed site.

Both sides submitted exhibit notebooks with numbered exhibits that were, without objection from either side, admitted into the grievance record, and will be referred to as Agency's or Grievant's Exhibits, numbered respectively. All evidence presented has been carefully considered by the hearing officer.

The disciplinary record for the Grievant has one prior active Group II Written Notice, issued October 12, 2007.

APPEARANCES

Grievant
One witness for Grievant
Advocate for Agency
Representative for Agency
Two witnesses for Agency (including Representative and witness for Grievant)

ISSUES

Did Grievant's conduct warrant disciplinary action under the Standards of Conduct and Agency policy? If so, what was the appropriate level of disciplinary action for the conduct at issue?

The Grievant requests reduction, reversal, or rescission of the Group II Written Notice and restoration of pay reduction. The Grievant has not requested transfer back to his prior position.

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. 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.

The applicable DHRM Standards of Conduct, Policy 1.60, defines Group II offenses to include acts of misconduct of a more serious [than Group I] and/or repeat nature that require formal disciplinary action. This level is appropriate for offenses that significantly impact

business operations and/or constitute neglect of duty, insubordination, the abuse of state resources, violations of policies, procedures, or laws. Group II offenses specifically include failure to follow supervisor's instructions or comply with written policy, etc. Agency Exhibit 8.

The Offense

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

The Grievant elected not to testify at the grievance hearing. The Grievant's supervisor, the division manager, testified that at the time of the offense the Grievant was working under a corrective action plan (CAP), directed to the Grievant's inappropriate use of e-mail correspondence that provided:

> Before responding to any inquiries or requests for information where the subject is water discharge permits, policies, guidance, or regulations, you will first consult with your supervisor on the proper action, . . .

Agency Exh. 1; 4; Grievant Exh. 1. The CAP was amended on occasion and further revised on February 4, 2008, to clarify that all forms of communication ("written, electronic and verbal") were covered by the instructions to consult with the supervisor before the subject communications. Agency Exh. 1. This general inappropriate communication issue was also the subject of the prior active Group II Written Notice. The Grievant's supervisor testified that the disruptive effects of the Grievant's pattern of intrusive contacts outside his job responsibilities and the negative feedback from those divisions involved led to the CAP in the first place.

The Grievant's manager received hearsay information establishing that the Grievant, on July 17, 2008, initiated verbal contact with personnel in another division and office of the Agency, the subject of the contact being a department permit reissuance. The contact was made without prior consultation with the Grievant's supervisor, in violation of the terms of the CAP, as amended on February 4, 2008. According to the Grievant's supervisor, the information received from the division contacted by the Grievant was that the Grievant was critical of the permit condition, and the contact was considered inappropriate. This contact was unrelated to the Grievant's job responsibilities.

The Agency employed Grievant as grant program manager for several years prior to the date of the offense, July 5, 2008. The Grievant enjoys record of good work performance, save for the issue of inappropriate communications with other Agency divisions. The Grievant's professional respect from others is documented in the grievance record. Grievant Exh. 4.

The Grievant, through his grievance arguments and his questioning of the witnesses, appeared to challenge his notice of the February 4, 2008, clarification of the CAP to include all communication regarding the permitting process. However, the Grievant did not testify or offer other evidence to challenge sufficiently or credibly the notice to him of the CAP clarification.

The Grievant's supervisor testified that he issued the Group II written notice because he considered the Grievant's conduct to be directly in violation of his supervisory instruction to the Grievant. The supervisor's recommendation was for termination, the normal disciplinary consequence of two active Group II Written Notices. The Agency's director of program development also testified for the Agency, and he stated that because of the Grievant's skill set he thought the Agency could avoid termination and use the Grievant in another division. Thus, instead of the normal termination following two active Group II Written Notices, the director elected to transfer the Grievant to a lateral position in another division of the Agency with a 5% disciplinary pay cut.

Free Speech

The Grievant submits and argues that the Agency has improperly disciplined him in violation of his First Amendment right to free speech. The Grievant argues that the Agency's limits on his free speech violate his First Amendment right to freedom of speech. However, the Courts have held that employers, as a condition of employment, may place certain limitations on employee speech. "If a public employee's speech does not touch upon a matter of public concern, the Commonwealth, as employer, may regulate it without infringing any First Amendment protection." See *Holland v. Rimmer*, 25 F. 3d 1251, 1255 n. 11 (4th Cir. 1994).

An employee is not required to remain employed if he disagrees with the employer's policies and procedures. However, as long as the employee decides to retain his employment, he must abide by the employer's policies if they are not illegal or immoral. In this case, the Agency's requirement that the Grievant abide by behavior directives is legal and, I find, not violative of freedom of speech.

The Grievant has directed the hearing officer to several cases, including *Pickering v. Board of Education*, 391 U.S. 563 (1968), *Givhan v. Western Line Consol. School Dist*., 439 U. S. 410 (1979), and *Rankin v. McPherson*, 483 U.S. 378 (1987). The central goal of *Pickering* was to balance the interests of an employee when speaking as a private citizen with the interests of the employer. "It is clearly established that a State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech." *Rankin v. McPherson*, 483 U.S. 378, 383 (1987). To determine whether a public employer's action against an employee violates the First Amendment, a court must balance the employee's interest "as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Connick v. Myers*, 461 U.S. 138, 142 (1983) (internal quotation marks omitted). The legal standard was further refined, and narrowed. "[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951, 1960 (2006).

Here, I find that the employer did no more than restrict the Grievant's behavior—the manner in which he communicated within his job setting. The content of his speech was not restricted. Even assuming the analysis goes beyond behavior and should consider speech, the

Grievant has not testified concerning the content of his speech, or provided the evidentiary basis to establish that the speech involved was made as a citizen, rather than his official duties, invoking the First Amendment analysis from *Garcetti*. The Agency clearly considered the Grievant's conduct as an errant behavior aspect of the Grievant's job duties, in violation of explicit direction on behavior. The contact the Grievant made to the permitting division of the Agency on July 17, 2008, was, by all accounts presented in the grievance record, purportedly made under color of the Grievant's official duties. While the Grievant elected not to testify at the grievance hearing, there certainly is no positive inference the hearing officer can make in the absence of testimony or evidence to support a First Amendment claim. For this reason, I find the Grievant's First Amendment claim and reliance misplaced.

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. I find that the Agency has met its burden of showing the misconduct.

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 DHRM Policy 1.60, Standards of Conduct, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id*.

I find that the Grievant's conduct, as described in the Written Notice and by the Agency's witnesses amounts to misconduct in the nature of failure to follow supervisor's instructions. This is properly a Group II offense. The accumulation of two active Group II Written Notices justifies the more severe discipline of termination from employment.

Mitigation

The agency has proved (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy. Thus, the discipline must be upheld absent evidence that the discipline exceeded the limits of reasonableness. *Rules for Conducting Grievance Hearings* ("Hearing Rules") § VI.B.1.

Termination is the normal disciplinary action for an accumulation of two active Group II Written Notices unless mitigation weighs in favor of a reduction of discipline. 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 Department of Employment Dispute Resolution." Va. Code § 2.2-3005(C)(6). 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.

Since the agency has already mitigated the discipline to a sanction less than termination, the agency has already exhibited a measured disciplinary response. With the agency already having mitigated the discipline, it would take extenuating circumstances to show mitigation sufficient to reduce the level of discipline further. Under the *Rules for Conducting Grievance Hearings*, an employee's length of service and satisfactory work performance, standing alone, are not sufficient to mitigate disciplinary action.

Under the EDR's Hearing Rules, the hearing officer is not a "super-personnel officer." Therefore, 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, even if he disagrees with the action. In this case, the Agency's action of imposing discipline less than termination is within the limits of reasonableness. While the hearing officer finds that this Grievant has a good record overall of being a sincere contributor to the agency, in light of the applicable standards, the Hearing Officer finds no evidence that warrants any further mitigation to reduce or rescind the disciplinary action.

DECISION

For the reasons stated herein, I uphold the Agency's Group II Written Notice with lateral transfer and 5% pay reduction.

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