Issues: Group I Written Notice (excessive tardiness/absences, Group II Written Notice (failure to follow instructions), and Termination (due to accumulation); Hearing Date: 01/19/10; Decision Issued: 06/22/10; Agency: VDOT; AHO: Sondra K. Alan, Esq.; Case No. 9065, 9210; Outcome: No Relief – Agency Upheld; **Administrative Review: AHO Reconsideration Request received 06/28/10; Reconsideration Decision issued 07/01/10; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 07/14/10; EDR Ruling #2011-2718 issued 07/16/10; Outcome: Untimely – request denied; Administrative Review: DHRM Ruling Request received 07/14/10; DHRM Ruling issued 07/26/10; Outcome: Untimely – request denied.**

DECISION OF HEARING OFFICER

IN RE: CASE NOS. 9065 & 9210

HEARING DATE: JANUARY 19, 2010

DECISION ISSUED: JUNE 22, 2010

PROCEDURAL HISTORY

9065

On October 23, 2008, Grievant filed a grievance against the Agency challenging a Group I Written Notice of October 10, 2008 issued to her on October 16, 2008 for failure "to follow instructions to improve her attendance and build her leave absences". Grievant alleges discrimination or retaliation by her immediate supervisor. Grievant filed her grievance in a timely fashion after she had exhausted a first resolution step (1-25-09), a second resolution step (2-13-09) and a third resolution step (3-10-09). The matter qualified for a hearing on March 19, 2009.

Grievant requests removal of the previous two prior Group I Notices from her employment record, reimbursement of attorney fees, reasonable accommodations to help improve her working conditions, the continuous harassment to stop immediately and to be treated fairly and have the same benefits as other employees such as flex-time, etc.

9210

On April 10, 2009, Grievant filed a grievance against the Agency challenging a Group II Written Notice and termination of employment issued to her on March 13, 2009 for unapproved absence from work on March 9, 2009, accumulation of disciplinary actions regarding excessive tardiness and absenteeism and failure to follow instructions to

correct the issues. Grievant filed her grievance in a timely fashion after she had exhausted a second resolution step (9/02/09).[1] The matter qualified for a hearing on September 18, 2009.

Grievant requests immediate reinstatement of her employment, full benefits and wages since termination, reimbursement of attorney fees, removal of all Written Notices from her employee file, her "EWP" rating to be upgraded to "contributor", recognition of disabled employees and their rights as stated by the Americans with Disabilities Act and education for all supervisors and personnel involved in this matter to ensure fair treatment of employees.

On June 1, 2009, the EDR Director issued Ruling No. 2009-2329, 2009-2330 consolidating the grievances for a single hearing. In a letter dated November 19, 2009 the Hearing Officer received appointment from the Department of Employment Dispute Resolution (EDR) effective November 23, 2009. The matter was scheduled for a hearing during a pre-telephone conference on December 7, 2009, at which time the case was set for hearing on January 19, 2010 at 10:00 am. at the VDOT Office in Bristol, Virginia.

Subsequent to the hearing, the Hearing Officer requested Briefs from both counsel particularly regarding the numerous disability issues that Grievant presented. The Agency believed the Hearing Officer had no authority to request this information. On March 26, 2010, the Director of the Department of Employment Dispute Resolution issued Compliance Ruling Number 2010-2569 stating, "A post-hearing Brief is a significant opportunity for a party to present a cogently explained rationale, with cited support, for

[1] This is the only Resolution Step with which the Hearing Officer was provided.

the hearing officer's consideration, especially when the matters at issue are complex."[2] The Grievant's Brief was submitted on April 23, 2010, and the Agency's Brief was submitted on May 24, 2010.

APPEARANCES

Agency advocate
Two Agency witnesses
Grievant's attorney
Grievant

ISSUES

Should a Group I Written Notice of Disciplinary Action of 10/10/08 issued 10/16/08 be upheld?

Should a Group II Written Notice Disciplinary Action of March 9, 2009 issued March 13, 2009 be upheld?

Are any mitigating circumstances relevant to the action?

BURDEN OF PROOF

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

FINDINGS OF FACT

The Grievant challenges three (3) Group I Written Notices issued in October of 2008. However, the Group I Written Notice of Disciplinary Action of September 12, 2008 issued

[2] (EDR) Compliance Ruling of Director No. 2010-2569

on October 2, 2008, as well as a Group I Written Notice of Disciplinary Action on October 21, 2008 issued on January 22, 2009 were not timely challenged and therefore are not an appropriate part of this hearing.

The Grievant challenges a Group I Written Notice regarding a matter of October 10, 2008 issued on October 16, 2008, which is the subject of Case # 9065.[3] The Grievant also challenges a Group II Disciplinary Action regarding a matter of March 9, 2009 issued on March 13, 2009, which is the subject of Case # 9210.[4]

Throughout her employment, Grievant has presented letters from physicians and other professionals requesting she be identified as having one or more medical conditions.[5] Between November 6, 2008 and January 26, 2009, Grievant made formal requests to be identified as a member of a protected class under the American with Disabilities Act.[6] On February 6, 2009 her employer sent notice to her that she had not qualified for that identification.[7] Grievant did not formally object to that identification and therefore this is not an appropriate part of this hearing.

Grievant alleges harassment due to her negative performance reports and several Group Notices issued.

APPLICABLE LAW

After satisfying the employer or organization's formal procedures, a party must prove the following elements to establish a claim for failure to accommodate under the ADA, 42 U.S.C.S. § 12101 et seq.: (1) that they were an individual who had a disability within the

[3] Agency Exhibit D
[4] Agency Exhibit F
[5] Grievant Exhibits B, D, E, F, M, K
[6] Grievant Exhibit M, Agency Exhibits C and F
[7] Grievant Exhibit G

meaning of the ADA; (2) that the employer had notice of the disability (3) that with reasonable accommodations, they could perform the essential functions of the position; and (4) that the employer refused to make such accommodations. *Papproth v. E. I. DuPont De Nemours & Co.*, 359 F. Supp. 2d 525 (2005).[8]

Unacceptable behavior is divided into three (3) 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 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 (2) Group II offenses normally should warrant removal." Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal." Department of Personnel and Training Policies and Procedures Manual; Standards of Conduct—Policy No. 16.0. *Standards of Conduct* Policy: 1.60 (B) (2) (b) states, "A Group II Notice in addition to three (3) active Group I Notices normally should result in termination…".[9]

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

[8] Agency's Brief, page 10
[9] Agency Exhibit I

officer" and must be careful not to succumb to the temptation to substitute his/her judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management.

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).

Va. Code § 2.2-3005.1 authorizes the Hearing Officer 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…" 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.

OPINION

Regarding the Group I Written Notice of October 10, 2008, Grievant did not allege that the issue of her tardiness and absenteeism was incorrect. Instead, she alleged that due to her medical condition she should not have been punished for her failure to be present for work.

As to the Group II Disciplinary Action regarding a matter of March 9, 2009 issued March 13, 2009, it was alleged Grievant failed to follow instructions to present herself for work on March 9, 2009. Grievant's defense was that she was being held hostage by her ex-husband and needed a personal day. Grievant made no police report of this alleged event. Grievant made two (2) calls to her employer that day, the second being to convey that her ex-husband had left her home. When then instructed by the Agency to come to work, she declined because she felt it was too late in the day. Grievant alleges that due to her circumstance, as well as her medical condition, she should not have been punished for her failure to go into work on March 9, 2009. Grievant does not deny her failure to come to work on March 9, 2009. She does not deny that she had been expected to be at work at least the second half of that day.

This should be a simple case for which to issue an opinion that Grievant did, in fact, fail to come to work as instructed by her supervisor and as expected of her as an employee.

The complicating factor in this case is that Grievant continually alleges that her employer failed to follow the Federal Americans with Disabilities Act. However, it must be noted Grievant never filed a specific grievance for Agency's failure to identify her as a qualified individual under the Act. Grievant made both informal and formal requests for inclusion in

the protected class, for which she was denied.[10] The Agency did not classify Grievant as eligible under the ADA. The case is further clouded by the fact that, despite being rejected for a protected class status, the Agency continued to make some accommodations for Grievant.[11]

The Americans with Disability Act prohibits employers from discriminating against Americans with disabilities. The Act does not, however, state a specific method by which an individual is identified. Even after reviewing both parties' briefs, it appears there is no standard "form" required to initiate the request for identification in the protected class. It appears the procedure is chosen by each individual employer or organization. In order to classify someone as protected under the Act, there may be standards ranging from a single physician's letter describing a disability and suggestions for accommodations to a much higher standard of extensive amounts of documentation and testing. There is no statute or case law that specifies a standard.

However, while there is no law on how to ascertain ADA status, there is case law that addresses what criteria needs gathered (see applicable law, Supra, page 4). Moreover, whether or not Grievant should be a qualified member of the class is not an issue presently before this Hearing Officer. While it is true that Grievant made an application for ADA status, the request was denied in a letter sent to Grievant on February 6, 2009[12] and Grievant did not file a formal grievance regarding that denial. For Grievant to accept a finding that she was not protected under the Federal Act and then to base her defense on

[10] Agency Exhibit F
[11] Grievant Exhibit G
[12] Agency exhibit F

her not being a member of the class renders the argument moot. Grievant was terminated for extensive tardiness and absenteeism, which she failed to remedy after being repeatedly instructed to do so.[13]

Grievant is requesting the Hearing Officer consider her condition as a mitigating circumstance. This, in essence, is asking the Hearing Officer to ignore the Agency's finding and supplant it with the Hearing Officer's Opinion. The Agency identified Grievant as not in the Americans with Disabilities class, and this determination was not challenged by Grievant. Further, the Agency did frequently counsel Grievant, and although they responded slowly, did offer reasonable accommodations.

As the Group I and Group II actions before the Hearing Officer are reasonable disciplines based on Grievant's action, it would be hard to identify them as harassment. That an earlier supervisor was more lenient with Grievant does not require the Hearing Officer to label the stricter, current supervisor as a "harasser".

There are no mitigating circumstances sufficient to reduce Grievant's discipline.

DECISION

For the reasons stated herein, the Agency's issuance on October 16, 2008 to the Grievant of a Group I Written Notice of Disciplinary Action is **upheld.** The Agency's issuance on March 13, 2009 to the Grievant of a Group II Written Notice of Disciplinary Action and termination is **upheld.** Since Grievant has three (3) Group I actions and one (1) Group II action, all of which are active, the termination of Grievant's employment is **upheld.**

[13] Agency's Brief, page 2

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 becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three (3) 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 are the basis for such a request.
2. A challenge that the hearing decision is inconsistent with state policy 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:

   Director, Department of Human Resources Management
   101 N. 14th Street, 12th Floor
   Richmond, VA 23219

3. A challenge that the hearing decision does not comply with grievance procedure is made to the Director of the 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:

   Director, Department of Employment Dispute Resolution
   600 East Main Street, Suite 301 [Corrected]
   Richmond, VA 23219

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 original hearing decision. (Note: the 15-day period, in which the appeal must occur, begins with 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 following the issuance of the decision). 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 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 grievance arose. You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution. The Agency shall request and receive prior approval of the Director before filing a notice of appeal.

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Sondra K. Alan, Hearing Officer

DECISION OF HEARING OFFICER

IN RE: RECONSIDERATION OF CASE NOS. 9065 & 9210

DECISION ISSUED: JULY 1, 2010

PROCEDURAL HISTORY

In a letter dated June 28, 2010, Grievant's attorney submitted a Request for Reconsideration to the Hearing Officer regarding the Hearing Officer's decision of case numbers 9065 & 9210 issued June 22, 2010.

ISSUES

The Grievant presented the following issues in her request for reconsideration:

1. Did the Hearing Officer err in finding that the Agency did not classify Grievant as eligible under the Americans with Disabilities Act?
2. Was it the Hearing Officer's duty to re-determine status under the American with Disabilities Act when Grievant did not grieve the Agency's determination?
3. Did the Agency's Brief unduly influence the Hearing Officer's decision?
4. Was Grievant justly terminated regarding late/tardy issues?

FINDINGS OF FACT

The Grievant submitted Exhibit G[14] at the evidentiary hearing. Exhibit G was a letter from the Agency to Grievant stating that she had not been identified in the American with Disabilities Class.

[14] Grievant's Exhibit G

Grievant had thirty (30) days from February 6, 2009 to file a grievance as to the Agency's determination that she was not an American with a disability. If Grievant did file that grievance, it was not a part of this consolidated hearing. Case 9065 relates to a Group I Written Notice of October 10, 2008 issued to her on October 16, 2008 for failure "to follow instructions to improve her attendance and build her leave absences". Case 9210 relates to a grievance filed on April 10, 2009 by Grievant against the Agency challenging a Group II Written Notice and termination of employment issued to her on March 13, 2009 for unapproved absence from work on March 9, 2009, accumulation of disciplinary actions regarding excessive tardiness and absenteeism and failure to follow instructions to correct the issues. There were no further issues before the Hearing Officer. The matter of how Grievant's disabilities affected her late/tardy issues was moot as the Agency found she was not entitled to consideration.

At the evidentiary hearing, there was testimony regarding Grievant's late/tardy issues and leaves taken by Grievant. Agency consolidated this information into chart form in Agency's Brief.

At the evidentiary hearing, there was testimony as to accommodations that the employer had chosen to give Grievant as well as many instances of Grievant being late or tardy from work.

OPINION

By letter of February 6, 2009, Grievant was not identified in the Americans with Disabilities class. The written document was given the greatest weight as evidence regarding the Agency's position as to Grievant's disability status.

With no identification as being in a disabilities class, Grievant had no entitlement to accommodations.

The Hearing Officer acknowledges the method by which an individual is identified and then accommodated as an American with a disability is unclear. However, while that issue could have been grieved, it was not. Therefore, it is not the duty of the Hearing Officer to decide at which point there was sufficient and/or overwhelming evidence to identify Grievant as an American with a disability.

The Hearing Officer recognizes the Attorney General's office did use information in his Brief not otherwise in evidence, and therefore, made no findings relevant to that additional information. Grievant had ten (10) days to file a reply Brief, and did not file one.

Mr. Barrow did testify Grievant had been granted some leeway. There was testimony Grievant was given an altered work schedule. Notwithstanding these accommodations, the Agency did not identify Grievant as a class member of Americans with Disabilities.

Since Grievant appeared to acquiesce to the decision of the letter of Exhibit G, then arguing her tardiness was due to her condition is moot. Grievant had sufficient tardy/absent incidents to justify her removal.

DECISION

For the reasons stated herein, the Hearing Officer's decision of June 22, 2010 is **upheld.**

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 becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three (3) types of administrative review, depending upon the nature of the alleged defect of the decision:

4. 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 are the basis for such a request.
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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 grievance arose. You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution. The Agency shall request and receive prior approval of the Director before filing a notice of appeal.

_____

Sondra K. Alan, Hearing Officer

July 26, 2010

RE: **Grievance of Grievant v. Department of Transportation**
Cases Nos. 9056/9210

Dear Grievant:

The agency head of the Department of Human Resource Management, Ms. Sara Redding Wilson, has asked that I respond to your request for an administrative review of the hearing officer's decision in the above referenced case. Please note that, pursuant to the Grievance Procedure Manual, §7.2(a), either party to the grievance may request an administrative review within 15 calendar days from the date the decision was issued if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management (DHRM) to review the decision. You must refer to the specific policy and explain why you believe the decision is inconsistent with that policy.

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

In each instance where a request is made to this Agency for an administrative review, the request must be received in this agency within 15 calendar days from the date of the hearing decision. Please note that the hearing officer issued the decision on June 22, 2010, and the request for an administrative review was received by the Department of Human Resource Management on July 14, 2010, well beyond the 15 calendar days as stipulated by the *Grievance Procedure Manual.* Therefore, we have no authority to conduct the requested review.

Sincerely,

Ernest G. Spratley