Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 08/07/09; Decision Issued: 08/13/09; Agency: VDH; AHO: Carl Wilson Schmidt, Esq.; Case No. 9145; Outcome: No Relief – Agency Upheld in Full.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9145

Hearing Date: August 7, 2009
Decision Issued: August 13, 2009

PROCEDURAL HISTORY

On March 24, 2009, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory work performance.

On April 13, 2009, 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 July 7, 2009, the EDR Director issued ruling numbers 2009-2353 and 2009-2354 consolidating this grievance with another grievance for a single hearing. On July 14, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 7, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
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?

5. Whether the Agency retaliated against Grievant.

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 Virginia Department of Health employs Grievant as an Administrative Office Specialist at one of its Facilities. She has been employed by the Agency for approximately 30 years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

In order to see medical staff, a client must enter the clinic waiting area and complete necessary forms. Those forms are then placed on a table near Grievant. Grievant obtains the forms and then calls the client over to her area. She speaks with the client and then enters information in to the Agency's computer database. Her interaction with the client and entries into the computer database usually take approximately two minutes. Grievant prints off the appropriate labels, puts them on the client's chart and takes the chart to the medical department towards the back of the office. When the medical staff see the chart, they know the client has been registered and is ready to be seen by the appropriate medical staff. Clinical staff then call the patient from the waiting area and the patient receives services.

On March 4, 2009, clients arrived in the waiting area and completed forms obtained from the sign in desk receptionist. The forms were placed in a bin next to Grievant so that she could begin registering the clients at 1 p.m. when the clinic opened.

Grievant did not register clients immediately even though the first patient was ready to be registered at 1 p.m. Grievant met with her first client a minute or two before 1:24 p.m. She updated the Agency's computer database at 1:24 p.m. Grievant completed a second registration at 1:34 p.m. She completed a third registration at 2:13 p.m. By 2:36 p.m., Grievant had registered only four clients. The latter two patients had waited one hour and one hour and fifteen minutes respectively to be registered.

At 2:15 p.m., the Business Office Supervisor received a complaint that no Sexually Transmitted Infection clients had arrived in the clinical area from registration. In addition, a client complained to the Agency's staff about having to wait too long.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."[1] Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

"Inadequate or unsatisfactory work performance" is a Group I offense. In order to prove inadequate or unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant was expected to begin registering clients at 1 p.m. when the clinic opened. Because of her approximately twenty minute delay in registering the first clients, clients had to wait additional time to be seen by medical staff. Grievant only registered four clients by 2:36 p.m. but should have registered many more than four clients in 96 minutes. One client called Agency staff to complain about the delay. Medical staff waited for approximately twenty minutes without providing medical treatment. Some of the physicians were being paid by the hour and were being paid while waiting for clients to be registered. One medical staff employee complained about the delay. Medical staff had to work approximately twenty minutes longer during the day. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for inadequate or unsatisfactory job performance.

Grievant argued that her registration duties were interrupted by check out duties. The evidence showed that Grievant checked out only two clients during the time period from 1 p.m. until 2:30 p.m. The amount of time needed to check out clients was only a few minutes for each client. Checking out two clients would not account for the approximately twenty minute delay in registering clients.

[1] The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

Grievant contends she was working as expected at 1 p.m. Grievant did not testify. No facts were presented to explain what Grievant was doing from 1 p.m. until 1:24 p.m. There is no basis for the Hearing Officer to conclude that Grievant was complying with her job expectations beginning at 1 p.m.

Grievant argued that the Agency was short staffed on March 4, 2009. Instead of three people devoted to registering clients, only Grievant and another employee were working. The evidence showed that the clinic typically worked well with only two persons registering clients. In addition, whether the clinic was short-staffed would not cause Grievant to delay registering clients.

Grievant contends the disciplinary action should be mitigated. *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…."[2] 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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;[3] (2) suffered a materially adverse action[4]; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's

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[2] *Va. Code § 2.2-3005.*

[3] *See* Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

[4] On July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, the EDR Director adopted the "materially adverse" standard for qualification decisions based on retaliation. A materially adverse action is, an action which well might have dissuaded a reasonable worker from engaging in a protected activity.

stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.[5]

Grievant contends she was subject to workplace harassment and retaliation. Grievant contends she was asked in October 2008 about her plans for her retirement and that on March 27, 2009 the Supervisor interrupted a phone call Grievant was having with someone seeking assistance. Grievant engaged in protected activity by filing a grievance on April 13, 2009. The Supervisor's actions were not based on Grievant engaging in a protected activity. The Supervisor inquired about Grievant's retirement plans because the Agency was facing budget cuts and needed information for financial planning. The Supervisor interrupted Grievant's conversation because the Supervisor believed Grievant was not providing the caller with complete information. None of the Agency's actions were for an improper purpose. The Agency did not retaliate or engage in workplace harassment with respect to Grievant.

On March 23, 2009, Grievant was given a Notice of Improvement Needed/Substandard Performance as a result of the facts giving rise to the disciplinary action. No evidence was presented to show that the Agency's action was contrary to State policy or otherwise improper.

DECISION

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

APPEAL RIGHTS

You may file an administrative review request 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 to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

[5] This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

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. Please address your request to:

Director
Department of Employment Dispute Resolution
600 East Main St. STE 301
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of all of your appeals to the other party and to the EDR Director. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

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.[6]

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

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

[6] Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.