Issue: Group II Written Notice with Suspension (insubordination); Hearing Date: 12/28/09; Decision Issued: 12/30/09; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9237; Outcome: Partial Relief.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9237

Hearing Date: December 28, 2009
Decision Issued: December 30, 2009

PROCEDURAL HISTORY

On September 14, 2009, Grievant was issued a Group II Written Notice of disciplinary action with ten workday suspension[1] for insubordination.

On September 18, 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 December 7, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 28, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Representative
Witnesses

ISSUES

[1] Section III of the Written Notice does not list the days of suspension. Section IV of the Written Notice indicates Grievant was suspended for ten workdays. The Agency added that the suspension was in lieu of termination but did not present any prior active disciplinary action. It is unclear why the Agency failed to complete Section III of the Written Notice and why the Agency would allege a Group II Written Notice was sufficient for removal without presenting evidence of prior active disciplinary action.

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 Department of Behavioral Health and Developmental Services employs Grievant as a CNA/DSP at one of its Facilities. Grievant reported to the Supervisor who reported to the RN Coordinator. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On September 7, 2009, Grievant was leaving the Facility at the end of her shift. She told the Supervisor that she would be two hours late on the following day because she was going to put her child on the school bus for the first day of school. The Supervisor responded, "[Grievant's name], is that the correct way to ask me that?" The Supervisor asked Grievant if her absence had been approved by the RN Coordinator. Grievant responded "[Supervisor's name], I'm not asking you a question, I'm letting you know that I'm going to be two hours late. This is not a question. It is a statement." The Supervisor responded, "ah girl go head on". Grievant then left the building. Grievant was not trying to be disrespectful or rude to the Supervisor. Her intent was not to upset and she had no reason to be angry with the Supervisor. Grievant was under the impression that the procedure to be late for work on the following day was tell her supervisor that she would be late. The Supervisor's understanding of the procedure was that an employee was supposed to obtain permission to be late for work in

advance. If the employee did not obtain permission to be late prior to being late, the tardiness would be unplanned and, thus, count against the employee under the Agency's leave policy. An employee who incurs sufficient unplanned leave, may receive disciplinary action. The Supervisor believed Grievant was being disrespectful and decided to counsel Grievant.

On September 9, 2009, the RN Coordinator told Grievant to go to the Supervisor's office. Grievant met with the Supervisor and the RN Coordinator. The Supervisor began talking about the incident on September 7, 2009 and handed Grievant a document to serve as a counseling. Grievant read the document and objected to its contents. Grievant disagreed with what the Supervisor had written. Grievant told the Supervisor that Grievant's name was misspelled. Using a loud and angry tone, Grievant told the Supervisor, "I don't have to respect you; and I'm not going to respect you!" The Supervisor attempted to re-type the document to correct the errors. Grievant demanded a copy of the original document. The Supervisor informed Grievant that when she finished editing the document, Grievant would receive a copy. Grievant continued to demand a copy immediately of the original document. The RN Coordinator and Supervisor asked Grievant to calm down and lower her voice several times but Grievant continued to argue her points. Grievant told the Supervisor that her tardiness on September 8, 2009 was covered by FMLA leave. The Supervisor called an employee working in the Human Resources office to discuss Grievant's claim. While the Supervisor was on the telephone with the HR employee, Grievant continued to interrupt the Supervisor and inhibit her conversation with the HR employee. Grievant left the office and located a coworker, Ms. W. Grievant brought Ms. W into the room. Ms. W insisted that Grievant be given a copy of the original document. After the Supervisor finished talking on the telephone, she told Grievant that Grievant's absence was not covered under the FMLA. The Supervisor tore up the original counseling document without providing Grievant a copy of the document.

On September 10, 2009, the Supervisor presented Grievant with a sealed envelope containing the revised counseling letter. The revised counseling memorandum was addressed to "Building 24"[2], from the Supervisor, regarding the subject "Verbal Counseling" and was dated September 7, 2009. The memo stated:

> On September 7, 2009, [Grievant] was preparing to leave the building after working her assigned shift. [Grievant] stated to [the Supervior] "I'll be two hours late tomorrow because it is the first day of school and I'm gonna put my daughter on the bus." Writer inquired of employee whether she was seeking approval to be late and was she aware of her tone. [Grievant's] arrogant reply was "I'm gonna take it whether you give it to me or not."

[2] It is unclear why the Supervisor addressed a counseling memorandum to a building instead of to Grievant. Nevertheless, it appears that Grievant understood the memorandum applied to her.

> [Grievant] was insubordinate as it relates to the manner in which she communicated what her intentions were. Moreover, [Grievant] did not seek prior approval from a RNM1 or RNC to be two hours late for her scheduled shift on September 8, 2009. Subsequently, the late arrival to work is not part of her FMLA approval and is therefore considered unplanned time.
>
> Insubordination will not be tolerated within the workplace. If an immediate and sustained change does not take place further disciplinary actions will be taken.
>
> Thank you for your cooperation in this matter.

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."[3] 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."

Disruptive behavior is a Group I offense.[4] On September 9, 2009, Grievant was disruptive. When she met with the RN Coordinator and the Supervisor, Grievant was angry, loud, confrontational, and not respectful towards the RN Coordinator and the Supervisor. Grievant interfered with the Supervisor's telephone call and disregarded repeated requests to calm down. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for disruptive behavior.

Grievant denies that her behavior was inappropriate. She contends she was merely asserting her position that the Supervisor was mistaken and should correct errors in the original document. Based on the evidence presented, it is clear that Grievant's behavior was inappropriate.

Insubordination is a Group II offense. It is similar to the Group II offense of failure to follow a supervisor's instructions because an insubordinate employee displays a disregard for the supervisor's authority. The Agency contends Grievant's behavior was so inappropriate so as to be considered insubordination. Although Grievant was disrespectful to the Supervisor, the degree of disrespect shown was not so excessive as to rise to the level of a Group II offense. Grievant was counseled for the events of

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

[4] See Attachment A, DHRM Policy 1.60.

September 7, 2009, but she was disciplined for the events of September 9, 2009. The Hearing Officer must focus on the events of September 9, 2009 to determine whether Grievant was insubordinate. Grievant was angry, loud, and said that she did not have to respect the Supervisor. Grievant's statement that she did not intend to respect the Supervisor is not the same as if she had said she did not intend to follow the Supervisor's instructions or that Grievant did not recognize the Supervisor's authority to supervise. It is certainly possible that Grievant could lack respect for the Supervisor but comply with the Supervisor's instructions and recognize the Supervisor's authority to manage employees. In light of this distinction, Grievant's behavior does not rise to a Group II offense. There is no basis to impost a suspension on Grievant.

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…."[5] 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 further the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **reduced** to a Group I offense. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of suspension and credit for leave and seniority that the employee did not otherwise accrue.

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.

[5] *Va. Code § 2.2-3005.*

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:

   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.