Issues: Group II Written Notice (insubordination) and Group III Written Notice (insubordination); Hearing Date: 03/04/10; Decision Issued: 03/10/10; Agency: DOC; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 9240; Outcome: Partial Relief; **Administrative Review: EDR Ruling Request received 03/25/10; EDR Ruling #2010-2582 issued 05/27/10; Outcome: AHO's decision affirmed.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 9240

Hearing Date: March 4, 2010
Decision Issued: March 10, 2010

PROCEDURAL HISTORY

On June 17, 2009, Grievant, a counselor for the Department of Corrections ("Agency") was issued two Group Notices, a Group II and a Group III, both for insubordination. The grievant was suspended for five days and given a disciplinary transfer with 9% pay reduction. The Group II Written Notice was issued for an incident of insubordination occurring on June 8, 2009. The second Written Notice, a Group III, was issued for an act of insubordination occurring on June 9, 2009.

Grievant timely filed a grievance to challenge the Agency's action. The outcome of the resolution steps was not satisfactory to the Grievant and she requested a hearing. On December 9, 2009, the Hearing Officer was appointed by the Department of Employment Dispute Resolution ("EDR"). At a pre-hearing conference held by telephone on December 21, 2009, the hearing was scheduled initially for January 12, 2010. However, on the Grievant's motion, for medical reasons, good cause was shown to continue the hearing until ultimately held on March 4, 2010, at an agreed Agency facility. Accordingly, the timeline for decision has been extended.

The Agency submitted documents for exhibits that were, without objection from the Grievant, admitted into the grievance record, and will be referred to as Agency's Exhibits. The Grievant also submitted additional documentation that was accepted into the grievance record, without objection. All evidence presented has been carefully considered by the hearing officer.

APPEARANCES

Grievant
Advocate for Grievant
Representative/Advocate for Agency
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?
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?

The Grievant requests rescission of the two Group Notices, reversal of suspension and disciplinary transfer, and restoration of back pay.

BURDEN OF PROOF

The *Grievance Procedure Manual* does not expressly address the burdens of the parties in a case such as this where the agency disciplines an employee for insubordination and the employee challenges the discipline based on retaliation, harassment, and intimidation. With "disciplinary actions and dismissals for unsatisfactory performance, the agency must present its evidence first and must show by a preponderance of the evidence that the action was warranted and appropriate under the circumstances." On the other hand, the *Grievance Procedure Manual* states, "in all other actions, the employee must present his evidence first and must prove [her] claim by a preponderance of the evidence." Grievance Procedure Manual ("GPM") § 5.8. The *Grievance Procedure Manual* does not expressly address how these two provisions interact in this sort of situation but the EDR Director has instructed on this issue, finding the Federal Merit System Protection Board (MSPB) law instructive. Under MSPB law, when a disciplined employee asserts that the discipline was issued for an improper reason, the employee is deemed to be raising an affirmative defense and it is the employee's burden to prove the affirmative defense. Under MSPB law, the agency has no burden to disprove the affirmative defense. The EDR Director has held that this is an appropriate model for cases under the grievance procedure as well. *See* EDR Ruling No. 2009-2300 (July 20, 2009). Accordingly, the grievant must establish by a preponderance of the evidence that the agency's actions constituted wrongful discrimination, retaliation, harassment, or intimidation. 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 Standards of Conduct defines Group II offenses to include acts and behavior that are more severe in nature (than Group I) and are such that an accumulation of two Group II offenses normally should warrant removal. A stated example of a Group II offense is failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy. Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal. All of the examples in the policy of Group III misconduct are more extreme than the instance of insubordination described in the written notice. The policy does provide that under certain circumstances an offense typically associated with one offense category may be elevated to a higher level offense. The Agency may consider any unique impact that a particular offense has on the department, and the fact that the potential consequences of the performance or misconduct substantially exceeded agency norms. Agency Exh. 5, DOC Operating Procedure 135.1. Attachment #2 to the policy describes Group II offenses as having a "significant" impact on agency operations. Group III offenses are of a "most serious nature that severely impact agency operations."

When elevating an offense to a higher level, the policy requires the Agency to establish its legitimate, material business reason(s) for elevating the discipline above the levels set forth in the table.

The Offenses

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

The Agency employed Grievant, a woman, as a counselor senior and director of an agency program. The Grievant's former supervisor, a woman, served as her advocate and character witness in this grievance hearing. Shortly after the former supervisor moved to a different agency location, in April 2009, a new supervisor, a male, took the position directly supervising the Grievant. The new supervisor testified that he had difficulty with the Grievant accepting his supervision, leading up to two instances of insubordination that occurred on June 8, 2009, and June 9, 2009, respectively, forming the bases for the two Group Notices. Aside from these two Group Notices, the Grievant has no other active Group Notices. The Grievant's advocate and former supervisor testified that the Grievant was an exceptionally good employee.

The June 17, 2009, written notices are as follows:

- 06/08/09 offense date. Group II. "Insubordination. By your own admission in a due process hearing, you knowingly and willfully refused to comply with your Supervisor's instruction on June 08, 2009. Your refusal to comply is unacceptable as a supervisor and is insubordination." Offense code 56 is noted, "Insubordination." Agency Exh. 7.
- 06/09/09 offense date. Group III. "Insubordination, repeated offense. On June 09, 2009, you again refused to obey another instruction from your Supervisor. This behavior is insubordinate." Offense code 56 is noted, "Insubordination." Agency Exh. 8

The facility's warden sent the Grievant a memo scheduling a pre-disciplinary conference that indicated he was considering issuing two Group II Written Notices for the two instances of insubordination. The memo stated:

> Please report to my office [four days later] for (two) 2 disciplinary hearings for "insubordination", which are Group II offenses. As you know, we discussed these matters [two days earlier] during a conference that we had.
>
> You are encouraged to bring any documentation that you feel will help you to support your position in this meeting.

Agency Exh. 1, item 13. At this due process meeting, the warden indicated that he would instead issue a Group II and a Group III Written Notice. The warden justified the Group III as the appropriate consequence of repeating the misconduct of insubordination. The Grievant asserts that the Group III level offense is not only inappropriate but also contrary to notice to her. Grievant also contends that the Agency's discipline against her is improperly motivated by discrimination, retaliation, harassment, and intimidation.

The Grievant also asserts that the Group Notices are too vague in their descriptions to be valid under the grievance procedural requirements.

Each side identified one of the witnesses, an office services assistant (OSA) who witnessed the act of insubordination on June 8, 2009—the claimant's refusal to complete audit files as requested by her supervisor. This witness corroborated the supervisor's version of the event and she did not testify to any actions by the supervisor that could be described as discriminatory, retaliatory, harassing, or intimidating. While the Grievant testified that she considered the supervisor to be discriminatory, retaliatory, harassing, and intimidating, in his demeanor, the Grievant did not produce any corroborating evidence or testimony. While such evidence might be difficult to produce, the one witness who was in a position to provide corroboration, the OSA, did not testify to any suggestion of improper conduct by the supervisor.

In addition to the OSA, the warden, assistant warden, the Grievant's direct supervisor, and a corrections officer also testified for the Agency. The Grievant testified on her own behalf, and voiced strong concerns about the effectiveness and motivation of her direct supervisor. The Grievant's advocate and former supervisor testified to the Grievant's work performance as exceeding expectations during her tenure supervising her.

The Agency's witnesses testified that the Grievant was fully aware of the nature of the charges of insubordination, that the instances were specifically discussed with the Grievant, and that she was given detailed written memos describing the conduct. Agency Exh. 7 and 8. On June 8, 2009, the Grievant, after multiple requests, refused to complete audit folders her supervisor asked her to complete. On June 9, 2009, the Grievant's supervisor called her for a brief meeting at his office at 2:30 p.m. However, the Grievant left for the day at about 3:30 p.m. for a medical appointment without meeting her supervisor.

The Grievant admits the essential facts of the alleged insubordination, but she submits that her conduct should be excused because of her other work duties and the hostile work environment created by her supervisor's discrimination, retaliation, harassment and intimidation. Other than an instance in which the Grievant describes her supervisor as having a clinched fist, the Grievant complains that her supervisor verbally abused, harassed, and bullied her in private. The Grievant complains of her supervisor sexually harassing other female employees, lying about her, and insisting that the Grievant be submissive to him. The Grievant further testified that she did not understand what "submissive" meant in an employment situation. The Grievant produced typed journal entries she kept that details some alleged antics of her supervisor involving other staff.

The supervisor denied the Grievant's contentions of misconduct. No other testifying witnesses corroborated the Grievant's complaints and allegations against her supervisor. The Grievant's journal entries are not subject to cross-examination and cannot be accorded weight sufficient to satisfy her burden of proof of a hostile working environment of discrimination, retaliation, harassment, and intimidation.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

> While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy..."the hearing officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

Based on the manner, tone, and demeanor of the witnesses, I find that the Grievant admitted the conduct forming the basis of the two Group Notices. Accordingly, I find that the Grievant committed the misconduct charged. The next question, then, is whether the misconduct is properly characterized as Group II and Group III offenses.

I find merit to the Grievant's argument that a Group III Written Notice was not justified under the circumstances. The notice to the Grievant specifically referenced two Group II Written Notices, and issuance of a Group III is a significant departure from the notice. Aside from the notice factor, in accord with DOC Operating Procedure 135.1, the Agency has not shown that the insubordination on June 9, 2009, presented any unique impact on the agency or substantially exceeded agency norms. Further, the Agency has not shown that the insubordination on June 9, 2009, was of the most serious or severe nature. Thus, I find that the June 9, 2009, offense was inappropriately elevated to a Group III offense.

As for the Grievant's complaint that the Written Notices did not put her on sufficient notice, the hearing officer recognizes that procedural due process is inextricably intertwined with the grievance procedure. The *Rules for Conducting Grievance Hearings* state:

> In all circumstances, however, the employee must receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge.

In support of this principal, the *Rules* cite *O'Keefe v. USPS*, 318 F.3d 1310 (Fed. Cir. 2002). In *O'Keefe*, the agency removed an employee with the general charge of "improper conduct/ fraudulent use of personal identifiers." The Court reversed the agency's action because the facts and reasons for the removal were not written in the Notice of Proposed Removal given to the employee.

Agencies are expected to issue Written Notices that properly place employees on notice of the supporting facts and reasons for the agency's disciplinary actions. To satisfy the requirements of procedural due process, an agency is required, at a minimum, to give the employee (1) notice of the charges against him or her, and (2) a meaningful opportunity to respond. It is incumbent on the agency to specify the employee's conduct or actions that are being disciplined. Whether an agency has met this standard is often a matter of degree.

Under the *Rules for Conducting Grievance Hearings*, the first issue in every disciplinary grievance is:

> Whether Grievant engaged in the behavior described in the Written Notice?

If the standard set forth in *O'Keefe* is to be applied meaningfully, careful review of the Written Notice is necessary when compared to the facts shown. Here, the Written Notice is for insubordination, and the evidence shows that the Grievant had direct and specific information as to the nature of the alleged offense, including written notification. The agency's Written Notice and other related documentation sufficiently detailed the nature of the offense. Accordingly, the Agency has met its burden of proving that Grievant committed two distinct acts of insubordination.

However, the Grievant advances her defense based on extenuating circumstances of her supervisor's alleged discrimination, harassment, intimidation, and general hostile work

environment. The Grievant seeks rescission or reduction of the discipline on the ground that the discipline is essentially retaliatory.

An agency may not retaliate against its employees. To establish retaliation, a grievant must show she (1) engaged in a protected activity, *see Va. Code § 2.2-3004(A)(v) and (vi)*; (2) suffered a materially adverse action, *see EDR Ruling Nos. 2005-1064, 2006-1169* and *2006-*1283; 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 raises a sufficient question as to whether the agency's 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. *See EDR Ruling No. 2007-1530,* page 5 (Feb. 2, 2007) and *EDR Ruling No. 2007-1561* and *1587*, page 5 (June 25, 2007).

The Grievant has alleged retaliation but has failed to carry her burden of proof in this regard. Concerning both Written Notices, the Agency has articulated and proven by evidence, and by the Grievant's admission, legitimate, non-retaliatory reasons for its discipline. The Agency has also clearly justified issuance of the two Group Notices, although the Group III is modified to Group II.

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 the Standards of Conduct, management has 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.*

In this proceeding, the Agency's actions were consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer. *Id.*

Mitigation. The Grievant argues, reasonably, that the Agency could have exercised discipline along the continuum short of five days suspension and disciplinary transfer with 9% pay reduction. The Grievant actually desired a transfer from her previous position as a supervisor to a counselor, and she requested not to be supervised by the same supervisor. Although with the reduction of the Group III to a Group II Written Notice, the Grievant still has

two Group II Written Notices. Under applicable policy, a second Group II Written Notice should normally result in removal. The Agency's warden testified that he recognized the Grievant's contributions to the Agency and potential value to the Agency; that the Grievant enjoyed a good work record; and that the Agency could continue to benefit from the Grievant's contributions in another setting. After weighing the totality of the circumstances, he concluded that termination, while justifiable by either two Group II Notices or the Group II and Group III Notices, was too severe.

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…." Va. Code § 2.2-3005. 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.

Grievant contends the disciplinary action should be mitigated further. Grievant contends the hostile work environment she described, if not justifying sufficient excuse for the insubordination or the improper motivation for her discipline, should provide enough consideration to mandate a lesser sanction. However, the Grievant failed to show, by a preponderance of the evidence, that the Agency or her supervisor created a hostile work environment, discriminated against her, or retaliated against her. Without such finding, the hearing officer is left only to consider whether the Agency considered mitigating factors in a reasonable fashion. Otherwise satisfactory work performance, alone, is insufficient for a hearing officer to overrule an agency's mitigation determination. EDR Ruling No. 2007-1518 (October 27, 2009) held:

> Both length of service and otherwise satisfactory work performance are grounds for mitigation by agency management under the Standards of Conduct. However, a hearing officer's authority to mitigate under the *Rules for Conducting Grievance Hearings* is not identical to the agency's authority to mitigate under the Standards of Conduct. Under the *Rules for Conducting Grievance Hearings*, the hearing officer can only mitigate if the agency's discipline exceeded the limits of reasonableness. Therefore, while it cannot be said that either length of service or otherwise satisfactory work performance are *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which these factors could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the

conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become.

The Agency argues that its action was entirely appropriate and that it has, in essence, already taken full account of any mitigating factors. In light of the standard set forth in the *Rules*, the Hearing Officer finds that the Agency, in the face of two Group II Written Notices, has not exceeded the bounds of reasonableness in the discipline levied. Accordingly, I find that no further mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance on June 17, 2009, of the two Written Notices of disciplinary action is upheld but modified to two Group II Written Notices. The Group III Written Notice is reduced to a Group II. The level of discipline is upheld and not reversed because the two Group II Written Notices still could support termination and the Agency exercised its discretion on mitigation within the bounds of reasonableness. The Agency has considered mitigation and demonstrated restraint in fashioning discipline short of discharge. The two Group II Written Notices have an active life of three years from the date of issuance, with an inactive date of June 17, 2012.

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, Main Street Centre, 600 East Main Street, Suite 301, 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