Issues: Group I Written Notice (excessive absences), Group II Written Notice (insubordination), Hostile Work Environment; Hearing Date: 02/23/10; Decision Issued: 03/02/10; Agency: DVS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9272; Outcome: Partial Relief; **Administrative Review: EDR Ruling Request received 03/15/10; EDR Ruling #2010-2572, 2010-2573 issued 04/06/10; Outcome: Remanded to AHO; Remand Decision issued 05/26/10; Outcome: Original decision affirmed; Administrative Review: DHRM Ruling Request received 03/15/10; DHRM Ruling issued 06/07/10; Outcome: AHO's decision affirmed; Judicial Review: Appealed to Richmond City Circuit Court; Outcome: Hearing Officer's decision upheld (07/26/10).**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9272

Hearing Date: February 23, 2010
Decision Issued: March 2, 2010

PROCEDURAL HISTORY

On October 14, 2009, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory attendance. Also on October 14, 2009, Grievant was issued a Group II Written Notice of disciplinary action for insubordination.

On November 4, 2009, Grievant timely filed a grievance to challenge the Agency's actions. She also alleged that the Agency created a hostile work environment based on gender, race and disability. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On January 26, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 23, 2010, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
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 created a hostile work environment for 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. The burden of proof is on Grievant to show that the Agency created a hostile work environment. 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 Veterans' Services employs Grievant as a Certified Nursing Assistant. She began working for the Agency on April 1, 2008. The purpose of her position is:

> The Certified Nursing Assistant is responsible for providing direct care to residents during their shift and for maintaining the quality of services to fulfill the objective of the facility in accordance with the policies and procedure set forth by the facility administration and established nursing standards. The Certified Nursing Assistant is responsible for ensuring the needs of residents are met and/or providing treatments and care as instructed.[1]

On August 7, 2009 and August 8, 2009, Grievant was scheduled to work but did not report to work. She called the Facility and informed a supervisor that she was not reporting to work because her mother had been admitted to a hospital. On September 8, 2009, Grievant was scheduled to work but did not report to work. She called the

[1] Agency Exhibit 3.

Facility and informed a supervisor that she would not be in to work. On September 30, 2009, Grievant was scheduled to work but did not report to work. She called the Facility and informed a supervisor that she would not be coming to work.

On October 5, 2009, Grievant met with Ms. L who told Grievant that Grievant would not be paid for a day Grievant was absent. This upset Grievant. Grievant went to Mr. O's office to discuss the issue. Mr. O explained the policy to Grievant. This angered Grievant and she became loud. Grievant asked Mr. O, "Do you think you are fair?" Mr. O responded "yes". Grievant became louder and started talking about other people not being docked for their absences. Grievant was so loud that an employee working in another office walked towards Mr. O's office and asked if Mr. O wanted his door closed. Mr. O declined because he wanted a witness to Grievant's behavior and he was concerned for his safety. Grievant stood over Mr. O's desk and shook her hands at Mr. O. Grievant yelled, "You're so rude and nasty, you're just nasty. You have no heart. You're nasty." Grievant then walked away from Mr. O's office.

Mr. O works as the Assistant Director of Nursing at the Facility. He is a white male who is often disrespectful, demeaning, and abrasive towards African American female Certified Nursing Assistants working at the Facility. He made racially offensive comments to several African American employees.

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."[2] 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."

The Agency's Facility operates on a 24 hour per day/7 days a week basis. Agency Policy HR-01 governs "Attendance/Call-in's". An employee's attendance is unsatisfactory under this policy if the employee has three occurrences and a 90 day period. An occurrence is:

> An unscheduled absence from work that does not meet the criteria defining a scheduled absence, to include leaving work early (citing reasons that cannot be reasonably denied by supervision): or being more than 60 minutes late in reporting to work; or calling-in to request time off without having requested the time off prior to the end of the last work day preceding the planned day of absence.

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

A scheduled absence is a, "period of time away from the worksite or job station approved in writing according to establish procedure."

An occurrence does not include an absence that is "covered by the Family Medical Leave (FMLA) authorization on file or has been approved and short-term disability (STD) under the Virginia Sickness and Disability Program (VSDP)."

Poor attendance is a Group I offense.[3] The Agency determines poor attendance based upon Agency Policy HR-01. Grievant had unscheduled absences on August 7, 2009, August 8, 2009, September 8, 2009, and September 30, 2009. The Agency considered the August 7 at August 8 absence as one occurrence. Grievant had at least three unscheduled absences in a 90 day time period thereby justifying the issuance of a Group I Written Notice.

Grievant contends that her absences on August 7, 2009 and August 8, 2009 were protected as Family Medical Leave. Grievant's mother was ill and Grievant went to the hospital to be with her mother. DHRM Policy 4.20 governs Family Medical Leave. This policy provides:

> If eligible, an employee is entitled to receive up to 12 weeks of unpaid family and medical leave per leave year on either a continuous, intermittent, or reduced leave schedule basis for any one or more of the following reasons:
>
> > The prenatal care for or the birth of a child, and to care for the newborn child.
> > Placement of a child with the employee for adoption or foster care.
> > **To care for the spouse, son, daughter or parent with a serious health condition.**
> > Because of a serious health condition which renders the employee unable to perform the functions of his/her position.
> > Because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on active duty, or has been notified of an impending call or order to active duty in support of a contingency operation. (Emphasis added).

If the Hearing Officer assumes for the sake of argument that Grievant's mother had a serious health condition, Grievant's absences on August 7 and August 8, 2009 are not protected as Family Medical Leave. Grievant was not absent "to care for" her mother. Grievant was visiting her mother at the hospital where hospital staff were caring for Grievant's mother.

[3] See Attachment A, DHRM Policy 1.60.

Grievant argued that a prior written counseling was insufficient to place her on notice that she could be subject to disciplinary action. The adequacy of the prior written counseling is insignificant. The Agency is not required to give Grievant a written counseling prior to taking disciplinary action against her for poor performance.

Disruptive behavior is a Group I offense.[4] Grievant was disruptive on October 5, 2009 because she was angry and yelled at Mr. O and called him nasty. Mr. O was concerned for his safety because of Grievant's behavior and at least one other employee was distracted from her work because of Grievant's outburst. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice. The Group II Written Notice issued to Grievant must be reduced.

The Agency contends Grievant should receive a Group II Written Notice for her behavior on October 5, 2009 because that behavior was insubordinate. In order to establish in subordination, the Agency must show that Grievant displayed a disregard or contempt for a supervisor's authority. In this case, Grievant did not indicate she would refuse to follow Mr. O's instructions or question his authority as a supervisor. Grievant was disrespectful to Mr. O but not in such a manner as to show contempt for his authority as opposed to showing contempt for Mr. O personally.

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 the Group I Written Notice for poor attendance and to further reduce the disciplinary action for disruptive behavior.

Grievant contends the Agency, acting through Mr. O, created a hostile work environment based on race, gender, and physical disability. To establish a claim of hostile work environment or harassment, Grievant must present evidence showing that the conduct at issue was (1) unwelcome; (2) based on a protected status or prior protected activity; (3) sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive or hostile work environment; and (4) imputable on

[4] See Attachment A, DHRM Policy 1.60.

[5] *Va. Code § 2.2-3005.*

some factual basis to the agency. Whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

Grievant has presented sufficient evidence to show that Mr. O created a hostile work environment based on race.[6] Several of Grievant's witnesses testified with credibility that Mr. O spoke to them in an abrasive, demeaning, and contemptuous manner. The witnesses were African American females. For example, Ms. R, an African American female, testified that she attempted to speak with Mr. O about her work schedule. Mr. O did not want to hear what she was saying. At one point Mr. O "got into her face" slapped his hands and said that she "would go by the schedule." He made these comments in a rude and abrasive manner. Ms. H is an African American female. When she attempted to tell Mr. O her side of a dispute involving her termination, Mr. O did not want to listen to her. He banged his desk, clapped his hands, and kept interrupting her. As she left he gave her the "peace sign". When she asked what that meant, Mr. O said, "ain't this how ya'll do." She construed this as a comment about behavior of African Americans and Mr. O's attempt to mock that behavior. Ms. M testified that during a weekend she worked, Mr. O brought doughnuts to approximately three African American females who were working on the weekend. One of the woman asked if Mr. O could bring in chicken next time and Mr. O responded, "You people eat enough chicken." The women perceived the comment "you people" to refer to African Americans. Eating chicken in excess is a negative stereotype of African Americans. Based on Mr. O's behavior and comments towards African American employees, Grievant has demonstrated that Mr. O created a hostile work environment for employees at the Facility. Mr. O's actions were unwelcome. They were based on the protected status of race, in particular, the status as of African Americans. Mr. O's actions were pervasive because many employees were affected and their perceptions of Mr. O and the Agency were affective negatively. Mr. O's status as a manager of the nursing department is sufficient to impute his actions to the Agency. He was involved in the hiring, firing, and daily supervision of Agency nursing staff.

The Agency contends that approximately 78 percent of its Certified Nursing Assistants are African American females and that Mr. O participated in the hiring of most of those employees. The hiring of African American females suggests that Mr. O may not act based on race in his hiring decisions. It is not necessary, however, for Grievant to show that Mr. O created a hostile work environment with every action during every day of his employment. It is sufficient if Grievant can show that on some occasions Mr. O has acted with racial bias. Grievant has met that standard.

DECISION

[6] She has not presented sufficient evidence to show that Mr. O created a hostile work environment based on gender or physical disability.

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action for poor attendance is **upheld**. The Group II Written Notice of disciplinary action for insubordination must be **reduced** to a Group I Written Notice for disruptive behavior.

The Agency created a hostile work environment based on race. The Agency is ordered to end the hostile work environment based on race.

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:

   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.[7]

[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

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Carl Wilson Schmidt, Esq.
Hearing Officer

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

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 9272-R

Reconsideration Decision Issued: May 26, 2010

RECONSIDERATION DECISION

The EDR Director issued Ruling No. 2010-2572 and 2010-2573 stating:

> Accordingly, this Department remands the hearing decision for consideration of the questions of (1) whether the grievant's due process rights were violated when the agency apparently failed to give her an opportunity to respond to the charges set forth in the written notices; and (2) whether state or agency policy was violated by this apparent failure and, if so, the impact if any, of the violation.

The Hearing Officer will assume for the sake of argument that the Agency violated Grievant's procedural due process rights. To the extent Grievant's due process rights were violated by the Agency, any such defect was cured by the hearing process. Grievant had every opportunity to present to the Hearing Officer any evidence or arguments she could have presented to the Agency but was denied that opportunity. Grievant was not denied procedural due process of law after she was afforded an evidentiary hearing. To the extent the Agency violated any state or agency policy, the outcome of this case is unaffected. Nothing in State or Agency policy authorizes the reversal or modification of disciplinary action because of an agency's failure to provide due process.

APPEAL RIGHTS

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.

S/Carl Wilson Schmidt

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Carl Wilson Schmidt, Esq.
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Department of Veterans Services

June 7, 2010

The grievant has requested that the Department of Human Resource Management conduct an administrative review of the hearing officer's decision in Case No. 9272. The grievant requested the review because she believes the hearing decision is inconsistent with agency and state policy. For the reason stated below, this Department will not disturb the decision. The agency head, Ms. Sara Redding Wilson, has asked that I respond to this appeal.

FACTS

The facts as set forth by the hearing officer in his **Finding of Facts**, in part, are as follows:

> After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:
>
> The Department of Veterans' Services employs Grievant as a Certified Nursing Assistant. She began working for the Agency on April 1, 2008. The purpose of her position is:
>
> The Certified Nursing Assistant is responsible for providing direct care to residents during their shift and for maintaining the quality of services to fulfill the objective of the facility in accordance with the policies and procedure set forth by the facility administration and established nursing standards. The Certified Nursing Assistant is responsible for ensuring the needs of residents are met and/or providing treatments and care as instructed.
>
> On August 7, 2009 and August 8, 2009, Grievant was scheduled to work but did not report to work. She called the Facility and informed a supervisor that she was not reporting to work because her mother had been admitted to a hospital. On September 8, 2009, Grievant was scheduled to work but did not report to work. She called the Facility and informed a supervisor that she would not be in to work. On September 30, 2009, Grievant was scheduled to work but did not report to work. She called the Facility and informed a supervisor that she would not be coming to work.
>
> On October 5, 2009, Grievant met with Ms. L who told Grievant that Grievant would not be paid for a day Grievant was absent. This upset Grievant. Grievant went to Mr. O's office to discuss the issue. Mr. O explained the policy to Grievant. This angered Grievant and she became loud. Grievant asked Mr. O, "Do you think you are fair?" Mr. O responded "yes". Grievant became louder and

> started talking about other people not being docked for their absences. Grievant was so loud that an employee working in another office walked towards Mr. O's office and asked if Mr. O wanted his door closed. Mr. O declined because he wanted a witness to Grievant's behavior and he was concerned for his safety. Grievant stood over Mr. O's desk and shook her hands at Mr. O. Grievant yelled, "You're so rude and nasty, you're just nasty. You have no heart. You're nasty." Grievant then walked away from Mr. O's office.
>
> Mr. O works as the Assistant Director of Nursing at the Facility. He is a white male who is often disrespectful, demeaning, and abrasive towards African American female Certified Nursing Assistants working at the Facility. He made racially offensive comments to several African American employees.

Based on the grievant's attendance/late arrivals, her supervisor issued to a Group I Written Notice for attendance and a Group II Written Notice with a three-day suspension for insubordination. She filed two grievances – one in which she appealed the Group I Written Notice and one in which she appealed the Group II Written Notice. When she did not receive relief she was seeking, she asked for and received a hearing. In his decision, the hearing officer upheld the Group I Written Notice and reduced the Group II Written Notice with suspension to a Group I Written Notice with backpay. She requested an administrative review on her belief that the decision is inconsistent with state and agency policy. She feels that the agency violated policy when she was not provided due process prior to issuing her disciplinary action.

She also requested an administrative review from the Director of Employment Dispute Resolution (EDR). The EDR Director remanded the decision to the hearing officer and directed that he address several issues, among those being the grievant's due process concern. The hearing officer addressed that concern in his remand decision by stating, in part:

> The Hearing Officer will assume for the sake of argument that the Agency violated Grievant's procedural due process rights. To the extent Grievant's due process rights were violated by the Agency, any such defect was cured by the hearing process. Grievant had every opportunity to present to the Hearing Officer any evidence or arguments she could have presented to the Agency but was denied that opportunity. Grievant was not denied procedural due process of law after she was afforded an evidentiary hearing. To the extent the Agency violated any State or Agency policy, the outcome of this case is unaffected. Nothing in State or Agency policy authorizes the reversal or modification of disciplinary action because of an agency's failure to provided due process.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found but the

hearing officer determines that the disciplinary action exceeds the limits of reasonableness, he may reduce the discipline. By statute, this Department has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and/or procedure.

The relevant policy, the Department of Human Resource Management's Policy No. 1.60, Standards of Conduct, states, "It is the policy of the Commonwealth to promote the well-being of its employees in the workplace by maintaining high standards of work performance and professional conduct." The policy states as its purpose, "The purpose of the policy is to set forth the Commonwealth's Standards of Conduct and the disciplinary process that agencies must utilize to address unacceptable behavior, conduct, and related employment problems in the workplace, or outside the workplace when conduct impacts an employee's ability to do his/her job and/or influences the agency's overall effectiveness." Attachment A, Unacceptable Standards of Conduct, of that policy sets forth examples of unacceptable behavior for which specific disciplinary action may be warranted. These examples are not all-inclusive.

The grievant is challenging the hearing officer's decision on a singular issue- the hearing officer's decision is inconsistent with agency and state policy as related to providing her due process. Deciding due process issues is beyond the purview of this Department. We have no authority to interfere with the application of this hearing decision.

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Ernest G. Spratley