Issues: Group II Written Notice with Suspension (failure to follow policy and disruptive behavior), Group II Written Notice with Suspension (failure to follow instructions and disruptive behavior), Group II Written Notice with Termination (failure to follow instructions, insubordination, leaving work without permission), and Retaliation; Hearing Date: 04/14/10; Decision Issued: 04/20/10; Agency: VDH; AHO: Carl Wilson Schmidt, Esq.; Case No. 9300, 9301, 9302; Outcome: Partial Relief; **Administrative Review: EDR Ruling Request received 04/28/10; EDR Ruling #2010-2632 issued 06/08/10; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 04/30/10; EDR Form Letter issued 05/06/10. Declined to review.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9300 / 9301 / 9302

Hearing Date: April 14, 2010
Decision Issued: April 20, 2010

PROCEDURAL HISTORY

On July 24, 2009, Grievant was issued a Group II Written Notice of disciplinary action with a five workday suspension for disruptive behavior, failure to follow instructions/policy and misrepresentation of the position held. On August 10, 2009, Grievant was issued a Group II Written Notice of disciplinary action with a five workday suspension for failure to follow instructions/policy and disruptive behavior. On October 9, 2009, Grievant was issued a Group II Written Notice of disciplinary action with removal effective October 9, 2009 for unsatisfactory performance, failure to follow instruction/policy, abuse of State time, disruptive behavior, insubordination, and leaving work without permission.

Grievant timely filed grievances to challenge the Agency's actions. The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and she requested a hearing. On January 26, 2010, the EDR Director issued Ruling No. 2010-2517, 2010-2518, 2010-2519 consolidating the grievances for a single hearing. On March 16, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 14, 2010, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representatives
Agency Party Designee

Agency Representative
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 actions, 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 employed Grievant as an Office Service Specialist II at one of its Facilities. She had been employed by the Agency since 1994. Other than the facts giving rise to these disciplinary actions, Grievant's work performance was satisfactory to the Agency. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

A Client called the Facility and told an employee, Ms. P, that she wish to cancel her maternity clinic visit because she did not have enough money to pay on her account. Ms. P told the Client that it was very important for her and the baby that she keep her appointment and not to worry about payment that day. On June 16, 2009, the

Client went to the clinic for her regular prenatal care visit. After the checkup, Grievant asked the Client to pay the balance owed by the Client. The Client said that she did not have any money at the moment and that she would pay the balance on the next visit. The Clients said she was "going through a really hard situation at the time". Grievant began talking in a loud voice such that others in the waiting area could overhear Grievant. Grievant told the Client that she needed to pay the balance at that moment. The Client started to cry and told Grievant that she had called a few hours before her appointment to say that she did not have any money to pay and that another employee told the Client not to miss the appointment. Grievant told the Client that she was the supervisor and that she did not care what other people told the Client on the phone. Grievant was not actually a supervisor at that time. Grievant told the Client that the Client needed to pay the balance at that moment, that the Client was lying to Grievant and that Grievant needed the money right at that moment.

Ms. P observed Grievant's "very ugly" interaction with the Client. Ms. P walked to the Client and took the Client to the registration desk to calm her down. Grievant followed Ms. P and the Client over to the registration desk and continued to question the Client. Grievant asked the Client "was her husband lazy or just couldn't find a job?" Ms. P considered Grievant's interaction with the Client to be "very ugly" and "very embarrassing".

Agency managers investigated the circumstances of Grievant's interaction with the Client. On July 15, 2009, the Business Manager sent Grievant a Due Process Memorandum advising Grievant of possible disciplinary actions against her and providing her with an opportunity to respond to the allegations before a decision was made. The memorandum also instructed Grievant as follows:

> You are not to discuss this issue with any district staff, nor have any contact with any health department clients concerning the incident of June 16, 2009.[1]

Grievant and another employee, Ms. C, had been working with each other for several years and were friends. On July 17, 2009, Grievant went to the Facility where Ms. C worked to fax documents regarding a grievance. Ms. C was surprised to see Grievant at that Facility and asked Grievant what she was doing. Grievant said "they are trying to fire me." Grievant stated that everyone knew about the allegations and that they (The District Office) said Grievant had harassed a client, attacked the client, called the client a liar, and claimed that Grievant was a supervisor. Grievant stated that the client had written a letter but that the client could not have written that letter because the client did not speak enough English to write the letter. Grievant told Ms. C that "she was fighting it".

On July 31, 2009, the Supervisor sent an email to staff in the office including Grievant. The email stated:

[1] Agency Exhibit 1.

> You may use your cell phones during your breaks and your lunch. You are not allowed to take cell phone calls during regular work hours UNLESS IT IS AN EMERGENCY! When you are using your cell phones please take them outside to talk.

On August 18, 2009, the Supervisor observed that Grievant was not assisting other employees working at the maternity clinic scheduled from 8:30 a.m. to 10 a.m. At approximately 10 a.m., the Supervisor noticed that the door to the Nurse Supervisor's office was closed. The Supervisor observed the Nurse Supervisor walking into her office. When the Nurse Supervisor walked into the office, the Supervisor noticed that Grievant was in the office talking on her cell phone. The Nurse Supervisor did not interrupt Grievant. The Nurse Supervisor closed the door and stood outside of her office waiting for Grievant to finish her telephone call. The Nurse Supervisor waited for least 15 minutes before Grievant left the office. Grievant walked past the Supervisor and said she was going outside to take her 15 minute break.

After the Supervisor finish working with a client at approximately 11 a.m., the Supervisor identified several patient charts that needed "destroy dates" written on them. The Supervisor wrote a note to Grievant saying "please make sure these charts have the appropriate destroy date on them and then file in the appropriate places." The Supervisor took the charge to Grievant's workspace. Shortly thereafter, Grievant took the charts back to the Supervisor and told the Supervisor that the task was at the bottom of her priority list.

At noon, Grievant announced to the Supervisor that she was going to lunch. Grievant left the building. At 12:30 p.m., the Supervisor located Grievant in the nutritionist's office. The Supervisor told Grievant that she needed Grievant to work up front in the clinic. Grievant said that she had more important things to do. The Supervisor asked what was more important than doing her job and Grievant replied that she was not allowed to tell the Supervisor because it was private. The Supervisor then told Grievant "to come up front now and do your job." Grievant refused saying that she "had to make a phone call". The Supervisor told Grievant that "your phone call would have to wait since we had patients to take care of and to come to the front immediately." Grievant picked up the phone and said that she had to call the Business Manager at the District Office.

At approximately 1:30 p.m., Grievant told the Supervisor that she was going to the District Office to meet with the Business Manager. Grievant did not have an appointment to meet with the Business Manager. When Grievant arrived at the District Office, the Business Manager met with Grievant to hear Grievant's concerns.

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."

Disruptive behavior is a Group I offense. On June 16, 2009, Grievant engaged in disruptive behavior because she upset the Client by disregarding the Client's explanation regarding the lack of payment, causing the Client to cry, falsely claiming to be a supervisor, and distracting Ms. P from her duties. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

The Agency contends that Grievant's behavior on June 16, 2009 rose to the level of a Group II offense. The Agency has not presented evidence showing that Grievant's behavior was contrary to policy or a supervisor's instructions. The Agency has not presented evidence showing that Grievant's behavior met any of the other standards necessary to establish a Group II offense. Grievant's behavior in itself was not so egregious as to support a Group II Written Notice.

Grievant contends that there is no basis to take disciplinary action against her for the events of June 16, 2009. She denies that the interaction occurred as the Agency claims. The Agency presented evidence of the letter of complaint submitted by the Client and confirmed the contents of that letter through credible testimony of other employees who observed Grievant's interaction with the Client. The Agency has presented facts to support the issuance of disciplinary action against Grievant.

Failure to follow a supervisor's instruction is a Group II offense. On July 15, 2009, the Business Manager, a supervisor instructed Grievant that she was "not to discuss this issue with any district staff, nor have any contact with any health department clients concerning the incident of June 16, 2009." Two days later, Grievant spoke with Ms. C and told Ms. C that Grievant had harassed a client, attacked the client, called the client a liar, and claimed that Grievant was a supervisor. Grievant stated that the client had written a letter but that the client could not have written that letter because the client did not speak enough English to write the letter. Grievant's comments to Ms. C were about the incident on June 16, 2009 and were contrary to the Business Manager's instruction thereby justifying the issuance of a Group II Written Notice.

Grievant argues that the Commonwealth did not have the authority to tell her with whom she could speak and that the Commonwealth could not remove her right to free

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

speech. The Agency's instruction to Grievant was consistent with its authority to operate the Agency's business. The Agency did not limit Grievant's ability to speak with the Department of Employment Dispute Resolution staff or with staff of the Department of Human Resource Management or with legal counsel. The Agency's instruction was designed to minimize disruption among its employees. Grievant was obligated to comply with that instruction.

The Hearing Officer will assume for the sake of argument that Grievant's use of her cell phone and attempts to make telephone calls were protected activities. The Hearing Officer will make this assumption because for some of the calls Grievant intended to communicate with the Department of Employment Dispute Resolution and with Agency Managers regarding her grievances and concerns regarding how she was treated in the workplace. Even with this assumption, there remains sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a supervisor's instructions. On August 18, 2009, the Supervisor instructed Grievant to review charts, write the appropriate "destroy dates" on those charts and then file the charts. Grievant refused to perform the task thereby acting contrary to a supervisor's instruction. The Agency's issuance of a Group II Written Notice for the events of August 18, 2009 must be upheld.

Upon the accumulation of two active Group II Written Notices, an agency may end an individuals employment with the agency. In this case, Grievant has accumulated two Group II Written Notices. Grievant's removal must be upheld based upon the accumulation of disciplinary action.

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…."[3] 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 argues that she had been suffering from depression and anxiety and had to increase the dosage of her medication in the six months prior to the disciplinary actions. Insufficient evidence has been presented to establish a causal relationship between Grievant's depression and her behavior that gave rise to the disciplinary actions.

[3] *Va. Code § 2.2-3005.*

In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce further the disciplinary actions.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;[4] (2) suffered a materially adverse action[5]; 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 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.[6]

Grievant engaged in protected activity because she filed grievances. Grievant suffered a materially adverse action because she received disciplinary action. Grievant has not established a causal link between the adverse action and the protected activity. The Agency did not take disciplinary action against Grievant because of her protected activities.[7]

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with suspension on July 24, 2009 is **reduced** to a Group I Written Notice. Grievant's suspension from July 29, 2009 through July 31, 2009 is **reversed**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with a five work day suspension on August 10, 2009 is **upheld**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action on

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[4] *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.

[5] 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.

[6] 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).

[7] Grievant also alleged that she was placed in a hostile work environment. She did not present any evidence showing that the Agency took action against her because of "race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability" as required by DHRM Policy 2.30.

October 9, 2009 is **upheld**. Grievant's removal based upon the accumulation 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:

   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.[8]

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

[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

May 6, 2010

RE: **Grievance of Grievant v. Virginia Department of Health**
Case Nos. 9300/9301/9302

Dear Grievant:

I am writing in response to your letter dated April 25, 2010, in which you requested an administrative review of the subject case. I find it necessary to list the guidelines to be followed when requesting an administrative review. 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 original decision is 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 for an administrative review, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent. In the instant case, you have not identified any policy, either state or agency, with which the hearing officer's decision is inconsistent. Rather, it appears that you are contesting the evidence considered by the hearing officer, the weight he accorded that evidence and the conclusions he drew. Therefore, this Agency will not honor your request to conduct an administrative review.

Sincerely,

Ernest G. Spratley, Assistant Director
Office of Equal Employment Services