Issues: Group II Written Notice (failure to follow instructions and policy) and Termination (due to accumulation); Hearing Date: 02/14/11; Decision Issued: 02/28/11; Agency: VCU; AHO: John V. Robinson, Esq.; Case No. 9494; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 9494

Hearing Officer Appointment: January 4, 2011
Hearing Date: February 14, 2011
Decision Issued: February 28, 2011

PROCEDURAL HISTORY, ISSUES AND PURPOSE OF HEARING

The Grievant requested an administrative due process hearing to challenge termination of his employment effective November 16, 2010, pursuant to a written notice, dated November 16, 2010 by Management of Virginia Commonwealth University (the "Department" or "Agency"), as described in the Grievance Form A dated November 18, 2010.

The parties duly participated in a first pre-hearing conference call scheduled by the hearing officer on January 18, 2011 at 12:30 p.m. The Grievant's advocate, the Department's advocate and the hearing officer participated in the call. The Grievant's advocate confirmed the Grievant is seeking the relief requested in his Grievance Form A, namely, reinstatement and confirmed during the call that he is also seeking back-pay and restoration of all benefits.

The Grievant had moved for a relatively short continuance. The hearing officer found that the process is best served if the grievant is represented by an advocate of his choosing who has time to adequately prepare for the hearing and that, under the facts and circumstances of this proceeding, a relatively short continuance would serve the interests of justice. Accordingly, just cause existed for the continuance. The hearing was scheduled for and held on February 14, 2011 at 10:00 a.m. and the hearing officer's deadline for issuance of the written decision was extended. The hearing officer used his own recording equipment and tapes.

Following the pre-hearing conference call, the hearing officer issued a Scheduling Order entered on January 18, 2011 (the "Scheduling Order"), which is incorporated herein by this reference.

At the hearing, the parties were represented by their respective advocates. Both parties were given the opportunity to make opening and closing statements, to call witnesses and to

cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing[1].

No open issues concerning non-attendance of witnesses or non-production of documents remained by the conclusion of the hearing.

In this proceeding, the Agency bears the primary burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances. Of course, the Grievant bears the burden of proof concerning his claim that the Agency violated the Americans with Disabilities Act, as amended (the "ADA").

APPEARANCES

Representative for Agency
Grievant
Witnesses

FINDINGS OF FACT

1. The Grievant was a master HVAC mechanic for the Agency, previously employed by the Agency for approximately 27 years before the termination of his employment by the Agency.

2. Several persons, including certain of the Grievant's coworkers and an Agency employee in business administration reported to the Grievant's supervisors that there was a strong odor of alcohol about the Grievant. The Grievant's supervisors, including the Grievant's direct supervisor, Ms. B, and the Director of Physical Plant, Mr. C, also noticed the odor of alcohol on the Grievant.

3. Persons had noticed the Grievant make frequent unscheduled trips to the Agency's N Parking Deck, where the Grievant typically parked his vehicle and Ms. B suspected that the Grievant might be drinking alcohol there.

4. In a meeting with the Grievant on September 9, 2010, Ms. B addressed the smell of alcohol reports with the Grievant and instructed the Grievant to limit any trips to the N Parking Deck to "[his] allotted lunch time." AE 3.

5. The Grievant denied that he was making numerous trips to the N Parking Deck, stating that he only occasionally returned to the deck for cigarettes.

[1] References to the grievant's exhibits will be designated GE followed by the exhibit number. References to the agency's exhibits will be designated AE followed by the exhibit number.

6. The Grievant suffered from an unfortunate cancer and in a number of operations has had all or substantially all of his jaw bone removed. The Grievant is, as a result, visibly disabled and, amongst other things, has to use a feeding tube which he attaches to his stomach. The Grievant's speech, understandably, is also garbled and, at times, he is difficult to understand. The Grievant never had any difficulty performing the essential functions of his job.

7. Until this disciplinary proceeding, the Grievant has actively resisted seeking any accommodations from his former employer, the Agency. Until this disciplinary proceeding, the Grievant has consistently exhibited to his employer the clear, unambiguous attitude that he did not want to be treated differently than his peers, and that he did not want to be treated as disabled.

8. The Agency has not sought to force the Grievant to accept any reasonable formal accommodations but has allowed the Grievant to feed himself as many times as he chooses without any complaint by the Agency.

9. Following their meeting, Ms. B sent the Grievant a letter dated September 13, 2010, which stated in part as follows:

> If you feel that you have a medical condition that is affecting your ability to perform the essential functions of your job, it is your responsibility to self-identify and inform the University that an accommodation is needed under the Americans with Disabilities Act of 1990 (ADA). Please contact [the Agency's] Office of Equal Employment Opportunity/Affirmative Action Services at [_____] immediately.

AE 3.

10. The Grievant had allocated to him by the Agency a personal locker which he secured with a padlock.

11. The Grievant was allocated a 30 minute lunch period by the Agency, which was unpaid time. The Grievant also had one 15 minute rest break before and one 15 minute rest break after the required lunch period. Both breaks were paid time.

12. On November 8, 2010, management met with the Grievant to discuss the Grievant's numerous trips to the N Parking Deck. Concerning the trips on November 5, 2010, at first, the Grievant stated to management that he had only been there one time to return his coat. AE 2. When asked by Mr. C to confirm that he only made a single trip, the Grievant stated that he had made a second trip to use the ATM.

13. Based on video evidence presented by the Agency, the Grievant now admits that he made five (5) trips to the N Parking Deck and the Grievant admits that a number of these trips were not work-related and were not to feed himself.

14. The Grievant maintains that any trips should not present a problem to management because he has done this for years.

15. On November 16, 2010, Ms. B issued the Grievant a Group II Written Notice for "failure to follow policy and instructions." The Grievant has an active Group III issued May 14, 2010 for "falsifying records, failure to follow instructions and/or policy and failure to perform assigned work." AE 5. Based on the cumulative Group III and Group II, the Agency ended the Grievant's employment effective November 16, 2010.

16. The testimony of the Agency witnesses was credible. The demeanor of such witnesses was open, frank and forthright.

APPLICABLE LAW, ANALYSIS AND DECISION

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).

Va. Code § 2.2-3000(A) 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.

In disciplinary actions, the Agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department

of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The operative Agency Standards of Conduct (the "SOC") are contained in Agency Human Resources Policy No. 0701 (effective January 1, 2009). AE 6. The SOC provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The SOC serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

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 DHRM Policy 1.60, Standards of Conduct, management is given 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.*

Pursuant to DHRM Policy No. 1.60, the Grievant's conduct when coupled with his active Group III Written Notice could clearly constitute a terminable offense, as asserted by the Agency. AE 6.

Policy 1.60 provides in part:

> b. **Group II Offense**:
>
> Offenses in this category include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action. This level is appropriate for offenses that significantly impact business operations and/or constitute neglect of duty, insubordination, the abuse of state resources, violations of policies, procedures, or laws.
>
> • See attachment A for examples of Group II Offenses.

AE 6.

Attachment A provides that failure to follow supervisor's instructions or comply with written policy constitutes a Group II Offense.

The SOC provide that a second active Group II Notice normally should result in termination. AE 6.

As previously stated, the Agency's burden is to show upon a preponderance of evidence that the discipline was warranted and appropriate under the circumstances. The hearing officer agrees with the Agency's advocate that the Grievant's disciplinary infractions justified the termination by Management. Accordingly, the Grievant's behavior constituted misconduct and the Agency's discipline is consistent with law and consistent with policy, being properly characterized as a terminable offense when combined with the active Group III.

ADA

In certain circumstances, a qualified individual with a disability may be able to receive relief under the Americans with Disabilities Act. An individual is considered to have a disability if that individual either (1) has a physical or mental impairment which substantially limits one or more of his or her major life activities (such as eating or speaking), (2) has a record of such an impairment, or (3) is regarded as having such an impairment. A qualified individual with a disability is one who "satisfies the requisite skill, experience, education and other job-related requirement of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position." 29 CFR § 1630.2(m).

The Grievant has met his burden of proving upon a preponderance of the evidence that he is a qualified individual with a disability. However, despite the employer's requests to the Grievant that he contact the Agency's Office of Equal Employment Opportunity/Affirmative Action Services if the Grievant felt that he had a medical condition that was affecting his ability to perform the essential functions of his life, the Grievant, until this discipline was underway, steadfastly declined to participate with the employer in any "interactive process" whereby the specific job-related limitations are identified, potential accommodations are suggested and a determination is made.

Applicable law and policy does not require or permit the Agency to compel the employee to engage in such interactive process with the Agency. Nevertheless, as a practical matter, the Agency did allow the Grievant the accommodation of feeding himself as many times per day as he desired. The Grievant has not proved that the discipline in this proceeding had anything to do with the Grievant feeding himself. The Grievant himself admits that a number of his trips to N Parking Deck on November 5, 2010 were not for feeding. The evidence simply does not reflect that the Agency discriminated against the Grievant because of any disability.

The U.S. Equal Employment Opportunity Commission has issued a publication entitled *The Americans With Disabilities Act: Applying Performance And Conduct Standards To Employees With Disabilities* (the "Publication"). The Publication recognizes that ". . . an

employee's disability typically has no bearing on performance or conduct . . ." The Publication also provides in part as follows:

> When an employee does not give notice of the need for accommodation until after a performance problem has occurred, reasonable accommodation does not require that the employer:
>
> - tolerate or excuse the poor performance;
>
> - withhold disciplinary action (including termination) warranted by the poor performance;
>
> **9. If an employee's disability causes violation of a conduct rule, may the employer discipline the individual?**
>
> Yes, if the conduct rule is job-related and consistent with business necessity and other employees are held to the same standard. The ADA does not protect employees from the consequences of violating conduct requirements even where the conduct is caused by the disability.
>
> **10. What should an employer do if an employee mentions a disability and/or the need for an accommodation for the first time in response to counseling or discipline for unacceptable conduct?**
>
> If an employee states that her disability is the cause of the conduct problem or requests accommodation, the employer may still discipline the employee for the misconduct. If the appropriate disciplinary action is termination, the ADA would not require further discussion about the employee's disability or request for reasonable accommodation.

EDR's *Rules for Conducting Grievance Hearings* provide in part:

> The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances" such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance." 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. *Rules* § VI(B) (alteration in original).

If the Department does not consider mitigating factors, the hearing officer should not show any deference to the Department in his mitigation analysis. In this proceeding the Department apparently did not consider mitigating factors in disciplining the Grievant.

While the Grievant did not specifically raise mitigation in the hearing or in her Form A and while the Grievant might not have specified for the hearing officer's mitigation analysis all of the mitigating factors below, the hearing officer considered a number of factors including those specifically referenced herein and all of those listed below in his analysis:

1. the Grievant's service to the Agency of approximately 27 years;

2. the Grievant's disability; and

3. the Grievant received many positive evaluations.

EDR has previously ruled that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518; and EDR Ruling 2010-2368. 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. *Id.*

Here the offense was very serious. Clearly, the hearing officer would not be acting responsibly or appropriately if he were to reduce the discipline under the circumstances of this proceeding.

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 DHRM Policy 1.60, Standards of Conduct, and the SOC, management is given 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.

In EDR Case No. 8975 involving the University of Virginia ("UVA"), a grievant received a Group III Written Notice with removal for falsifying records on five (5) separate dates. Although the evidence supported only one of those instances, the hearing officer upheld the disciplinary action. The grievant appealed to EDR asserting that the disciplinary action was inappropriate in that the grievant did not engage in as much misconduct as alleged by UVA. The Director upheld the hearing officer's decision:

> The grievant's arguments essentially contest the hearing officer's determinations of fact as they relate to the proper sanction for the misconduct. Such determinations are within the hearing officer's authority as the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate. In this case, while it appears that the hearing officer did find that the grievant did not engage in as much misconduct as alleged by the University, it was still determined that the grievant had falsified a state record with the requisite intent, generally a Group III offense under the Standards of Conduct. [footnote omitted] Upon review of the record, there is no indication that the hearing officer abused his discretion in making these findings or that the facts were not supported by the hearing record. Consequently, this Department has no basis to disturb the hearing decision.

EDR Ruling Number 2009-2192; February 6, 2009.

The hearing officer decides for each offense specified in the written notice (i) the Grievant engaged in the behavior described in the written notice; (ii) the behavior constituted serious misconduct; (iii) the Department's discipline was consistent with law and policy and that there are no mitigating circumstances justifying a further reduction or removal of the disciplinary action.

DECISION

The Agency has sustained its burden of proof in this proceeding and the action of the Agency in issuing the written notice and in terminating the Grievant's employment and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the Agency's action concerning the Grievant is hereby upheld,

having been shown by the Agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

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, Virginia 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 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.

ENTER:

_____

John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).