Issues: Group II Written Notice (failure to follow policy) and Retaliation (other protected right); Hearing Date: 04/05/11; Decision Issued: 04/08/11; Agency: DBHDS; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 9532; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION

In the matter of: Case No. 9532

Hearing Date: April 5, 2011
Decision Issued: April 8, 2011

PROCEDURAL HISTORY

Grievant is a registered nurse for the Department of Behavioral Health and Developmental Services ("the Agency"), with many years of service. On November 3, 2010, the Grievant was charged with a Group II Written Notice for unauthorized use of residents' medical records on October 7, 2010. The applicable policy is Records Management SOP #1. The Written Notice carried no suspension. The Grievant had no other active Written Notices.

Grievant timely filed a grievance to challenge the Agency's disciplinary action. The outcome of the resolution steps was not satisfactory to the Grievant and she requested a hearing. On March 14, 2011, the Department of Employment Dispute Resolution ("EDR") appointed the Hearing Officer. A pre-hearing conference was held by telephone on March 21, 2011. The hearing ultimately was scheduled for the first date available between the parties and the hearing officer, April 5, 2011, on which date the grievance hearing was held, at the Agency's facility.

Both the Agency and Grievant submitted documents for exhibits that were, without objection, accepted into the grievance record, and they will be referred to as Agency's or Grievant's Exhibits, as appropriate. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant
Representative and Witnesses for Agency
Advocate for Agency

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?

The Grievant requests rescission or reduction of the Group II Written Notice.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency*. 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.

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 Agency's Standards of Conduct, DHRM Policy 1.60, defines Group II offenses to include offenses that have a significant impact on business operations and/or constitute neglect of duty, insubordination, the abuse of state resources, violations of policies, procedures, or laws.

Agency Exh. 5. An example of a Group II offense is failure to perform assigned work or otherwise comply with established written policy.

The Agency's Records Management No. 1, Confidentiality of Protected Health Information ("PHI"), provides that all clinical records, whether written or printed, paper or electronic, photographs, videotapes, or audiotapes, will be kept confidential. The policy provides that employees must confirm understanding of the policy and the signature of the confidentiality statement in the Employee Work Profile ("EWP") is sufficient. Further, the policy references the general awareness of HIPAA regulations. Breaches of confidentiality are described as including inappropriate access or disclosure of such records or information. Unauthorized use and/or misuse of PHI or records constitute a Group II offense. Agency Exh. 3.

The Offense

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 as a registered nurse for a number of years, without any other active disciplinary actions. In October 2010, the Grievant was issued a disciplinary due process notice of an alleged offense. In her defense of the alleged offense, the Grievant copied confidential PHI records of two facility residents and submitted the records as exhibits on her own behalf. The Agency considered the use of the residents' PHI records as the Grievant's personal use; not for a legitimate business purpose. Following the records management policy referenced above, the Agency issued a Group II Written Notice for unauthorized use and/or misuse of PHI or records.

The Agency's director of nursing testified that all staff members, including the Grievant, are trained in the Agency's policies for confidentiality of records, including HIPAA. The director of nursing testified that the Grievant's supervisor brought to her the concern over the Grievant's use of residents' medical records in defense of a proposed disciplinary action. The director of nursing testified that the policies, procedures, and expectations of the Agency require that staff not access or use residents' confidential records for a non-business reason or a personal reason. Defending herself in a disciplinary inquiry is considered personal use. The director of nursing further testified that the Grievant could have requested the records and they could have been provided, in redacted form, to protect the residents from unauthorized use of their confidential medical records. The director of nursing also denied that the discipline in this case was disparate treatment.

The Grievant's direct supervisor testified that her understanding and the training of all staff emphasizes that no one is allowed to copy residents' protected informaion for any reason other than accomplishing a work task. When she saw the Grievant's use of the residents' PHI, she notified the director of nursing.

The facility director testified that the violation was obvious and could not be overlooked. He denied any retaliatory intent because the violation was "cut and dry," like someone found sleeping on the job.

The Grievant testified that she copied the records as charged and submitted them in defense of a disciplinary due process notice. The Grievant testified that she did not consider this use of PHI to be prohibited by policy, and that copies of such records are made routinely to carry out the paperwork and other work of the facility. The Grievant asserted that her discipline was disparate treatment, and used as an example a situation in which a staff member, during an emergency concerning the life of a resident, was overheard discussing PHI. The Grievant did not provide any examples of use of PHI similar to her case.

The Grievant also testified that the Agency issued the Group II Written Notice as retaliation for her successful defense of a different charge of misconduct, albeit with the use of the residents' PHI records that are the subject of the current Group II Written Notice and grievance. The Grievant also advanced her belief that her prior complaints to management in 2010 concerning certain procedures and controls. *See* Grievant's Exhibits.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. 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).

Based on the evidence, including the Grievant's admission of copying the records for her use for defense of another disciplinary matter, I find that the Agency has met its burden of proof that the Grievant violated applicable policy. The offense, unless circumstances warrant mitigation, satisfies the Group II level of discipline because the policy itself declares unauthorized use of PHI to be a Group II offense.

Pursuant to applicable policy, 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*.

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution." The facility director testified that this was a "cut and dry" offense with a clearly stated level of discipline.

The Agency could have exercised discipline along the continuum short of a Group II Written Notice. The Agency had the discretion to elect less severe discipline. 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 Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution." 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. Grievant contends her otherwise good work history, service, and performance should provide enough consideration to mandate a lesser sanction than a Group II. However, length of service, 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.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. 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 applicable policy, 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, even if he would have levied a lesser discipline, he 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*.

The Agency presents a position in advance of its role as guardian of PHI and asserts that the Grievant's unauthorized use of PHI records warrants disciplinary action. The hearing officer accepts, recognizes, and upholds the Agency's important role in guarding the appropriate use of PHI and the valid public policies promoted by the Agency and its policies. I find that the unauthorized use of residents' PHI records for defense of a disciplinary due process notice is in violation of applicable policy. The Agency did not levy the maximum allowable discipline, namely up to 10 workdays of suspension with the Group II Written Notice. Thus, the Agency has exercised some restraint. Accordingly, I find no mitigating circumstances that render the Agency's action outside the bounds of reasonableness.

As argued by the Grievant, an Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;[1] (2) suffered a materially adverse action[2]; 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.[3]

Grievant engaged in protected activity because she participated to defend a prior, proposed disciplinary action against her.[4] The nature of her defense was to show that the alleged conduct was prevalent, and the Agency dropped the prior disciplinary inquiry. Grievant suffered a materially adverse action because she received disciplinary action that actually arose out of the

[1] *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.

[2] 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 that well might have dissuaded a reasonable worker from engaging in a protected activity.

[3] The EDR Director established this framework. *See*, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

[4] For purposes of this decision, I consider the Grievant's other complaints to management concerning management of the facility as protected activity.

Grievant's manner of defending the prior disciplinary inquiry. However, Grievant has not established a causal link between her protected activity and the materially adverse action she suffered. It is clear that the Agency issued disciplinary action against Grievant because it believed she engaged in inappropriate behavior as discussed above. The Agency did not take action against Grievant as a pretext for retaliation.

Finally, there is no evidence of disparate disciplinary treatment in this situation.

DECISION

For the reasons stated herein, the Agency's issuance of the Group II Written Notice must be and is **upheld**.

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 shown on the attached list.

Cecil H. Creasey, Jr.
Hearing Officer