Issues: Group II Written Notice (unsatisfactory attendance) and Termination (due to accumulation); Hearing Date: 05/26/11; Decision Issued: 06/01/11; Agency: DBHDS; AHO: Cecil H. Creasey, Jr.; Case No. 9592; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION

In the matter of: Case No. 9592

Hearing Date: May 26, 2011
Decision Issued: June 1, 2011

PROCEDURAL HISTORY

Grievant was a direct support associate ("DSA") for the Department of Behavioral Health and Developmental Services ("the Agency"), with close to 11 years of service. On January 24, 2011, the Grievant was charged with a Group II Written Notice for unsatisfactory attendance from January 20, 2010 through January 20, 2011. The applicable policy is the Agency's Joint Instruction #8-1, Employee Attendance. Based on the cumulative discipline of two prior, active written notices, a Group I for unsatisfactory attendance and a Group II for failure to follow policy, the discipline levied for the present offense was termination.

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 May 2, 2011, the Department of Employment Dispute Resolution ("EDR") appointed the Hearing Officer. A pre-hearing conference was held by telephone on May 3, 2011. The hearing ultimately was scheduled for the first date available between the parties and the hearing officer, May 26, 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
Advocate for 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, reinstatement and back pay.

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

The Agency's Joint Instruction # 8-1, Employee Attendance, provides that when an employee exceeds 8 occurences within a 12-month consecutive period, the employee attendance is unsatisfactory. Agency Exh. 3. An occurrence is an unscheduled absence from work or being more than 60 minutes late in reporting for work. *Id.*

The policy states that regular attendance in accordance with established work schedule is a condition of employment. The policy states that a Group I Written Notice is normally issued once an employee exceeds 8 occurrences within any 12-month consecutive period. The policy also states that a repeat offense of the same, active Group I Written Notice should result in the issuance of a Group II Written Notice.

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 DSA for about 11 years. The Grievant qualified for and obtained approved Family and Medical Leave Act ("FMLA") leave on various dates related to the care of an immediate family member. From January 20, 2010, through January 20, 2011, the Grievant had up to 13 occurrences of unplanned absences (not FMLA absences). Agency Exh. 2. Upon a "fairness" review, the Agency reduced the occurrences to 11 during the 12-month period. The Agency witnesses testified that they apply the policy consistently for all employees, and that the Agency applies progressive discipline to address the attendance policy violations.

The Grievant has two prior, active Written Notices. Agency Exh. 5. As is her right, the Grievant elected not to testify or present any witnesses.

The Agency's program director and assistant human resources director testified that none of the Grievant's approved FMLA leave was counted as occurrences under the attendance policy. Thus, without any contrary evidence, the unrebutted evidence is that, during the applicable 12-month period, the Grievant had at least 11 occurrences. The Agency's witnesses testified that it is charged with constant care for intellectually disabled adults, 24 hours per day, every day. Thus, employee attendance is critical to the Agency's mission and responsibilities, and unplanned absences is very disruptive of the Agency's primary responsibilities.

On cross-examination, the Agency witnesses conceded that the Grievant's pattern of occurrences within the 12-month period was improving. However, the Agency's witnesses testified that an aggravating factor was the continuing, repeat nature of the unsatisfactory attendance coupled with the cumulative effect of the Written Notices. With the current Written

Notice, the Grievant's active disciplinary record contains two Group II Written Notices plus one Group I Written Notice.

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 unrebutted evidence of at least 11 occurrences, I find that the Agency has met its burden of proof that the Grievant violated applicable policy. Because the offense is a second Written Notice for unsatisfactory attendance, unless circumstances warrant mitigation, it satisfies the Group II level of discipline.

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 Agency witnesses testified that the Agency applies the policy and progressive discipline consistently for all employees, and discipline in this claim, including termination, was applied consistently.

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 with termination. 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 caretaker of intellectually disabled adults and asserts that the Grievant's unsatisfactory attendance warrants consistent

disciplinary action. The hearing officer accepts, recognizes, and upholds the Agency's important role in caring for its charges and the valid public policy promoted by its attendance policy. I find that the Grievant's occurrences in excess of 8 within the 12-month consecutive period is in violation of applicable policy. The Agency levied the maximum allowable discipline, namely termination, as is the normal consequence with this record of active written notices. The Agency asserted that it consistently applied the progressive discipline, and that the disciplinary record exceeds two Group II Written Notices that normally warrant removal.

Finally, there is no evidence of disparate disciplinary treatment in this situation. Accordingly, I find no mitigating circumstances that render the Agency's action outside the bounds of reasonableness.

DECISION

For the reasons stated herein, the Agency's issuance of the Group II Written Notice with termination 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