Issue: Group II Written Notice with Suspension (failure to follow instructions and violation of safety rule); Hearing Date: 06/21/11; Decision Issued: 06/22/11; Agency: UVA; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 9617; Outcome: Partial Relief.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 9617

Hearing Date: June 21, 2010
Decision Issued: June 22, 2010

PROCEDURAL HISTORY

University of Virginia ("Agency") issued to the Grievant a Group II Written Notice on March 29, 2011, for failure to follow instructions/policy and a safety rule violation. Agency Exh. 2. The discipline for the current Group II Written Notice was suspension for five days.

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 June 8, 2011, the Department of Employment Dispute Resolution ("EDR") appointed the Hearing Officer. A pre-hearing conference was held by telephone on June 9, 2011, at which time the Grievant was unavailable by telephone.[1] The hearing was scheduled for June 21, 2011, on which date the grievance hearing was held, at the Agency's human resources office.[2]

The Agency submitted documents for exhibits that were, with some objections from the Grievant overruled, admitted into the grievance record, and they will be referred to as Agency's Exhibits. The hearing officer has carefully considered all evidence presented.

[1] The hearing officer reached the Grievant by telephone and arranged the telephonic pre-hearing conference for later in the day on June 9, 2011. At the appointed time, the Grievant did not answer the hearing officer's phone call and the hearing officer left a voice message. After waiting a reasonable time, the hearing officer conducted the pre-hearing conference with the Agency's advocate for the limited purpose of scheduling the grievance hearing. Written notification of the hearing and schedule for exchange of witness lists and exhibits was sent to the Grievant on June 9, 2011, via email and regular U.S. Mail. The Grievant left the hearing officer a phone message in the following days apologizing for missing the pre-hearing conference.

[2] Upon receipt of the Agency's proposed exhibits, the Grievant moved to continue the hearing so that she could have a longer time to prepare. The Grievant indicated that she was seeking legal counsel related to her separation from employment. A telephonic hearing was conducted on June 20, 2011, for approximately one hour, with the Grievant and Agency's advocate arguing the Grievant's continuance motion. While the Grievant expressed some issues regarding her subsequent, alleged involuntary separation from employment with the Agency, the only issue before the hearing officer is the Group II Written Notice with five days suspension issued March 29, 2011. The hearing officer ruled that the Grievant had not shown justified cause for continuing the hearing and/or extending the required time in which to conclude the grievance hearing.

APPEARANCES

Grievant
Representative/Advocate for Agency
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?

The Grievant requests rescission or reduction of the Group II Written Notice and rescission of the five-day suspension.

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, Policy 1.60, defines Group II offenses to include acts of misconduct of a more serious nature that significantly impact agency operations, such as failure to follow supervisor's instructions. Group I offenses generally include offenses that have a relatively minor impact on agency business operations, such unsatisfactory work performance. Agency Exh. 9.

The written policy the Agency relied upon is Policy No. 100, Telephone calls. Agency Exh. 3. The policy states, "This policy outlines the process and procedure for handling these calls in a timely manner." Id. at ¶ C. It further states, after making the available appointment, "If a patient (or referring physician's office) states it is medically necessary for the appointment to be made sooner, the access staff member is to obtain the reason for this request and contact information. This information will be placed in a telephone encounter in EPIC and sent to the clinical nurse pool for a clinic staff person to review."[3] Id. at ¶ D.1. The policy further states, "All patients will receive a phone call within 24 business hours from the clinic (front desk, clinical or physician) to follow up on the medical concern issues." Id. at ¶ D.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 an access specialist in the Agency's ambulatory care clinic with many years of experience and service. Her job entailed taking phone calls and scheduling medical appointments, among other tasks.

On March 29, 2011, the Agency issued the Grievant a Group II Written Notice, with five days suspension, stating

> [Grievant] scheduled a patient on 3/14/11 @ 10:42 AM to be seen in clinic on 5/24/11. The patient was a child who had a bead lodged in her ear. [Grievant] recorded that the bead was stuck in the child's nose. Per department policy [Grievant] was to notify the clinical staff immediately requesting an emergency appointment. [Grievant] failed to do this as instructed; this placed the patient in danger. It wasn't until 3/15/11 @ 2:17 PM that [Grievant] notified the clinical staff as a result [sic], the patient ended up going to [the] ER on 3/15/11 where she was scheduled to see [the clinic's doctor] on 3/16/11.

[3] EPIC is a medical records software system used by the Agency and instituted within the last year.

The Group II codes were 13 (Failure to follow instructions and/or policy), 14 (Safety rule violation), and 99 (Other—patient safety).

The Grievant's supervisor testified that on the morning of March 14, 2011, the Grievant received a call referral from the patient's physician as referenced above. The Grievant scheduled the first available appointment on May 24, 2011. On March 15, 2011, the Grievant sent an electronic note to the nurse asking for an earlier appointment because of the situation. On the same day, the nurse offered an appointment with another physician on March 18, 2011. The Grievant did not respond to the nurse's note until March 18, 2011. Meanwhile, the patient sought treatment at the ER on March 15, 2011, and received a referral to the Agency clinic physician and was seen on March 16, 2011.

The supervisor testified to a history of informal counseling and performance reviews regarding the Grievant's history of errors in scheduling appointments and other errors concerning keeping up with her work on the EPIC software system. Agency Exhs. 4, 5, 6 & 7. The supervisor testified that the Grievant stood out among her co-workers for unsatisfactory performance. The supervisor testified that the reference to "24 business hours" in Policy No. 100 would cover three full business days, but that the unwritten practice is for the return telephone call to be made within 24 actual hours, unless there is an intervening weekend.

The supervisor testified that she considered the misconduct a Group II offense because of the potential danger to the patient and the repeated behavior and continuing counseling she and her predecessor have given the Grievant.

Another access specialist testified to the job duties and training on the EPIC electronic records system. The co-worker testified to attending a daylong in-class training. The supervisor testified that the in-class training was only a two-hour course—not a daylong course. The Agency, with the Grievant's consent, obtained the Grievant's training records. Agency Exh. 10. The supervisor testified that the records indicate the Grievant attended the two-hour in-class training, and that access to the EPIC system was contingent on successful completion of that training course.

The Grievant, on the other hand, testified that she participated in many computer based learning (CBL) training courses at home, which proved difficult for her, but she denied ever attending an in-class training, even the two-hour course. The Grievant testified that she struggled with the EPIC software system and repeatedly asked for training on it. The Grievant also testified that she recorded the child had a bead in her nose, as opposed to her ear, because that was the information called in to her. The Grievant testified that she thought she sent the EPIC message to the nurse on March 14, 2011, asking for an earlier appointment than the "next available." The Grievant noticed on March 15, 2011, that the message to the nurse had not been sent and she sent it.

The Grievant never returned the call to the patient's referring physician or the patient regarding scheduling an appointment. The Grievant attributed that failure to the fact that the patient was already seen in the ER and also seen in the clinic by March 16, 2011. The Grievant's internal rescheduling efforts on March 18, 2011, however, are not consistent with the Grievant

having known of the patient's ER and clinic visits days before. Perhaps the Grievant learned of this information at some point that led her not to call the patient. However, the Grievant concedes that her performance in this instance, and overall, was sub-par.

The Agency has the burden of proof of all the elements of the discipline levied. Based on the evidence presented, I find that the Agency has met its burden of proof that the Grievant has committed misconduct. However, there is no basis to find that the Grievant negligently or carelessly noted the location of the bead in the child's nose rather her ear. The Grievant's unrebutted testimony is that the caller identified the nose rather than the ear. I find that the misconduct associated with the delay in handling the scheduling was partly related to the Grievant's inaccurate use or lack of skill with the software program EPIC. The misconduct was at least compounded by the Grievant's lack of skill with EPIC, and this lack of skill can be directly related to training. However, the record is unclear, conflicting, and does not preponderate in showing that the Grievant completed the two-hour in-class training as asserted by the Agency.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

> While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy..."the hearing officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

The offense of not completing the appointment scheduling on a timely basis could be classified as unsatisfactory work performance, a typical Group I offense, or the more serious Group II for failing to follow policy.

The Standards of Conduct permit a Group I offense to be disciplined as a Group II offense for repeated violations of the same offense. However, in this matter, there is no evidence of prior, active Written Notices of repeat misconduct. Although there was a record of prior counseling, this is the first formal discipline. The Agency, thus, has not met its burden of justifying a Group II Written notice based on prior counseling. As for the written policy identified, Policy No. 100, the policy states that the return call to the patient for medical concern issues may be made up to three business days later (24 business hours) and can come from the front desk, clinical or physician. Although the Grievant did not specifically argue the technicalities of the policy at issue, the Grievant expressed her general assertion that she did not

knowingly do anything wrong and did not endanger the child. I find that the policy, read plainly, does not expressly require a return telephone call by the Grievant within 24 hours. However, in this case, the return call by the Grievant would not have been made within the three business days, either.

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.

The Grievant advances the position that the discipline is too severe and should be mitigated. Her contention is that she lacked adequate training and actually repeatedly asked for more training on the EPIC software. While I find the Agency has met its burden of proof of misconduct, the hearing officer should consider mitigation.

Although the Agency could have done so, it did not levy up to 10 days suspension as allowed by the Standards of Conduct for a Group II Written Notice. The Agency voiced that it has conducted progressive discipline, including the multiple instances of informal counseling for the Grievant before issuing the present Group II Written Notice. The Agency asserts that issuing only five days suspension was further evidence of its restraint.

In light of the standard set forth above in the *Rules*, the hearing officer is not a "super-personnel officer." Therefore, the hearing officer should give the appropriate level of deference to actions by Agency management that are found to be consistent with law and policy, even if he disagrees with the action. However, the Hearing Officer finds that the Grievant's lack of training on EPIC is a mitigating circumstance, but not completely mitigating. I find that the Grievant's lack of skill with manipulating the notes within EPIC played a part in her errors in this scheduling offense. Accordingly, this mitigating factor causes the Group II discipline to exceed the limits of reasonableness and compels a reduction of the disciplinary action from the Group II offense to a Group I offense for unsatisfactory work performance.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of the Group II Written Notice of disciplinary action with five-day suspension is **reduced** to a Group I Written Notice for unsatisfactory work performance, without suspension. The Group I Written Notice does not permit any suspension.

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 as indicated on the attached cover sheet.

Cecil H. Creasey, Jr.
Hearing Officer