Issues: Group I Written Notice (unsatisfactory performance) and Termination (due to accumulation); Hearing Date: 06/27/11; Decision Issued: 07/22/11; Agency: DBHDS; AHO: John V. Robinson, Esq.; Case No. 9599; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 9599

Hearing Officer Appointment: May 9, 2011
Hearing Date: June 27, 2011
Decision Issued: July 22, 2011

PROCEDURAL HISTORY, ISSUES AND PURPOSE OF HEARING

The Grievant requested an administrative due process hearing to challenge termination of his employment effective March 1, 2011, pursuant to a Group I Written Notice issued by Management of the Department of Behavioral Health and Developmental Services as described in the Grievance Form A dated March 4, 2011. The termination resulted from the Grievant's accumulation of an active Group III, Group II and the Group I Written Notice. The Grievant is seeking the relief requested in his Grievance Form A, including reinstatement and he is also seeking back-pay and restoration of all benefits if he prevails.

The hearing officer issued a Scheduling Order entered on May 17, 2011 (the "Scheduling Order"), which is incorporated herein by this reference.

At the hearing, the Grievant represented himself and the Agency was represented by its advocate. 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 burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances.

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

APPEARANCES

Representative for Agency
Grievant
Witness for Agency

FINDINGS OF FACT

1. The Grievant was formerly employed as a Direct Service Associate III by the Agency at a facility (the "Facility") which houses and provides all care needs for approximately 400 individuals with varying degrees of learning disabilities.

2. The Facility employs approximately 1,300 full-time staff to meet the needs of its clientele, who cannot care for themselves.

3. Staffing and timely attendance by staff are critical and the Grievant essentially was employed as a primary care provider.

4. The Facility is managed by and audited annually by the Virginia Department of Medical Assistance Services ("DMAS") and the Department of Justice ("DOJ").

5. If the Facility does not meet the minimum care levels prescribed by DMAS and DOJ, the funding of the Facility could be jeopardized.

6. The Grievant's supervisor (the "Supervisor") was an Assistant Building Manager at the Facility.

7. Grievant reported late to work by more than ten (10) minutes on each of January 4, 2011, January 31, 2011, February 1, 2011 and February 12, 2011. AE 1.

8. Accordingly, the Grievant's shift supervisors on each applicable above date issued the Grievant a tardy. AE 8-9. The Grievant did not seek mitigation or challenge any tardy because of "an unusual or emergency situation" as the Agency Attendance Policy allows. AE 3.

9. Subsequently, on March 1, 2011, the Supervisor issued a Group I Written Notice for "Fourth Tardy in a 3 month period (01/04/11, 01/31/11, 02/01/11 and 02/12/11). Failure to comply with Facility Policy VII.A.10(a) "Attendance". 24 Hour Letter issued on 02/17/11." AE 1.

10. The Grievant's employment was terminated effective March 1, 2011 resulting from the Grievant's accumulation of the subject Group I Written Notice, an active Group III Written Notice – Sleeping on duty (8/29/10) (AE 5) and an active Group II Written Notice – Refusal to work overtime (9/28/10) (AE 6).

11. The testimony of the Supervisor was credible and was not challenged at the hearing by the Grievant. The demeanor of the Supervisor 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). 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 and Agency policy, the Grievant's conduct could clearly constitute a Group I offense, as asserted by the Agency.

Agency Policy provides in part:

> Group I Offenses include, but are not limited to:
>
> (1) Unsatisfactory attendance or excessive tardiness (i.e. . . excessive tardiness with more than three tardies of more than 10 minutes over a three-month period).

AE 4. *See also,* Agency Attendance Policy at AE 3.

In this instance, the Agency appropriately determined that the Grievant's violations of its attendance policy constituted a Group I Offense.

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 Group I Written Notice 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 Group I offense.

The hearing officer also agrees with the Agency's advocate that the Grievant's accumulation of the active Group III, Group II and Group I Written Notices justified the Agency's action in terminating the Grievant's employment, effective March 1, 2011, being consistent with law and policy.

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 consider mitigating factors in disciplining the Grievant.

While the Grievant did not specifically raise mitigation in the hearing or in his 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;

2. the often difficult and stressful circumstances of the Grievant's work environment;

3. the Grievant's difficult family circumstances, being a single dad to his children who have their own demanding healthcare needs; and

4. the Grievant's honesty and forthrightness at the hearing.

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 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.

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 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:

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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).