Issue: Group II Written Notice with Suspension (failure to follow instructions); Hearing Date: 02/28/17; Decision Issued: 03/20/17; Agency: VCCS; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 10934; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 10934

Hearing Date: February 28, 2017
Decision Issued: March 20, 2017

PROCEDURAL HISTORY

Grievant is a human resource analyst with the Virginia Community College System (the Agency), with many years of service. On September 30, 2016, the Agency issued to the Grievant a Group II Written Notice, for failure to follow supervisor's instructions, with five days suspension. The Grievant has a prior disciplinary record of one active Group I Written Notice and one active Group II Written Notice.

Grievant timely filed a grievance to challenge the Agency's disciplinary action, and the grievance qualified for a hearing. On January 3, 2017, the Office of Employment Dispute Resolution, Department of Human Resource Management (EDR), appointed the Hearing Officer. During the pre-hearing conference, the grievance hearing was scheduled first for February 15, 2017, but, on the Grievant's motion, rescheduled for February 28, 2017, on which date the grievance hearing was held, at the Agency's designated location.

Both the Grievant and the Agency submitted documents for exhibits that were accepted into the grievance record, and they will be referred to as Agency's or Grievant's exhibits as numbered, respectively. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant
Counsel for Grievant
Agency Representative
Counsel 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?

Through her grievance filings and presentation, the Grievant requested rescission of the 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. However, § 5.8 states *"[t]he employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline*." 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.

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 State Standards of Conduct, DHRM Policy 1.60, provides that Group II offenses include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action. This level is appropriate for 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. 7. Failure to follow instructions and repeated instances of poor job performance specifically are considered Group II offenses. *Id.*

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 the Grievant as a human resource analyst, with a long tenure at the Agency. The Grievant has a disciplinary record of one prior active Group I and one prior active Group II Written notice. Agency Exhs. 3, 5 and 6. The current Group II Written Notice detailed the offense in the attachment to the Written Notice, a notice of intent memo from the Grievant's supervisor:

> On July 28, 2016 I sent you an email to confirm your work hours. I stated to you,
>
> *It appears you have been making many adjustments to your work schedule recently. In the future, I would like for you to let me know in advance if your work schedule will be different than your scheduled 7:30am until 4:30pm, Monday through Friday schedule, with a one hour lunch. If you must deviate from this schedule, please let me know in advance. As your supervisor, I should know about these schedule changes so I am aware of your schedule and workload status.*
>
> *Let me know if you have any questions.*

As of the date of this memo, I have not received any response from you concerning the content of this email and I have not received any notification of you needing to adjust any of work hours.

On September 1, 2016, I met with you and again reiterated your work hours and sent you the following email to recap our meeting.

[Name of Grievant]

This is a recap of the meeting we had this afternoon. On July 28, 2016, I sent you an email asking you to let me know any time you have adjustments in your work schedule. Your work hours are from 7:30am until 4:30pm, Monday through Friday. In the past, I have not had an issue with you coming in a few minutes late because I would see you working during lunch or staying a few minutes past your work schedule. However, now you are tracking all of your work time, such as stated in the attached email, therefore, I must also track all of your work time too. As you can see, the time you are tracking listed in the email did not include the 10 to 15 minutes you come in late every day without explanation or leave approved by me. You are late to work every day. You typically arrive around 7:40am to 7:45am. Your start time is 7:30am. I expect you to begin your work day at 7:30am beginning your next work day. If you must be late, or come to work past 7:30am for any reason, contact me.

If you have any additional questions or information on these topics, please feel free to contact me.

Agency Exh. 2. The supervisor testified consistently with the allegations in the Written Notice. In addition, the supervisor testified that following her initial direction to the Grievant in July 2016, the Grievant's attendance and notification of changes did not improve. Agency Exhs. 11 and 12. The supervisor testified that the Grievant's time variances and her high volume of after-the-fact leave requests were unique among staff reporting to the supervisor, and that the Grievant's level of schedule deviations are unusual and disruptive for the relatively small office. The supervisor testified that her staff members may request flexible work schedules, but all staff members are expected to work their designated schedules. The supervisor also testified that the discipline was specifically limited to the Grievant's conduct after July 28, 2016, her initial memo regarding the issue. The supervisor elected not to pursue termination for the second active Group II Written notice and to reduce the planned discipline from ten days suspension down to five days suspension, believing that was sufficient to get the Grievant's attention to this issue.

The supervisor also testified that there was no "time clock" for the exempt employees, like the Grievant, to use. She did not have other employees' time similarly recorded because no other staff members were making extensive deviations to their work schedule beyond simple, infrequent instances of tardiness.

The Grievant's time recorded for Agency's Exhs. 11 and 12, and used to support the discipline, was kept by K, a co-worker, at the supervisor's direction. The co-worker, K, testified that she did not enjoy a good relationship with the Grievant, but she was attentive and checked

her time recording to make sure it was accurate. K testified to her belief that the Grievant was abusing her work schedule.

The Grievant testified that she did not have a good relationship with K, they had mutual complaints against each other, and that K had motive to make the Grievant look bad. The Grievant was unaware of her time was being observed. The Grievant also asserted that her discipline should be limited to what it is—tardiness, at most a recognized Group I offense. The Grievant also testified that her relationship with her supervisor went downhill after her prior grievance that was concluded by hearing officer's decision, issued July 5, 2016. Agency Exh. 6. The Grievant testified that she understood that her office had a flexible work culture, but she could not refute the time record included in Agency's Exhs. 11 and 12. The Grievant believed the discipline unduly singled her out and was an act of retaliation for her prior grievance, a protected activity.

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 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. DHRM Policy 1.60 As long as it acts within law and policy, the Agency is permitted to apply exacting standards to its employees.

EDR's *Rules for Conducting Grievance Hearings* (*Rules*) provides that "a hearing officer is not a 'super-personnel officer'" therefore, "in providing any remedy, 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." *Rules* § VI(A). More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

> (i) the employee engaged in the behavior described in the Written Notice,
> (ii) the behavior constituted misconduct, and
> (iii) the agency's discipline was consistent with law and policy,
>
> the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.

Rules § VI(B).

Based on the manner, tone, and demeanor of the testifying supervisor, I find that she has reasonably described a behavior concern that she, as the supervisor, is positioned to address. Accordingly, I find that the Agency has met its burden of showing the Grievant's conduct as charged in the Written Notice. Further, I find that the offense is appropriately considered a Group II offense. Failure to follow supervisor's instructions is a policy designated Group II offense. Granted, as the Grievant has contended, tardiness is an example of a Group I offense. However, in this case, the Grievant was specifically counseled and directed by her supervisor explicitly to address her pattern of leave requests and to notify the supervisor in advance. The repeated occurrences of the failure to comply with the supervisor's direction could establish a more severe Group II Notice even for a Group I offense grounded in tardiness. The Grievant's contention that, at most, she is guilty of the lesser charge of tardiness is not persuasive. The Agency's evidence preponderates in showing the Grievant's conduct to be a substantive, serious matter. Following direct supervisor's instructions is a serious expectation.

The grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. The Agency has the burden to prove that the Grievant is guilty of the conduct charged in the written notice. Such decision for discipline falls within the discretion of the Agency so long as the discipline does not exceed the bounds of reasonableness. Thus, the Agency has borne its burden of proving the offending behavior, the behavior was misconduct, and Group II is an appropriate level offense.

Mitigation

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 Office of Employment Dispute Resolution." 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.

While the hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances, the hearing officer is permitted to mitigate a disciplinary action if, and only if, it exceeds the limits of reasonableness. There is no authority that requires an Agency to exhaust all possible lesser sanctions or, alternatively, show that termination was its only option. Even if the hearing officer would have levied a lesser discipline, the Agency has the management prerogative to act within a continuum of discipline as long as the Agency acts within the bounds of reasonableness.

On the issue of mitigation, EDR has ruled:

> Importantly, because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management. Rather, mitigation by a hearing officer under the Rules requires that he or she, based on the record evidence, make findings of fact that clearly support the conclusion that the agency's discipline, though issued for founded misconduct described in the Written Notice, and though consistent with law and policy, nevertheless meets the Rules "exceeds the limits of reasonableness" standard. This is a high standard to meet, and has been described in analogous Merit System Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.

EDR Ruling No. 2010-2483 (March 2, 2010) (citations omitted). EDR has further explained:

> When an agency's decision on mitigation is fairly debatable, it is, by definition, within the bounds of reason, and thus not subject to reversal by the hearing officer. A hearing officer "will not freely substitute [his or her] judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"

EDR Ruling No. 2010-2465 (March 4, 2010) (citations omitted).

The Agency presents a position in advance of its obligation and need to manage the important affairs of the Agency. The hearing officer accepts, recognizes, and upholds the Agency's important responsibility for its mission to the college community. The Grievant's position placed her in a responsible role, and the Grievant's conduct as documented by the Agency was contrary to the Agency's expectations and instructions. I find that the Agency has demonstrated a legitimate business reason and acted within the bounds of reason in its discipline of the Grievant.

A Group II Written Notice with five days suspension is arguably a harsh result, but the Agency has demonstrated mitigation and restraint since two active Group II Written Notices normally warrants termination. A Group II Written Notice may include suspension of up to 30 days. Regardless, however, there is no requirement for an Agency to exhaust all possible lesser sanctions or, alternatively, to show that the chosen discipline was its only option. While the Agency could have justified or exercised lesser discipline, a hearing officer may not substitute his judgment for that of Agency management. I find no mitigating circumstances that render the Agency's action of a Group II Written Notice with five days suspension outside the bounds of reasonableness, particularly considering the other active Group II Written Notice. The conduct as stated in the written notice occurred. The normal result of two Group II Written Notices is termination. Here, the Agency credibly asserts that it has exercised reasonable discretion and has already mitigated the discipline.

Finally, the Grievant asserted that the Agency's discipline of her was disparate treatment, but there was insufficient evidence presented to support the assertion. While the Grievant successfully demonstrated that all employees are, from time to time, a few minutes tardy, there is nothing to show that the Agency's handling of this discipline was in any way disparate treatment beyond the Grievant's mere allegation. Grievant has not presented sufficient evidence to show that the Agency's discipline was applied inconsistently. Rather, it appears that the determinations were based on the Grievant's actual conduct, all of which actions were within the Grievant's control. While lesser discipline was within the discretion of Agency management, the Agency acted within its discretion by issuing a Group II Written Notice.

Accordingly, I find no mitigating circumstances that allow the hearing officer to reduce the Agency's action.

Retaliation

The Grievant asserts that the Agency's action is motivated by retaliation. For a claim of retaliation to succeed, the Grievant must show (1) she engaged in a protected activity; (2) she suffered a materially adverse action; and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took a materially adverse action because the employee had engaged in the protected activity. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006); s*ee, e.g.*, EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633. If the Agency presents a nonretaliatory business reason for the adverse action, then the Grievant must present sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation. *See EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 405 (4th Cir. 2005). Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

The Grievant engaged in protected activity by exercising her grievance rights culminating in the hearing officer's decision issued July 5, 2016. Agency Exh. 6. The Grievant asserts that the retaliation she has experienced stems from this prior grievance process that temporally coincided with the Agency's pursuit of this present discipline. Further, she could be viewed as having potentially suffered a materially adverse action due to the agency's discipline and suspension. However, the Grievant does not satisfy the burden of proof of showing that the materially adverse action was taken because of his protected activity.

There is nothing to suggest that the Agency's handling of this discipline was in any way retaliatory beyond the Grievant's mere allegation. The Agency has addressed a noticeable occurrence or occurrences of conduct with the Written Notice. Grievant has not presented sufficient evidence to show that the Agency's discipline was motivated by improper factors. Rather, it appears that the determinations were based on the Grievant's actual conduct and behavior, all of which was solely within the control of the Grievant.

DECISION

For the reasons stated herein, I uphold the Agency's discipline of a Group II Written Notice with five days suspension.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

   Director
   Department of Human Resource Management
   101 North 14th St., 12th Floor
   Richmond, VA 23219

   or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

   Office of Employment Dispute Resolution
   Department of Human Resource Management
   101 North 14th St., 12th Floor
   Richmond, VA 23219

   or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[1]

[1] Agencies must request and receive prior approval from EDR 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