Issues: Group II (unsatisfactory performance), Group II (failure to follow instructions/policy), Group II (unsatisfactory attendance), and Termination; Hearing Date: 01/26/18; Decision Issued: 01/30/18; Agency: VDOT; AHO: Cecil H. Creasey, Jr.; Case No. 11141; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management
Office of Equal Employment and Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 11141

Hearing Date: January 26, 2018
Decision Issued: January 30, 2018

PROCEDURAL HISTORY

Grievant was a business coordinator with the Virginia Department of Transportation (the Agency) since 2015. In the fall of 2017, the Agency issued to the Grievant three separate Group II Written Notices. The third, issued November 9, 2017, resulted in job termination based on the accumulation of Written Notices.

Grievant timely filed grievances to challenge the Agency's disciplinary actions, and the grievances qualified for a hearing. On December 11, 2017, the Office of Equal Employment and Dispute Resolution, Department of Human Resource Management (EEDR), appointed the Hearing Officer to hear the grievances of all three Written Notices. During the pre-hearing conference, the grievance hearing was scheduled for January 26, 2018, 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 Notices?

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?

Within her grievance filings, the Grievant seeks the following relief:

> I want to have each of these three Written Notices issued to me in this case rescinded and removed from all of my personnel files and records with the Agency (VDOT) or with any other agency of the Commonwealth of Virginia. I also want to be reinstated to my position of employment with the Agency from which the Agency has wrongly terminated me. I also want to be restored to any and all lost pay and benefits that I suffered as a result of these Written Notices and the termination. And, of course, I do not want to be retaliated against in the future over my having brought this within grievance or over my engaging in any other legally protected activity. I also want to be reimbursed for any out of pocket expenses I have had to incur as a result of the termination. I also want to be awarded any reasonable attorney's fees that I may have to incur in this case.

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, and, specifically, failure to follow supervisor's instructions or comply with written policy. Agency Exh. 9. The policy allows offenses typically associated with one offense category to be elevated to a higher level offense. The Standards of Conduct provides:

> Employees who contribute to the success of an agency's mission:
>
> - Report to work as scheduled and seek approval from their supervisors in advance for any changes to the established work schedule, including the use of leave and late or early arrivals and departures.
>
> . . .
>
> - Use state equipment, time, and resources judiciously and as authorized.
>
> . . .

- Utilize leave and related employee benefits in the manner for which they were intended.

. . .

- Meet or exceed established job performance expectations.

Agency Exh. 9, p. 2.

DHRM Policy 4.57 provides the Virginia Sickess and Disability Program. Agency Exh. 10. Agency Policy No. 2.21 addresses Outside Employment. It provides

> Employees must verbally notify their immediate supervisor of employment outside of their primary VDOT employment and work schedule. Employees shall request formal approval by completing and submitting the VDOT Outside Employment Request and Release Form to their immediate supervisor. A request may be denied by management only at the formal written notification stage. Once submitted to the supervisor, the Outside Employment Request and Release Form must be forwarded and evaluated by the next level manager, and receive final approval by the HR Manager.

Agency Exh. 8.

The Offenses

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 business coordinator since 2015. Other than the currently grieved three Group II Written Notices, there are no other Written Notices of record.

The Group II Written Notice issued October 27, 2017, detailed the offense:

> This written notice is for Unsatisfactory Work Performance and Poor Attendance. [redacted] has received two counseling memorandums this year in regards to her unsatisfactory performance and poor attendance as well as being issued a notice of needs improvement plan. [redacted] did file a VSDP Claim thru our third party vendor, The Reed group on 09/27/2017 for the time period of 08/18/2017 through 10/01/207 however, [redacted] did not provide sufficient documentation to The Reed group or to the HR Benefits Team in a timely matter in order for the claim to be processed. After the HR Benefits reached out to The Reed group on September 19, 25, 28 and October 2, 5, 11, they were notified on 10/17/2017 that the claim had been declined (per attached) for failure to meet plan guidelines. [redacted] is currently in a Leave without pay status for any absence/time away from the office.
>
> [redacted] returned to the office on October 2, 2017 and since her return, she has been late 4 times and only notified me twice that she was going to be late. On October 16, 2017, [redacted] called in to say she was attending a funeral later that day and would not make it to work. After guidance from management I called her back to tell her the absence would be unexcused and she needed to report to work within 1 hour. [redacted] called back at 10 AM and said she was sick and could not come in the office. On October 24, 2017, [redacted] left work without supervisor's approval.

Since [redacted]'s return to work she has failed to follow her supervisor's instructions and failed to perform assigned work, specifically ordering office supplies and starting monthly expenditure reports.

While [redacted] continues to be absent from work, staff members have had to take on additional workloads to meet needs of the division and customers.

Agency Exh. 5.

The Group II Written Notice issued November 3, 2017, detailed the offense:

This written notice is for failure to follow instructions and/or policy. [redacted] is in violation of VDOT policy 2.21, outside employment and the Standards of Conduct, Policy 1.60, failure to obtain approval from supervisor prior to accepting outside employment.

On October 27, 2017 at 8:20 PM, I saw [redacted] drive into the Pizza Hut on 5100 Williamsburg Road, Richmond, VA and park her car in the space tagged for delivery drivers only. She was wearing a pizza hut shirt and she went in the back entrance which is for employees only.

Policy 2.21 states the employees must verbally notify their immediate supervisor of employment outside of their primary VDOT employment and work schedule. The employee must request formal approval by completing and submitting the VDOT outside Employment Request and Release Form to their immediate supervisor. [redacted] did not verbally notify me of outside employment nor did she complete and submit the VDOT Outside Employment Request and Release Form.

Agency Exh. 4.

The Group II Written Notice issued November 9, 2017, detailed the offense:

This written notice is for Poor Attendance. [redacted] has received two counseling memorandums this year in regards to her poor attendance as well as being issued a notice of needs improvement plan which addressed attendance issues. [redacted] was written up on October 27, 2017 for poor attendance. Just recently, she had two unexcused absences on November 2nd, 3rd, and 6th 2017. [redacted] is currently in a Leave without pay status for any absence/time away from the office.

While [redacted] continues to be absent from work, staff members have had to take on additional workloads to meet needs of the division and customers.

Agency Exh. 3. This third Group II Written Notice included job termination based on the accumulation of three active Group II Written Notices.

The supervisor testified consistently with the allegations in the Written Notices. She testified to the history of the counseling memoranda and the plan for improvement that preceded the issuance of the first Written Notice. Agency Exhs. 6 and 7. Additionally, she testified the Grievant did not notify her of the outside employment, as required by policy.

The division director testified that she was aware of the Grievant's attendance and performance issues, and they adversely affected the business operations of the Agency.

The human resources manager testified in corroboration of the attendance issues and failure of the Grievant to notify the Agency of her outside employment and lack of Agency approval, pursuant to policy.

The Grievant testified that her absences were caused by illness brought on by the stress of her job. She testified that the Agency had retaliated against her for her outspokenness and assistance to another employee seeking benefits. Grievant's Exh. 4. She testified that she was seeking short-term disability (STD) and Family and Medical Leave Act (FMLA) benefits. While she elected not to respond to the due process notifications for the first two Written Notices, she testified that she did not timely receive the due process notice mailed to her regarding the November 9, 2017, Written Notice and termination. She testified that she would have responded, and she believed her application for FMLA benefits ultimately would have excused the absences that led to the November 9, 2017, Written Notice and termination.

The Grievant testified to her passing performance evaluation for the 2015-2016 performance year. Grievant's Exh. 5. She believed the Agency's actions were directed to her more out of retaliation than on the merits. For bases of retaliation, the Grievant referred to 1) her responsive emails frankly expressing her sharp disagreement with the Agency's view of her performance, and 2) her noted assistance to another employee seeking FMLA benefits.

In rebuttal, the Agency's total awards manager testified that the Grievant's application for STD and FMLA benefits was denied by the state's outside administrator for insufficient documentation. Regarding a separate, internal request from the Grievant for FMLA benefits, the application was not submitted timely, and, by the time the review was being conducted, the third Written Notice had been issued with job termination on November 9, 2017. The manager testified, however, that because of the job termination no internal decision on FMLA was issued. She testified that the application would have been denied because it included only supporting documentation identical to that previously denied by the outside administrator.

The supervisor testified in rebuttal that she was unaware of any issue regarding the Grievant's purported assistance to another employee seeking benefits.

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 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.

EEDR'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).

In sum, 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. Based on the manner, tone, and demeanor of the testifying supervisor and other Agency witnesses, I find that the Agency has reasonably described behavior concerns that the Agency and the supervisor are positioned and obligated to address. Accordingly, I find that the Agency has met its burden of showing the Grievant's conduct as charged in the Written Notices. The evidence preponderates in showing that the Grievant was aware of her responsibilities to come to work and to comply with the outside employment policy. Further, I find that the offenses are appropriately considered Group II offenses under the Standards of Conduct that provide the Agency with discretion to impose progressive discipline.

While a first Written Notice for poor performance or poor attendance is typically expected to be a Group I Written Notice, the Written Notice issued October 27, 2017, noted poor performance, poor attendance, and leaving work without permission (the latter being typically a Group II offense). I find the Agency's evidence supported the Written Notice, and it followed counseling memoranda. I find the circumstances support the Agency's election to issue a Group II Written Notice. As for the Written Notice issued November 3, 2017, regarding the outside employment, that offense is failure to follow policy, which may typically be a Group II level offense. The Written Notice issued November 9, 2017, was expressly for repeat conduct regarding work attendance and, thus, may properly be elevated to a Group II level offense.

The Agency, conceivably, and within its discretion, could have imposed lesser discipline or even hastened termination after the second Group II Written Notice. It only imposed termination after the third Group II Written Notice, well within its discretion. Thus, the Agency has borne its burden of proving the offending behaviors, the behavior was misconduct, and Group II is an appropriate level for each offense.

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 expressing her responsive views to the Agency regarding her job performance. The Grievant asserts that the retaliation she has experienced stems from her frank and sharp expressions to the Agency. Further, she could be viewed as having potentially suffered a materially adverse action due to the agency's discipline and termination. However, the Grievant does not satisfy the burden of proof of showing that the Agency's assessment of the Grievant's work performance, attendance, and compliance with the outside employment policy was retaliatory.

The Agency has addressed a noticeable performance deficiency. Grievant has not presented sufficient evidence to show that the Agency's evaluation of the Grievant's performance was motivated by improper factors. Rather, the Agency's assessment of poor performance, poor attendance, and failure to comply with policy all appear based on the Grievant's actual conduct and behavior, all of which was solely within the control of the Grievant.

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 no mitigating circumstances were specified in the Written Notices, the Agency expressed restraint by not electing termination after the second Group II Written Notice. I must note that the Grievant does not have a long tenure with this Agency.

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 the discipline imposed 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, EEDR 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.

EEDR Ruling No. 2010-2483 (March 2, 2010) (citations omitted). EEDR 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.'"

EEDR 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 Agency's 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.

Job termination is a harsh result, but the Agency has demonstrated mitigation and restraint since it could have imposed termination after just the second Group II Written Notice. 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 issuance of three Group II Written Notices, with termination, outside the bounds of reasonableness. The conduct as stated in the written notices occurred.

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

DECISION

For the reasons stated herein, I uphold the Agency's discipline of three Group II Written Notices and job termination.

APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and 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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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 EEDR before filing a notice of appeal.

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

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