Issue: Group III Written Notice with Termination (failure to follow policy and misuse of State property); Hearing Date: 02/28/18; Decision Issued: 03/14/18; Agency: VDH; AHO: John V. Robinson, Esq.; Case No. 11156; Outcome: No Relief - Agency Upheld.

COMMONWEALTH OF VIRGINIA
The Office of Equal Employment And Dispute Resolution
at the Department of Human Resource Management

DIVISION OF HEARINGS

In the matter of: Case No. 11156

Hearing Officer Appointment: January 10, 2018
Hearing Date: February 28, 2018
Decision Issued: March 14, 2018

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge a Group III Written Notice issued on December 5, 2017 by Management of the Virginia Department of Heath (the "Department" or "Agency"), as described in the Grievance Form A.

The hearing officer was appointed on January 10, 2018. The hearing officer scheduled a pre-hearing telephone conference call on January 17, 2018 at 10:00 a.m. The Grievant, the Agency's representative, and the hearing officer participated in the pre-hearing conference call. During the call and in the hearing, the Grievant, confirmed and clarified that she is challenging the issuance of the Group III Written Notice for the reasons provided in her Grievance From A and is seeking various forms of relief, including rescission of the Group III Written Notice and reinstatement of her employment.

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. Of course, the Grievant bears the burden of proof concerning any affirmative defenses.

At the hearing, the Agency's Attorney represented the Agency. The Grievant represented herself. 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, namely Agency exhibits 1-9.[1]

APPEARANCES

Representative for Agency
Grievant
Witnesses

FINDINGS OF FACT

1. At the time of the termination of the Grievant's employment, the Grievant had been employed by the Agency for just over 3 years.

2. The Grievant worked as a HR Analyst in the Office of Human Resources.

3. In this position, the Grievant had access to various forms of confidential information concerning personnel, patients and the public. AE 6.

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

4. By policy and pursuant to a Confidentiality Agreement, the Grievant was not to access or attempt to access confidential information unrelated to her job duties at the Agency; was not to use confidential information for personal reasons of any kind; etc. AE 5 & 6.

5. The Grievant submitted confidential information to the EEO and Employee Relations Division Director contrary to the above agreement and policy and the Grievant admitted this in the hearing. AE2. Specifically, the Grievant accessed the Leave Records and Pay Action Worksheets of other Agency employees.

6. Grievant received annual training concerning confidentiality requirements and on July 19, 2016, the Grievant signed the VDH General Confidentiality Agreement agreeing to comply with all aspects of Policy OCOM 1.01 and acknowledging that any infractions could result in disciplinary action up to and including termination of employment. AE 6.

7. On February 15, 2017, the Grievant signed the VDH Informational Systems Security Access Agreement (the "Security Access Agreement") agreeing to so comply and acknowledging that violations of confidentiality would result in disciplinary action including termination. AE 8.

8. Compliance with the above confidentiality policies and agreements is essential to maintain a secure, harmonious work environment and to safeguard the public trust and the trust of its patients and personnel in the Agency and its mission.

9. The Department has fully accounted for all mitigating factors in determining the corrective action taken concerning the Grievant.

10. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.

11. The Department's actions concerning this grievance were reasonable and consistent with law and policy.

12. The testimony of the witnesses called by the Agency was both credible and consistent on the material issues before the hearing officer. The demeanor of such Agency witnesses at the hearing was candid 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 Standards of Conduct (the "SOC") provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards 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. AE 7.

Policy OCOM 1.01 provides in part:

1. **Limit Collection of Confidential Information**
   VDH personnel shall collect confidential information only when such collection is authorized by law or regulation and when confidential information is deemed necessary to further a public health purpose, including when provided to VDH by individuals seeking services. VDH personnel shall collect no more confidential information that is reasonably necessary to accomplish their work-related tasks.

2. **Limit Use of Confidential Information**
   VDH personnel shall not use confidential information for personal reasons of any kind and shall limit the use of confidential information to only those purposes for which the information was collected or other public health purposes and work-related tasks permitted by law, which furthers the mission of VDH. Whenever identifiable information is not necessary for public health purposes, the confidential information shall be rendered de-identified.

3. **Limit Access to Confidential Information**
   VDH personnel shall limit access to confidential information to only those personnel who have a legitimate work-related need to access the information. Access shall be limited to the minimum number of individuals who are reasonably necessary to conduct the work-related purpose.

4. **Limit Disclosure of Confidential Information**
   VDH personnel shall limit disclosure of confidential information to only authorized persons. VDH personnel shall follow the confidentiality procedures, which delineate when and to whom disclosures can be made. VDH personnel shall limit disclosure of confidential information to the minimum amount of confidential information necessary to accomplish the intended purpose of the disclosure.

5. **Acknowledgement of Confidentiality Policy and Procedures**
   All VDH personnel shall strictly maintain the confidentiality of all confidential information held by the Department. No person having access to confidential information shall disclose, in any manner, any confidential

> information except as established in the confidentiality procedures. All VDH personnel will receive education and training regarding the confidentiality and security principles addressed in this policy and the procedures. In addition, all VDH personnel shall sign an acknowledgment that they received training and that it is their responsibility to read and comply with all aspects of the Confidentiality Policy and Procedures.

The Security Access Agreement provides in part:

> As a user of Commonwealth of Virginia and Virginia Department of Health (VDH) information systems, I understand and agree to abide by Commonwealth Security Policies and Standards, VDH Security Policies and Standards; and the following terms which govern my access to and use of the information, equipment and computer systems of the Commonwealth and VDH. Information systems include, but are not limited to, the computer; computer network; all computers or peripherals connected to the network; and all devices and storage media.
>
> . . .
>
> I will not disclose any confidential, restricted or sensitive data to unauthorized persons. I will not disclose information concerning any access control mechanism of which I have knowledge unless properly authorized to do so. I will not use access mechanisms which have not been expressly assigned to me.
> I will not use VDH systems for personal, commercial or partisan political purposes.
>
> . . .
>
> By signing this agreement, I hereby certify that I understand the preceding terms and provisions and that I accept the responsibility of adhering to the same. I further acknowledge that any infractions of this agreement will result in disciplinary action according to the Standards of Conduct, including but not limited to, termination.

Pursuant to the SOC, the Grievant's infractions can constitute a Group III offense, as asserted by the Department.

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.*

In this proceeding, the Department's actions were clearly consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer. *Id.*

The Grievant argued that the punishment was too harsh. However, the Agency counters that because of the severity of the violations, it was compelled to terminate the Grievant's employment. AE 4.

The Agency did consider mitigating factors, including the Grievant's past good service to the Agency.

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 did consider mitigating factors in disciplining the Grievant.

The Grievant has specifically raised mitigation as an issue in the hearing. 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, in the Form A, in the Written Notice and all of those listed below in his analysis:

1. the Grievant's past good service to the Agency;
2. the Grievant's past, lengthy good service to the State;
3. the fact that the Grievant has not had any prior Written Notices;
4. the Grievant's previous performance evaluations; and
5. the many demands of the Grievant's job.

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 very 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 Grievant has alleged also retaliation but has failed to carry her burden of proof in this regard. An agency may not retaliate against its employees. To establish retaliation, a grievant

must show he or she (1) engaged in a protected activity; *See Va. Code § 2.2-3004(A)(v) and (vi)* (2) suffered a materially adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse employment action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, retaliation is not established unless the grievant's evidence shows by a preponderance of the evidence that the agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn there from may be considered on the issue of whether the Agency's explanation was pretextual. *See, EDR Ruling No. 2007-1530, page 5* (Feb. 2, 2007) and *EDR Ruling No. 2007-1561* and 1587, page 5 (June 25, 2007). This is addressed in greater detail below.

The Grievant has described the protected activity in which she engaged, namely complaining to management of retaliation by management. However, the Grievant has not borne her burden of proving that a causal link exists between the discipline and any alleged protected activity.

The Grievant also raised other affirmative defenses. However, any other affirmative defenses were not supported by any meaningful probative evidence at the hearing and, in any event, the hearing officer finds there is insufficient evidence in the record to even begin to decide that the Grievant has met her evidentiary burden of proof in this regard.

The hearing officer decides for the offenses 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 Group III Written Notice and terminating the Grievant's employment concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the agency's action concerning the grievant in this proceeding 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

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].

ENTER: 3 / 14 / 2018

John V. Robinson

John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by e-mail transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).