Issues: Group I Written Notice (disruptive behavior) and Termination due to accumulation; Hearing Date: 05/09/13; Decision Issued: 05/29/13; Agency: DBHDS; AHO: Termon Galloway Lee, Esq.; Case No. 10060; Outcome: No Relief – Agency Upheld.

DECISION OF HEARING OFFICER

In the matter of
Case Number: 10060
Hearing Date: May 9, 2013
Decision Issued: May 29, 2013

SUMMARY OF DECISION

The Agency had found Grievant engaged in disruptive behavior. The Agency then issued Grievant a Group I Written Notice and terminated Grievant due to an accumulation of Written Notices. The Hearing Officer upholds the Agency's discipline for reasons noted in this decision.

HISTORY

On March 4, 2013, the Agency issued Grievant a Group I Written Notice for making disruptive behavior and terminated Grievant due to cumulative written notices. On or about March 11, 2013, Grievant timely filed her grievance to challenge the Agency's action. On March 27, 2013, the Office of Employment Dispute Resolution ("EDR") assigned the undersigned as the hearing officer to this appeal. A prehearing conference ("PHC") was held on April 1, 2013, and then a scheduling order was issued that set the hearing date for May 9, 2013.[1]

By motion submitted on April 19, 2013, the Grievant requested the following documents:

> All e-mails sent by me to [Director of Administration, Administrator], and [Supervisor] from January 25, 2013 to February 19, 2013;
> All e-mail sent to me from [Director of Administrator, Administrator], and [Supervisor] from January 25, 2013 to February 19, 2013.

In her above-referenced motion, Grievant also identified by name seven (7) individuals and requested that the Hearing Officer issue orders for their appearance at the hearing.

In an email, the Agency expressed concerns about Grievant's requests and asked for a second PHC which the Hearing Officer held on April 30, 2013.[2] During this PHC Grievant acknowledged receiving over 100 pages in emails from the Agency. However, Grievant stated those emails failed to include two to three emails she contends she sent to Director of Administration sometime between January 2013, and February 15, 2013 requesting a meeting with him. After hearing arguments from the parties, the Hearing Officer found the emails requested were relevant under § 8.2 of the GPM. Thus, the Hearing Officer instructed the Agency during the PHC and by subsequent written order on the same day to produce the absent emails by 5:00 p.m. on May 2, 2013, or in the

[1] This was the first date available for both parties.
[2] This was the first date both parties were available.

alternative, provide the Hearing Officer with an Affidavit from the custodian of record stating the cause for not producing those emails.[3]

Regarding Grievant's request for 7 witness orders, the Agency objected stating they were not relevant. After hearing arguments, the Hearing Officer informed the parties she would issue the orders. Further, the Hearing Officer informed the parties that under § 5.3 of the GPM the Agency was responsible for making available for the hearing 4 of the witnesses as they were employees of the Agency and not on leave. Grievant was informed she was responsible for making sure the other three witnesses she subpoenaed were available for the hearing.[4]

On the date of the hearing and prior to commencing it, the parties were given an opportunity to present matters of concern to the Hearing Office. The Agency Advocate requested that the statement by Director of Administration be admitted as an exhibit. It was admitted without objection. The Hearing Officer also admitted the Agency's Exhibits 1 through 15, Grievant's Exhibit 1[5], and the Hearing Officer's Exhibit.

At the hearing both parties were given the opportunity to make opening and closing statements and to call witnesses. Each party was provided the opportunity to cross examine any witnesses presented by the opposing party.

During the proceeding, the Agency was represented by its advocate and the Grievant represented herself.

APPEARANCES

Advocate for Agency
Witnesses for the Agency (3 witnesses)
Grievant
Witnesses for Grievant (6 witnesses including Grievant)

ISSUE

Was the written notice warranted and appropriate under the circumstances?

---

[3] The Hearing Officer notes that after the April 30, 2013 PHC, she received an email from the Agency's advocate with the following statement from Director of Administration:

> The email copies I provided you [Grievant] at our meeting on Wednesday, April 24, 2013 are the only emails I received or have on file from [Grievant], all were dated during the month of February 2013.

Director of Administration's: name, official title, and employment address, telephone and fax numbers followed the statement. This email, along with others, was admitted as evidence. (A Exh. 15, p. 1).

[4] See the Hearing Officer's order dated April 30, 2013.

[5] Over the Agency Advocate's objection, the Grievant's Exhibit was admitted.

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8(2). A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing all the evidence presented and observing the demeanor of each witness who testified in person at the hearing[6], the Hearing Officer makes the following findings of fact:

1. Grievant had been employed with the Commonwealth for 14 years. (A Exh. 2, p. 2). Prior to her termination she was employed as a residential team leader for the Agency. She supervised several individuals in a cottage that housed mentally challenged and or disabled individuals. (A Exh. 1, Testimony of Grievant).

2. Among other reports or perceptions of supervisor misconduct, alleged inappropriate conduct of Grievant's immediate supervisor was brought to Grievant's attention prior to February 10, 2013, when one of Grievant's subordinates informed Grievant that the supervisor had contacted the office of the subordinate's physician to inquire about the subordinate's work restrictions. Supervisor's responsibilities did not include her contacting a doctor's office to inquire about an employee's limitation. (Employee Health Nurse, G Exh. 1, Testimony of Grievant).

Between January 25, 2013, and February 15, 2013, on several occasions Grievant requested by email/voicemail messages to meet with her supervisor's superior, the Director/Assistant Director of Administration, to discuss concerns (to include the supervisor overstepping her bounds with employees) she had about her immediate supervisor. Grievant did not feel comfortable meeting with her supervisor one on one as Grievant perceived her supervisor had a history of not accurately stating the outcome of the meeting or statements made during the meeting. (Testimony of Grievant, A Exh. 6).

3. The Director/Assistant Director of Administration declined to respond to Grievant's emails that were sent to him prior to February 14, 2013. In the earlier emails, Grievant requested to meet with him. Specific concerns about her immediate supervisor were not expressed in those emails. After no response to her earlier emails, Grievant sent subsequent, detailed emails– one on February 14, 2013, and several on February 15, 2013. (Testimony of Grievant, A Exh. 6).

4. These subsequent emails are the subject of the grievance before the Hearing Officer. The emails are set forth in "Findings of Facts 5 – 15" below. (A Exh. 6).

[6] Several of Grievant's witnesses testified by telephone.

5. On February 11, 2013 grievant sent an e-mail to her supervisor. The email states:

Subject: 9:30 meeting/Wednesday

I have concerns about meeting with you alone behind closed doors. I don't feel comfortable meeting with you alone, because your written follow-up notes sometimes differ from my perception of what was actually discussed during a meeting. I would like to have an impartial person sit in on the meeting. For me, impartial does not include [Administrator/Agency Witness 2, Administrator 2,] or another APM.

(A Exh. 6, p. 4).

6. On February 14, 2013, Grievant sent an email to Director/Acting Director of Administration ("Acting Director of Administration"). She copied Employee Health Nurse and Grievant Witness 1 (both employees work in the Human Resource division of the Agency). (Testimonies of Employee Health Nurse and Grievant Witness 1). The email states:

Subject: Staff Complaints

A staff member who recently returned from medical leave came to me with a concern. The employee stated that upon her return to work [Supervisor] called the employee's doctor's office for clarification on the employee's limitations & restrictions. I directed the employee to [Grievant Witness 1] & to you. I spoke to Employee Health Nurse & Grievant Witness 1 about this yesterday.

Another staff member confided in me that a while back she was on medical leave & subsequent family leave. The employee had suffered a difficult maternity & the loss of a newborn. During her leave the employee received a phone call from [Supervisor] asking when she planned to return to work. The call was stressful for the employee & made her feel like she needed to cut short her grieving process & return to work. I directed this employee to you also.

Both employees granted permission for me to give you this information. Both will speak to you directly.

(A. Exh. 6, p.1).

7. On February 15, 2013, at 11:29 a.m. Grievant sent an email to her supervisor. She also copied Administrator, Director of Administration. The email states:

Subject: last night in 5A

[Subordinate 2] stated that you came into the cottage last night, did not announce

yourself, and went straight to [Resident 1's] room because she was yelling and cussing. [Subordinate 2] said you asked why [Resident 1's] bed was elevated with [Patient 1] in the bed & why nobody was responding to her agitation at the time. [Subordinate 4] stated that when she assisted [Resident 1]with getting into bed, the bed was left at its lowest position. [Subordinate 3] verified the lowered position of the bed. [Subordinate 2] verified the lowered position of the bed. [Subordinate 1] said she cannot verify the position of the bed, as she was attending the med cart. There are 3 staff stating that the bed was lowered as indicated by the PMP. Nobody saw [Resident 1's] bed elevated until after you came out of her room. I asked the 3 staff to write statements. Will forward copies of those statements to you when I receive them. Regarding [Resident 1] not being attended to at the moment you walked in…[Resident 1] had literally just gotten into bed, upon her own request. There were 3 staff covering 8 residents (as [Subordinate 1] was tied to the med car). Three staff cannot remain at the immediate side of 8 residents all the times. [Resident 1] sometimes has to wait a few seconds for a response, because staff may be attending to other residents.

[Subordinate 2] also stated that you had a problem with the fact that 7 residents were already in bed by 8:30 p.m. [Resident 1 & Resident 2] prefer (they ask) to go to bed early. [Resident 3] follows whatever [Resident 2] does. Those are the only three residents who are usually in bed at that time. Since neither you nor I was running the shift in 5A at the time, we can't automatically determine this as a problem. Many of the residents did not sleep well the previous night due to the commotion surrounding [Resident 4's] suspected illness. Nursing staff were in & out of 5A from about 9 p.m. until 3 a.m. the previous night. [Resident 3] was completely displaced from his room. Before assuming it was wrong consider, resident needs. I will explore & address this issue & follow-up with you.

[Night shift Staff 1 & Night shift Staff 2] (night shift staff) stated that you & [Other Staff] wanted to know if I returned the call I received about Subordinate 2's emergency last night. Yes, I returned the call. Spoke to Night Shift staff 2 at about 1 am. For future reference, when I am not at work, I have family & personal obligations that do not always permit me to monitor & answer my phone each time it rings, nor to respond immediately to a missed call. And of course, I do sleep at night. But I do return all calls when I receive the messages. Had I slept through the entire night, I wouldn't have received the message until I woke up this morning so there would have been no return call. I realize I am considered "on call" at all times. However, if I am expected to monitor my phone 24 hours a day, not to sleep at night, and to respond immediately to all calls from SEVTC, please put your specific expectations in written form so I can have the expectations handy for reference. Also state that your expectations include when I am tending to my sick mother, when I am showering, when I'm assisting my son with homework, when I'm at the ER with my son due to his frequent asthma attacks, when the phone has lost its charge, when I'm asleep, when I am driving & when I am ill.

(A Exh. 6, p. 5).

8. At 3:53 p.m. on February 15, 2013, Administrator sent an email to Grievant regarding the 9:30 meeting on Wednesday. Administrator copied Grievant's supervisor on the email which states:

Subject: 9:30 meeting/Wednesday

[Grievant], [Supervisor] is your supervisor. I am confident in her ability to be objective. You are to meet with her when she asks without "impartial witnesses".

(A Exh. 6, p.4).

9. Grievant's supervisor then sent Grievant an email on February 15, 2013, at 3:54 p.m. Supervisor sent a copy of the email to Administrator. The email states:

Since you are reluctant to meet with me about performance related issues just now, and because we have already discussed some of this previously, I will put the attached form in your office in an interdepartmental envelope. Please read it and sign it. Or, if you choose not to sign it, attach a statement to the form and return to me. As always, if you want to schedule a meeting to discuss this with me, just let me know.

(A Exh. 6, p. 3).

10. On February 15, 2013 at 4:26 p.m., Grievant sent a response to her supervisor's email and copied the Director of Administration and Administrator. The email states:

I am not reluctant to meet with you. Have never said I will not meet with you. I simply told you I don't want to talk to you 1:1. You canceled the 9:30 a.m. meeting on 2/13/13, not me. You had all day today to come over here to give me whatever it is you left on my desk, yet you chose to wait until you knew I would be out of the building for a training. You came purposely when I wasn't there to see if I had cleared out my office, as the rumor mill has it. Yep, my office is clean, because I knew you'd find a reason to enter it. I am not resigning. I will meet with you when/if there is an impartial party present at the meeting. Already spoke to a lawyer. I do not have to meet with you 1:1, and won't. If Director of Administration and Administrator choose not to mediate this problem I will make sure the state does. You will not bully me anymore. In the future if you need to access my office, use your own key. Don't touch my personal key ring or personal keys.

(A Exh. 6, p. 2).

11. On February 15, 2013, at 5:35 p.m., Administrator sent an email to Grievant. It states:

[Grievant], you have sent some remarkably inappropriate messages to your

supervisor. I would strongly suggest that you wait 24 hours and reread any new messages before sending. We've had this conversation before.

(A Exh. 6, p. 2).

12. On February 15 2013 at 5:37 p.m., Grievant sent an email to her supervisor. Grievant sent a copy of the email to Administrator and the Director of Administration. The e-mail states:

Subject: Response to Notice of Needs Improvements

(1) It is clear that I received notices for needs improvement for the same things other TLs [team leaders] under your supervision don't get written up for. It is my understanding that plenty of staff who leave here still call/visit residents. At least they visited before new homes were occupied. But the only former staff you take an active role in blocking access for are those who have crossed you. Two years ago when you said I wasn't providing the required reading and training for my staff, there were several TLs under your supervision who have not done this for years. Ironically, I was one who did ensure it was done, but the documents mysteriously went missing when they got into your hands while I was out on sick leave. Certain TLs are allowed to have deficient training binders & inadequate data. Then when those residents are sent to 5A, I am immediately required to fix deficiencies which were ignored before the resident(s) came to 5A, or face the consequences (notice for needs improvement).

(2) Resident, Resident [4] was thrown into 5A without even so much as 5 hours notice. He came without a sufficient PMP, no medications, no directions about nutrition, no truly in-service for staff, and no staff who knew him. To state it simply, we did not know him. I scrambled to get a PMP in place within 2 days, which EQ & … (PT) only addressed after I inquired about it. I spent 2 days reading through his POR & training binder, sharing everything I learned with cottage staff. The 5A team kept Resident 4 safe, clean & healthy for 5 days before we were even given a proper in-service. Pop-in staff from 304 & repeated phone calls to 304 was not sufficient nor appropriate to comply with your expectations. You failed to provide me & the 5A team with adequate training to care for a resident with recent health declines, whose former disposition & health status we have not witnessed. We didn't have a frame of reference to compare his behavior. Unfortunately, we were too busy during those 1st five days trying to provide sufficient care to [Resident 4] to brush up on policy. If the pressure of taking on a new residence with inadequate training & not enough staffing caused us to neglect proper ID notetaking, I will accept the responsibility. Considering the inadequate resources & training we received, you should be thankful the only deficiency was in the note taking.

(3) Don't know what you mean by "you seem to have heard that 304 staff will be spending time in 5A caring for the individual." If I didn't say it to you, you have no right to state it in a disciplinary action. I asked you before, when you documented

the statement made by [Another Employee] in my eval, don't write anything about me based on hearsay. You put [Another Employee's] statement in my eval without so much as asking me about it. You documented a statement made during a personal conversation, between two supposed friends, after work hours, on both parties' personal (not work) phones. You have also made disciplinary decisions in training decision raised solely on the word of resource staff, who simply don't understand the cultural communication nuances of the cottage staff they are are speaking to. I will ask you again… Don't document what you believe I think/ " seem to have heard", or said based on hearsay. When resource staff tell you anything about me or 5A staff, you take it upon yourself to ask, " who said this" or "who did this" before asking if there was a misperception. I will not continue to defend myself or 5A staff against wrongful allegations or miscommunications. I will simply tell you my version, and leave it at that. My word & the word of 5A staff holds just as much credence as yours and anyone else's. You repeatedly fail to evaluate both sides of a story, before instituting disciplinary action.

(A Exh. 6, p.6).

13. On February 15 2013 at 5:46 p.m., Grievant sent an e-mail to Administrator. The email states:

I know from previous experience that you don't question or explore anything [supervisor] says or does with regard to me. I've sought your assistance in the past, was patronized & dismissed. Currently, I am trying to meet with [Director of Administration]. He has not returned any of my emails or phone calls. If I cannot get assistance from you or [Director of Administration], the only alternative I have is " documentation" & calling Richmond. I am asking for your assistance with changing the way [Supervisor] speaks to & interacts with me & residential staff as a whole. There are several people who want to speak out. Many fear nothing will be done & that [Supervisor] will be left to deal with them as she chooses, yet they are still willing to speak up at this point. We want to talk to you and [Director of Administration]. Hopefully, this can be resolved in-house. I'll take your advice & wait 24 hours before sending any more emails. Thanks for the advice.

(A Exh. 6, p. 2)

14. On February 15 2013 at 6:03 p.m., Grievant sent an e-mail to Director of Administration. The e-mail states:

Subject: will you meet with me?

(A Exh. 6, p. 2).

15. On February 15 2013 at 6:55 p.m., Grievant sent an email to Administrator. She copied Supervisor on it. The e-mail states:

Subject: Re: 9:30 meeting/Wednesday

Your confidence in her ability to be objective is apparent. That's why she's allowed interact with staff the way she does, without being checked. But I am telling you your confidence is misplaced. Myself & several other staff under her supervision know she is not <u>always</u> objective. I am not comfortable meeting with a person 1:1 who I know from personal experience sometimes revises statements & meeting outcomes based either on her own perceptions or her subsequent objectives. Do you have so much confidence in her that you honestly believe myself & all of the other staff who have complained to you about her over the years are lying? If so, why are so many people feeling & saying the same thing? Your failure to assist me with having a meeting which is as comfortable for me as it is for [Supervisor] is unfair. If your directive for me to meet with [Supervisor] without an "impartial witness" is your attempt to force me, or to subsequently write me up for failure to follow your supervisor instructions, proceed as you deem necessary. I will not meet with [Supervisor] alone. I am asking to have an impartial witness present when I meet with [Supervisor], which is not unreasonable given the circumstances.

(A Exh. 6, p. 4).

16. Because of the above noted emails, the Agency issued Grievant a Group I Written Notice on March 4, 2013. The notice describes Grievant's offense as follows:

Disruptive behavior: [Grievant's] e-mail communication(s) and implied serious allegations against her supervisor. As team leader, [Grievant] was seeking information from her subordinates in an effort to denigrate and demean her supervisor. Eliciting statements from employees to be used against her supervisor has created and instilled a negative atmosphere among staff and is highly disruptive. Soliciting subordinates to the determent (sic) of her supervisor demonstrates inappropriate and unprofessional conduct. [Grievant's] conduct by circulating inappropriate and unfounded complaints by way of e-mail communication shows disrespect and insubordination towards her supervisor.
(A Exh. 1).

17. After Grievant's termination, the Agency conducted a workshop on the development of Rules of Courtesy. (A Exh. 9).

18. When Supervisor expresses a concern about noncompliance with work and safety procedures, as the team leader Grievant would investigate the matter. The inquiry would or could include Grievant questioning her subordinates, obtaining statements from them, and submitting a report to the supervisor regarding Grievant's findings. (Testimonies of Grievant's Witness 3 and Supervisor).

19. Supervisor scheduled a meeting with Grievant for on or about February 13, 2013 at 9:30 a.m. But it was cancelled by Supervisor due to an unforeseen urgent matter occurring at the time of the scheduled meeting. Although the meeting could have been rescheduled by Supervisor for later during the day, it was not. (A Exh. 6, Testimonies of

Supervisor and Administrator).

20. Agency Policy No. 49, Section 6(E) provides in pertinent part the following:

> All staff members are expected to perform assigned tasks… in a manner that fosters productive and cooperative teamwork. No loud, abusive, or threatening communication is permitted. Each staff member should interact with other staff members pleasantly and positively and demonstrate a continuous focus on active treatment and services.

(A Exh. 10, p. 6).

21. At the time Grievant was terminated, her discipline record consisted of one active Group II Written notice and two active Group I written notices. (A Exh. 13).

22. Grievant's work performance improved after receiving a Notice of Improvement needed on July 20, 2010. (A Exh. 14, Testimony of Supervisor).

23. Grievant received another Notice of Improvement on or about February 15, 2013. (A Exh. 6, Testimony of Supervisor).

DETERMINATIONS 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/her 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 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.[7]

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 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.

Under the Standards of Conduct, Group I offenses are categorized as those that are less severe in nature, but warrant formal discipline; Group II offenses are more than minor in nature or repeat offenses. Further an offense is appropriately identified as a Group II offense when it significantly impacts business operations/constitute neglect of duty or violation of a policy/procedure. Group III offenses are the most severe and normally warrant termination. *See* Standards of Conduct Policy 1.60, at pp. 8,9.

On March 4, 2013, management issued Grievant a Group I Written Notice for disruptive conduct. Grievant was terminated due to an accumulation of group notices. Thus, Hearing Officer examines the evidence to determine if the Agency has met its burden.

I. Analysis of Issue before the Hearing Officer

Issue: Whether the discipline was warranted and appropriate under the circumstances?

A. Did the employee engage in the behavior described in the Group I Written Notice and did that behavior constitute misconduct?

The Agency contends that Grievant engaged in disruptive behavior by

1. implying serious allegations against her supervisor;
2. seeking information from her subordinates in an effort to denigrate and demean her supervisor;
3. eliciting statements from employees to be used against her supervisor; and
4. circulating inappropriate and unfounded complaints by email which showed disrespect and insubordination.

In support of the noted allegations, the Agency references a series of emails sent by Grievant on February 14 – 15, 2013, to upper management, Grievant's supervisor, and/or

[7] Grievance Procedural Manual §5.8

Human Resource personnel.

Engaging in conduct described in Va. Code § 2.2-3000 is a right protected by law.[8] This cited law provides in pertinent part that "[i]t shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and disputes. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management."

The evidence shows that early January 2013, through sometime in February 2013, Grievant attempted to discuss with Supervisor's superiors concerns Grievant had about Supervisor by requesting a meeting with the Director of Administration and or Administrator. The evidence further shows that Supervisor's superiors did not grant that request. But Administrator did instruct Grievant to meet with her supervisor one on one. Because upper management declined to meet with Grievant regarding her concerns, on February 14, 15, 2013, Grievant sent emails to Supervisor and upper management detailing her concerns about her supervisor.

Having carefully reviewed these emails the Hearing Officer finds Grievant engaged in a protected activity when she sent them. For example, the evidence shows that in her February 14, 2013 email Grievant reported that Supervisor contacted an employee's doctor's office to determine the employee's restrictions. (The evidence shows that this task was within the work purview of the Employee Health Nurse, not the Supervisor). Moreover, in this email, Grievant reported an employee complained that Supervisor telephoned the employee at home while she was grieving the recent loss of her newborn. Supervisor reportedly inquired when the employee was returning to work, stressing the employee and making the employee think she had to return to work immediately.

In addition, Grievant's February 15, 2013 email sent at 4:26 p.m. to Administrator expressed that the (i) Director of Administration was ignoring Grievant's request to discuss her concerns about her Supervisor with him and (ii) Supervisor treated her employees with no respect. Moreover, she aired concerns about Supervisor bullying Grievant and others. What is more, in a subsequent email Grievant sent to Administrator at 6:55 p.m. the same day, Grievant stated that the Supervisor was not objective and falsifies information for her own benefit. Grievant also contended that upper management was attempting to set Grievant up to be disciplined as upper management knew Grievant would not attend a meeting with Supervisor because of all the concerns Grievant has regarding Supervisor. The evidence also shows additional emails Grievant sent to upper management on February 15, 2013 cited Supervisor as showing favoritism, being overly critical and unfair by instituting disciplinary action without proper research and thought.

Previously, the Hearing Officer noted the protection an employee has been afforded to bring his/her concerns to management. However, the Hearing Officer also

[8] EDR Ruling No. 2008-1964, 2008-1970.

notes that this protection is not without exception. For example, an employee might still be disciplined for raising workplace concerns with management if the manner in which those concerns are expressed is unlawful or otherwise exceeds the limits of reasonableness.[9]

Accordingly, the Hearing Officer now considers the method employed by Grievant in her emails to raise her concerns.

Grievant's February 15, 2013 emails sent at 11:29, 4:26 and 5:46 p.m. show rudeness, insulting language, Grievant practically giving directives to her superiors when she is the subordinate, and in some cases extreme disrespect for Supervisor or upper management. Examples include "[n]obody saw [Resident 1's bed elevated until after you came out of her room." (February 15, 2013 email sent at 11:29). "You had all day today to come over her to give me whatever it is you left on my desk, yet you chose to wait until you knew I would be out of the building for a training. You came purposefully when I wasn't there to see if I had cleared out my office, as the rumor mill has it…." (February 15, 2013 email sent at 4:26 p.m.). …[T]he documents mysteriously went missing when they got into your hands while I was out on leave." (February 15, 2013 email sent at 5:37p.m.). "I know from previous experience that you don't question or explore anything [Supervisor] says or does with regard to me. I sought your assistance in the past, was patronized & dismissed." (February 15, 2013 email sent at 5:46 p.m.). "Your confidence in her ability to be objective is apparent. That's why she's allowed to interact with staff the way she does, without being checked. But I am telling you your confidence is misplaced." (February 15, 2013 email sent at 6:55 p.m.).

The Hearing Officer finds Grievant certainly had a right to voice her concerns to her superiors even if she did not follow the chain of command; however a reasonable approach would have been to do so in a courteous, tactful, and respectful way. Grievant's emails show she failed to do so. Accordingly, the Hearing Officer finds the manner used by Grievant to bring her concerns to management and her supervisor was, unreasonable, not protected activity, and therefore inappropriate.

The Hearing Officer now considers the Agency's claim that Grievant sought information from her subordinates in an effort to denigrate and demean her supervisor. As noted before, the Hearing Officer has carefully reviewed the emails and find that they do not provide clarity as to whether Grievant pursued such information from her subordinates or it was provided to Greivant without solicitation. What is more, the evidence shows that alleged inappropriate conduct of the supervisor was brought to Grievant's attention when one of Grievant's subordinates informed Grievant that the supervisor had contacted the office of the subordinate's physician to inquire about the subordinate' work restrictions. Such was not part of Supervisor's duties. Accordingly,

[9] *Id.* at 4 noting in footnote 13 Equal Employment Opportunity Commission (EEOC) Compliance Manual, section 8," Retaliation," at 8-7, at http://www.EEOC.gov/policy/docs/retal.html (protected acts under Title VII must be reasonable for the anti-retaliation provisions to apply.) While retaliation may not have been raised as an issue here, the reasoning applies that the protection may be lost depending on the manner in which the concerns are raised.

the Agency has not met its burden with respect to the claim that Grievant sought information from her subordinates to demean her supervisor.

Similarly, the Hearing Officer finds the Agency has not shown by the preponderance of evidence that Grievant elicited statements from her subordinates to be used against her supervisor. Several of Grievant's witnesses testified that when the supervisor expresses a concern about noncompliance with work and safety procedures, as the team leader, Grievant would investigate the matter. Further, the testimony revealed that the inquiry would or could include Grievant questioning her subordinates, obtaining statements from them, and submitting a report to the supervisor regarding her findings. The Hearing Officer has found the testimony of these witnesses credible. The evidence further showed that Grievant followed this protocol on February 15, 2013, after receiving a report that the supervisor complained about a resident's bed being in an incorrect position the night before. Grievant's investigation revealed that the concern of the supervisor as reported to Grievant was erroneous.

Regarding the Agency's contention that Grievant implied several allegations against the supervisor, the Hearing Officer does find that in Grievant's attempt to discuss concerns about her supervisor with management, Grievant made many allegations about her supervisor. However, the Hearing Officer does not find the mere making of allegations against the supervisor is disruptive behavior. As to those allegations being unfounded, the Hearing Officer notes that Grievant's evidence appears to supports some of the allegations. For example, the testimony of Employee Health Nurse and supporting letter indicate the supervisor did overstep her bounds and made employees uncomfortable. Thus, the Hearing Officer cannot find the Agency has shown by a preponderance of the evidence that Grievant made unfounded complaints.

In summary, the Hearing Officer has found that the Agency has shown that some of Grievant's February 15, 2013 emails were inappropriate as they presented her concerns to her immediate supervisor and management in an unreasonable manner. Further, the manner in which they were presented failed to foster a productive and cooperative working environment, in violation of Agency policy No. 49. Thus, this conduct was misconduct and subjected her to discipline.

However, the Agency did not meet its burden in showing that Grievant sought information from her subordinates to demean or use against her supervisor. Neither did the mere making of allegations against her supervisor constitute misconduct.

B. Was the discipline consistent with policy and law?

The Standards of Conduct provide that Group I offenses are those that are less serious in nature, but warrant formal discipline. The Evidence establishes that some of Grievant's February 15, 2013 emails, were condescending, extremely insulting, and void of courtesy. While they do not rise to serious misconduct, Grievant engaged in at least minimal misbehavior. Accordingly, issuance of a Group I was consistent with policy. Further, at the time Grievant received the Group I she had two active Group I Notices and

one active Group II Notice. Thus, it was consistent with policy for Grievant to be terminated due to the accumulation of active Group Notices.

II. Mitigation.

Under statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with the rules established by the Office of Employment Dispute Resolution ["EDR"]."[10] EDR's *Rules for Conducting Grievance Hearings* 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."[11] 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.[12]

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

The Hearing Officer has found that Grievant engaged in part in the conduct described in the group notice sufficient to substantiate a Group I Written Notice. Specifically, Grievant sent inappropriate emails to her supervisor and/or management on February 15, 2013, as alleged in the group notice. And those emails were not protected activities for the reasons already stated her. The behavior was misconduct. The Agency's discipline was consistent with policy and law.

Next, the Hearing Officer considers whether the discipline was unreasonable. The Hearing Officer has carefully deliberated. This has included considering all the evidence, to include (but not limited) Grievant's 14 years with the Commonwealth as an employee, Grievant's attempts to discuss her concerns with upper management as early as January 2013, the supervisor's cancellation of the 9:30 meeting, and Grievant's own recognition that her emails may have been "overzealous." Having taken all evidence into account, the Hearing Officer cannot find the Agency acted unreasonable. Thus, the

---

[10] Va. Code § 2.2-3005 and (c)(6)

[11] *Rules for Conducting Grievance Hearings* VI(A)

[12] *Rules for Conducting Grievance Hearings* VI(B)

Hearing Officer upholds the discipline.

DECISION

Hence for the reasons stated here, the Hearing Officer upholds the Agency's discipline.

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
Departmental of Human Resource Management
101 N. 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 N. 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.[13]

Entered this 29th day of May, 2013.

_____

Ternon Galloway Lee, Hearing Officer

cc: Agency Advocate
Agency Representative
Grievant
Director of EDR

[13] Agencies must request and receive prior approval from EDR before filing a notice of appeal.

DECISION OF HEARING OFFICER

In the matter of
Case Number: 10060
Shellie Atkins v. SEVTC
Hearing Date: May 9, 2013
Decision Issued: May 29, 2013

COVER PAGE

Agency	South Eastern Virginia Training Center (SEVTC)
Supervisor/ Immediate Supervisor	Judy Salway
Administrator/ Agency Witness 2	Sherwin Davis
Director of Agency	Dr. Robert Shrewberry
Administrator 2	Edie
Director/Assistant Director of Administration	Brian Whitesell
Resident 1	Roxanne
Resident 2	Lori
Resident 3	Norman
Resident 4	Greg
Night Shift Staff 1	Yvette
Other Staff	Rachelle
Night Shift Staff 2	Della
Grievant	Shellie Atkins
Grievant's Representative/Advocate	None
Grievant Witness 1	Cynthia Darcus-Wilson (Testified in Person)

Grievant Witness 2/ Subordinate 4	Melody Woodard (Testified In Person)
Grievant Witness 3/ Subordinate 2	Iesha Boyd
Grievant Witness 4/ Subordinate 3	Gloria Branch (Blake)
Subordinate 1	Michelle Beamon
Employee Health Nurse/ Grievant Witness 5	Vanessa Ridley
Director of EDR	Chris Grab