Issues: Group II Written Notice (failure to follow instructions) and Termination (due to accumulation); Hearing Date: 06/20/13; Decision Issued: 06/25/13; Agency: DBHDS; AHO: John V. Robinson, Esq.; Case No.10099; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 10099

Hearing Officer Appointment: May 15, 2013
Hearing Date: June 20, 2013
Decision Issued: June 25, 2013

PROCEDURAL HISTORY, ISSUES AND PURPOSE OF HEARING

The Grievant requested an administrative due process hearing to challenge termination of her employment effective April 16, 2013, pursuant to a Group II Written Notice issued by Management of the Department of Behavioral Health and Developmental Services as described in the Grievance Form A dated May 1, 2013. The termination resulted from the Grievant's accumulation of 2 active Group II Written Notices. The Grievant is seeking the relief requested in her Grievance Form A, namely reinstatement if she prevails.

The hearing officer issued a Scheduling Order entered on May 21, 2013 (the "Scheduling Order"), which is incorporated herein by this reference.

At the hearing, the Grievant represented herself and the Agency was represented by its advocate, (the "Advocate"). Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the Agency and the Grievant into evidence at the hearing[1].

No open issues concerning non-attendance of witnesses or non-production of documents remained by the conclusion of the hearing.

In this proceeding, the Agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances. Of course, the Grievant bears the burden of proof concerning any affirmative claims she has raised.

[1] References to the Agency's exhibits will be designated AE followed by the exhibit number. Any references to the Grievant's exhibits will be to the seven pages sent by fax.

APPEARANCES

Representative for Agency
Grievant
Witnesses for Agency

FINDINGS OF FACT

1. The Grievant was formerly employed as a Human Services Care Specialist by the Agency at a hospital facility (the "Facility") providing therapeutic rehabilitation services to patients.

2. The Grievant facilitated active treatment with adults with serious mental illness in a forensic setting. AE 5.

3. Staffing and timely attendance by staff are critical at the Facility. Similarly, failure of staff to follow written policy concerning call-in procedure to notify management of late arrival at work is extremely detrimental to the business operations of the Facility.

4. On October 26, 2012, the Grievant was issued a Group II Written Notice which is still active. AE 6.

5. On February 5, 2013, the Grievant received 2 notices of Improvement Needed/Substandard Performance. AE 2. One of these Notices concerned the Grievant's failure "to follow the proper hospital and departmental procedures for calling in to request leave for your inability to report for work as scheduled on 1/16/13 and1/17/13." AE 2.

6. The Grievant was cautioned by Management: "[Grievant], you have been notified of these expectations multiple times. If you fail to follow the call call-in procedure in the future, your employment with the hospital may be terminated. I am considering this Notice of Improvement Needed/Substandard Performance form as your last warning." AE 2.

7. On March 20, 2013, the Grievant was scheduled to start work at 8:12 a.m.

8. When the Grievant had not arrived at work by 10:30 a.m., the Grievant's immediate Supervisor called to ask the Grievant about the Grievant's situation. At the hearing, the Grievant testified she was about to call her immediate Supervisor when he called and spoke to her.

9. The immediate Supervisor had checked with the H.R. Department before he called the Grievant but the H.R. Department informed the immediate Supervisor that they had no information concerning why the Grievant had not yet reported to work.

10. The Grievant had been provided a "Supervisor's Back-up Roster" with multiple phone/pager numbers for 9 supervisors to call if the Grievant's immediate Supervisor could not be reached. The Grievant asserted that she called 3 individuals on the list but could not get an answer.

11. The Grievant did not follow the Department's call in policy to notify the Department of her late arrival at work.

12. The testimony of the Agency witnesses was credible. The demeanor of the Agency witnesses was open, frank and forthright.

APPLICABLE LAW, ANALYSIS AND DECISION

The General Assembly enacted the *Virginia Personnel Act, Va. Code* § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Va. Code § 2.2-3000(A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the Agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The operative Agency Standards of Conduct (the "SOC") are contained in Agency Human Resources

Policy No. 0701 (effective January 1, 2009). The SOC provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The SOC serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

Pursuant to DHRM Policy No. 1.60 and Agency policy, the Grievant's conduct could clearly constitute a Group II offense, as asserted by the Agency.

Agency Policy provides in part:

b. Group II Offense:

> Offenses in this category include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action. This level is appropriate for offenses that significantly impact business operations and/or constitute neglect of duty, insubordination, the abuse of state resources, violations of policies, procedures or laws.

AE 7.

> Joint Instruction 8-1, Employee Attendance, Page 6 of 8, provides in part as follows:
>
> **Communication:** Employees will personally communicate with their supervisor or the supervisor on duty to request leave. Voice mail messages or e-mail are **not** considered proper notification. Employees are responsible for knowing the appropriate phone number(s) for calling in an unscheduled absence...

AE 3.

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

As previously stated, the Agency's burden is to show upon a preponderance of evidence that the discipline was warranted and appropriate under the circumstances. The hearing officer agrees with the Agency's advocate that the Grievant's disciplinary infractions justified the Group II Written Notice by Management. Accordingly, the Grievant's behavior constituted misconduct and the Agency's discipline is consistent with law and consistent with policy, being properly characterized as a Group II offense.

The hearing officer also agrees with the Agency's advocate that the Grievant's accumulation of two (2) active Group II Written Notices justified the Agency's action in terminating the Grievant's employment, effective April 16, 2013, being consistent with law and policy. AE 7.

EDR's *Rules for Conducting Grievance Hearings* provide in part:

> DHRM'S *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." *Rules* § VI(B) (alteration in original).

If the Department does not consider mitigating factors, the hearing officer should not show any deference to the Department in his mitigation analysis. In this proceeding the Department apparently did consider mitigating factors in disciplining the Grievant.

While the Grievant did not specifically raise mitigation in the hearing or in her Form A and while the Grievant might not have specified for the hearing officer's mitigation analysis all of the mitigating factors below, the hearing officer considered a number of factors including those specifically referenced herein and all of those listed below in his analysis:

1. the Grievant's service to the Agency;

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

3. the Grievant's accident days before the offense which gave rise to the discipline.

EDR has previously ruled that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-

1903; EDR Ruling No. 2007-1518; and EDR Ruling 2010-2368. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. *Id.*

Here the offense was serious. Clearly, the hearing officer would not be acting responsibly or appropriately if he were to reduce the discipline under the circumstances of this proceeding.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, and the SOC, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

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

The hearing officer decides for the offense specified in the written notice (i) the Grievant engaged in the behavior described in the written notice; (ii) the behavior constituted misconduct; (iii) the Department's discipline was consistent with law and policy and that there are no mitigating circumstances justifying a further reduction or removal of the disciplinary action.

In her Form A, the Grievant did raise the issue of harassment but did not develop this theory at the hearing and certainly did not begin to satisfy her burden of proof in this regard.

DECISION

The Agency has sustained its burden of proof in this proceeding and the action of the Agency in issuing the written notice and in terminating the Grievant's employment and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the Agency's action concerning the Grievant is hereby upheld,

having been shown by the Agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

APPEAL RIGHTS

As the *Grievance Procedure Manual* sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to two types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must refer to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401 or e-mailed.

2. **A challenge that the hearing decision does not comply with grievance procedure** as well as a request to present newly discovered evidence is made to EDR. This request must refer to a specific requirement of the grievance procedure with which the decision is not in compliance. EDR's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the Office of Employment Dispute Resolution, 101 N. 14th Street, 12th floor, Richmond, Virginia 23219, faxed or e-mailed to EDR.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of original hearing decision.** (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days.) A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or

2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of EDR before filing a notice of appeal.

ENTER: 6/25/13

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John V. Robinson, Hearing Officer

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

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