Issue: Group III Written Notice with Termination (patient neglect); Hearing Date: 06/25/13; Decision Issued: 06/27/13; Agency: DBHDS; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 10104; Outcome: Partial Relief; **Administrative Review: EDR Ruling Request received 07/12/13; EDR Ruling No. 2014-3656 issued 07/26/13; Outcome: Remanded to AHO; Reconsideration Decision issued 07/26/13; Outcome: Decision reversed – Group III and Termination upheld; Administrative Review: DHRM Ruling Request received 07/12/13; Outcome: Issue is moot since original decision was reversed.**

COMMONWEALTH of VIRGINIA

Department of Human Resource Management
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 10104

Hearing Date: June 25, 2013
Decision Issued: June 27, 2013

PROCEDURAL HISTORY

Grievant was a forensic mental health technician ("FMHT") for the Department of Behavioral Health and Development Services ("the Agency"), serving ([facility]). On April 24, 2013, the Grievant was charged with a Group III Written Notice for patient neglect on March 13, 2013, with job termination.

Grievant timely filed a grievance to challenge the Agency's disciplinary action, and the outcome of the resolution steps was not satisfactory to the Grievant and the grievance qualified for a hearing. On May 29, 2013, the Office of Employment Dispute Resolution, Department of Human Resource Management, ("EDR") appointed the Hearing Officer. During the pre-hearing conference, the grievance hearing was scheduled for June 25, 2013, on which date the grievance hearing was held, at the Agency's facility.

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

APPEARANCES

Grievant
Advocate for Grievant
Representative for Agency
Advocate for Agency
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

Through her grievance filings, the Grievant requested rescission of the Group III Written Notice, reinstatement, and back pay.

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. 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.

The Agency relied on the Standards of Conduct, promulgated by the Department of Human Resource Management, Policy 1.60, which defines Group III Offenses to include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination. This level is appropriate for offenses that, for example, endanger others in the workplace, constitute illegal or unethical conduct; neglect of duty; disruption of the workplace; or other serious violations of policies, procedures, or laws. Agency Exh. 7.

[Facility] Policy P-11, *Monitoring Patient Movement,* at III. 16., states:

> When the entire ward is being vacated, the staff assigned to the bathroom post will be the last to exit the ward and will complete checks of the bathrooms, time out room, seclusion rooms, corners of the dayrooms, porches, group rooms, and bedrooms to assure that all patients scheduled to leave the ward are accounted for. This staff then take the position at the rear of the line and monitor the patients from this position.

Agency Exh. 7.

Departmental Instruction 201-3 defines "neglect":

> This means the failure by a person, program, or facility operated, licensed, or funded by the department, responsible for providing services to do so, including nourishment, treatment, care, goods, or services necessary to the health, safety, or welfare of a person receiving care or treatment for mental illness, mental retardation, or substance abuse.

Agency Exh. 7.

[Facility] Policy RTS-15a, Patient Abuse, Reporting and Investigation of Allegations, provides, at IV(J)(4):

> It is expected that the Hospital Director will issue a Group III Written Notice and terminate an employee(s) found to have abused or neglected a patient. If it is determined that, based on established mitigating factors, disciplinary action may warrant a penalty less than termination, the Hospital Director must consult with the Central Office Human Resource Development and Management Office and provide written justification within five working days to the Assistant Commissioner for Behavioral Health.

Agency Exh. 7.

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 Offense

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions:

The Agency employed Grievant as a FMHT, and she was working with two other FMHTs when patients were being moved from one ward to another building. The Grievant was assigned the bathroom post, and that post includes the responsibility for "sweeping" the building to make sure no patients are left behind. The Grievant relied on another FMHT whom she understood would make the sweep of one hallway while the Grievant swept the other hallway to make sure no patients were left behind. A patient was left behind in his room on the hallway the Grievant thought was secured by her co-worker. As a result, the Grievant was issued a Group III Written Notice with termination.

The current written notice for the Grievant charged:

> Violation of DI-201: Patient Neglect; While assigned to the bathroom monitor posts, you were found to be negligent when you failed to conduct a complete check of the bathrooms, timeout room, seclusion room, corners of the dayrooms, porches, group rooms, and bedrooms to assure that all patients scheduled to leave were accounted for. A patient was left unsupervised for approximately four (4) minutes as a result of your negligence.

Agency Exh 2. As for circumstances considered, the Written Notice, in Section IV, stated:

> DHRM Policy 1.60: Standards of Conduct, states that Group III level offenses "include acts of misconduct of such severe nature that a first occurrence normally should warrant termination." You currently have an active Group III written notice for Violation of DI-201 on your record, therefore, the Facility Director was unable to find justifiable reason to mitigate this disciplinary action.

The Agency's witnesses testified consistently with the charge in the Written Notice and the Grievant confirmed the essential facts.

The abuse and neglect investigator testified to his investigation and report. Agency Exh. 3. The hospital director testified that the Grievant's record of an active Group III Written Notice weighed against mitigation of the offense to less than termination. For a founded occurrence of neglect, the director is required to issue a Group III Written Notice with termination unless she first obtains permission to issue a lesser level of discipline. In this case, the director did not request permission to levy lesser discipline under [Facility] Policy RTS-15a, described above. The hospital director emphasized the high risk patients involved and pointed to the Grievant's record of an active Group III Written Notice as aggravating factors outweighing any mitigating factors. The hospital director also testified that another staff member was disciplined for this incident, but, based on the specific case and disciplinary record, the policy "default" discipline of Group III and termination was mitigated to a lesser level. The hospital director testified, consistent with the indication on the Written Notice, that the level of the Grievant's prior Written Notice was a consideration in the mitigation analysis.

The Regional Human Resources Director testified that Written Notices are not removed from employees' records when the Notices become inactive. The Standards of Conduct, at G.1.b., states:

> Written Notices that are no longer active shall not be considered in an employee's accumulation of Written Notices; *however, an inactive notice may be considered in determining the appropriate disciplinary action if the conduct or behavior is repeated. For example, misconduct which if a "first" offense would normally be addressed through counseling may warrant a Written Notice when the employee has an inactive Notice on file for the same misconduct.*

Emphasis in original. Agency Exh 7.

The Grievant testified that she was aware of [Facility] Policy P-11 and her responsibility to check the building to make sure no patient was left behind. The Grievant testified that she was trained to work as a team, and she understood from her co-worker, L.H., that the co-worker was sharing the responsibility. L.H.'s written statement confirmed that she "had precautions at the time and was doing a round to make sure all patients were in the front to go to opposite ward. As I was walking down the hallway to do a round I was called by someone on the ward. I do not remember if it was a staff or patient but I went back to the dayroom." Agency Exh. 3.

Regarding the prior Written Notice (issued January 25, 2010), the Grievant testified that she was notified that the Notice was mitigated down from a Group III to a Group II with three days suspension. Her copy of the Written Notice stated such. The inactive date on the Notice was three years later—consistent with a Group II Written Notice. However, the Notice was later corrected by the Agency in handwriting to show that it remained a Group III Written Notice but only the termination was mitigated down to three days suspension. The hand written change, however, did not change the inactive date from three to four years. Agency Exh. 1. The Grievant denied receiving the letter, dated February 3, 2010, describing the January 25, 2010, Written Notice as a Group III. Agency Exh. 4. The Grievant testified that her understanding was that her record showed only a Group II Written Notice, and that she was surprised to learn

during the course of the present discipline that the Agency considered the prior Written Notice a Group III.

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).

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. The evidence preponderates in showing that the Grievant did not carry out her duty to sweep the building to assure that all patients were moved. Such behavior violated the applicable policy, leaving a patient unsupervised for up to four minutes. Based on the evidence presented, I conclude that the Agency has met its burden of proof of the offense and level of discipline—Group III, pursuant to the mandate of Policy RTS-15a.

Mitigation

The Agency had leeway to impose discipline along the continuum less than Group III with termination. However, the Agency expressed its inability to mitigate the discipline to less than termination because of the prior Group III Written Notice in 2010 for inattention during a 1:1 assignment. The Grievant asserts, reasonably, that her prior Notice was a Group II that became inactive on January 25, 2013. The level of discipline in this situation is fairly debatable. While the Hearing Officer may have reached a different level of discipline, he may not substitute his judgment for that of the Agency when the Agency's discipline falls within the limits of reasonableness.

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.

The agency has proved (i) the employee engaged in the behavior described in the written notice, (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy. Thus, the discipline must be upheld absent evidence that the discipline exceeded the limits of reasonableness. *Rules for Conducting Grievance Hearings* ("Hearing Rules") § VI.B.1.

On the issue of mitigation, EDR has ruled:

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

EDR Ruling #2010-2483 (March 2, 2010) (citations omitted). EDR has further explained:

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

EDR Ruling 2010-2465 (March 4, 2010) (citations omitted).

The Agency presents a position in advance of its role as guardian of public and institutional integrity regarding its unique patient population and the security of the facility. The hearing officer accepts, recognizes, and upholds the Agency's important role in safeguarding the public and residents in its charge, as well as the valid public policies promoted by the Agency and its policies. The applicable policies and standards of conduct provide stringent expectations of facility staff. Termination is the normal disciplinary action for a Group III offense unless mitigation weighs in favor of a reduction of discipline. There is no requirement for an Agency to exhaust all possible lesser sanctions or, alternatively, to show that termination was its only option. However, under the specific circumstances presented here, I find that the mitigation consideration was flawed.

The Grievant testified credibly, and with documentary justification, that she was informed that her prior Written Notice was mitigated down to a Group II. There is a significant difference between an inactive Group II Written Notice and an active Group III Written Notice. The Standards of Conduct make such distinction very clear. The record is not fully developed regarding the Agency's apparent change or amendment to the prior Written Notice issued to the Grievant, but the Grievant's testimony was credible and unrebutted. The Agency correctly points out that the active life of a Written Notice only restricts the accumulation and an inactive notice still may be considered in determining the appropriate disciplinary action if the conduct or behavior is repeated. However, in this instance, the present Written Notice itself, for mitigation, specifically relies on a prior, active Group III Written Notice in upholding termination instead of

a lesser sanction. I find that the record does not support a prior, active Group III Written Notice, and that due process concerns demand that mitigation be reviewed. There is no procedure, however, for the hearing officer to remand the matter back to the Agency to reconsider mitigation in light of the flawed disciplinary process for the 2010 Written Notice. See EDR Ruling #2008-1749, 2008-1759 (2007).

The United States Supreme Court has held that, under certain circumstances, public employees are vested with a constitutionally protected property interest in continued employment. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-39 (1985) (holding that a state statute providing that an employee "could not be dismissed 'except . . . for . . . misfeasance, malfeasance, or nonfeasance'" created a property interest in continued employment). And, where a public employee has a property interest in continued employment, that employment may not be terminated without adequate procedural safeguards. *Id.* at 541 (noting that, once the legislature has conferred "'a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest . . . without appropriate procedural safeguards'" (quoting *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974) (Powell, J., concurring in part) (first alteration in original))).

The Grievant signed the prior Written Notice on January 25, 2010, reasonably understanding that it was mitigated down to a Group II. The subsequent amendment was neither initialed nor signed by the Grievant, and there is no record showing that she was duly informed. I find that the Agency, after the Grievant received and signed the mitigated Written Notice in 2010, improperly amended the Grievant's prior Written Notice from a Group II to a Group III, without due process to the Grievant. While there is some inherent conflict in the document, the active life was consistent with a Group II, and the specific language regarding mitigation indicates the Group III was being mitigated to a Group II. To satisfy procedural due process requirements, the Agency was required, at minimum, to give the Grievant: (1) notice of the charges against her, and (2) a meaningful opportunity to respond. *Loudermill*, 470 U.S. at 546; *McManama*, 250 Va. at 34, 458 S.E.2d at 763 ("Procedural due process guarantees that a person shall have reasonable notice and opportunity to be heard before any binding order can be made affecting the person's rights to liberty or property.") Without notice of the change or amendment, the Grievant was denied the opportunity in 2010 to grieve the Group III discipline. Such a grievance could have, conceivably, overturned the discipline or reduced it. Thus, because the prior Written Notice should only properly be considered an inactive Group II, the mitigation analysis for the present Written Notice was fundamentally flawed.

The Agency's present consideration of the Grievant's prior disciplinary record was, thus, tainted. Under the EDR's Hearing Rules, the hearing officer is not a "super-personnel officer," and 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. The Agency undeniably could have justified or exercised lesser discipline in this present matter, and I find the tainted mitigation analysis, based on a flawed record of a prior, active Group III Written Notice (instead of an inactive Group II) exceeds the bounds of reasonableness and allows the hearing officer to exercise mitigation. Here, I find that the circumstances surrounding the January 25, 2010, Written Notice and the Agency's reliance on it as an active Group III for mitigation analysis exceeds the bounds of reasonableness. Further, the circumstances of the Grievant relying on a

co-worker's representations for assisting in the security sweep, while not excusing the Grievant's responsibilities, is also a mitigating factor. Additionally, the record contains at least four letters of recommendation for the Grievant's good work ethic and character. Accordingly, in exercising the mitigation analysis, the Hearing Officer reduces the level of discipline and reverses the job termination.

DECISION

For the reasons stated herein, the Agency's Group III discipline is reduced to a Group II Written Notice with ten (10) days suspension. The termination, accordingly, is reversed and the Grievant is reinstated with full back pay, subject to the suspension.

APPEAL RIGHTS

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

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

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

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

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

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

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

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued.

You must provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

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

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

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

COMMONWEALTH of VIRGINIA

Department of Human Resource Management
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER
ON REMAND

In the matter of: Case No. 10104

Hearing Date:	June 25, 2013
Decision Issued:	June 27, 2013
Remand Decision	July 26, 2013

PROCEDURAL HISTORY

The Agency sought administrative review of the hearing officer's original decision granting relief to the Grievant—reduction of the Written Notice and reinstatement. By administrative ruling issued July 26, 2013, the Office of Employment Dispute Resolution ("EDR") remanded the grievance decision to the hearing officer to reverse the mitigation determinations.

The initial decision held that the Agency met its burden of proving that the Grievant was guilty of the conduct charged in the written notice and level of discipline—Group III. The termination discipline was reduced to Group II with suspension and the Grievant reinstated, based on mitigating factors that EDR has reversed. (EDR Ruling No. 2014-3656). Accordingly, the hearing officer's decision must uphold the Agency's initial discipline, Group III with termination.

DECISION

For the reasons stated herein, on remand, the Agency's Group III Written Notice with termination is **upheld**.

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:

3. 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

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Department of Human Resource Management
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Richmond, VA 23219

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

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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

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