

Issues: Group II Written Notice (failure to follow instructions/provide standard of care), and Termination (due to accumulation); Hearing Date: 12/12/12; Decision Issued: 01/01/13; Agency: VDH; AHO: Jane E. Schroeder, Esq.; Case No. 9983; Outcome: Full Relief; **Administrative Review: DHRM Ruling Request received 01/15/13; DHRM Ruling issued 02/14/13; Outcome: AHO's decision affirmed; Fee Addendum issued 03/21/13 awarding \$2,638.60.**

**COMMONWEALTH OF VIRGINIA**  
**Department of Human Resource Management**  
**Office of Employment Dispute Resolution**

**DECISION OF HEARING OFFICER**

In the matter of Case # 9983

Hearing Date: December 12, 2012

Decision Issued: January 1, 2013

**PROCEDURAL HISTORY**

The Grievant was employed by the agency as a health counselor. On October 2, 2012, the agency issued a Group II Written Notice to the Grievant for failure to follow instructions and/or policy and failure to provide standard of care. The Grievant was terminated from employment. The Grievant initiated a letter to EDR, by counsel, to dispute the Group II Written Notice and request a hearing. On November 13, 2012, the hearing officer was assigned to hear the case.

A pre-hearing conference was held on November 15, 2012. The hearing date was set for December 12, 2012, and was subsequently held on that date. Four witnesses testified. The agency's exhibits (Agency Exhibits A-I) were entered into evidence without objection. The Grievant's exhibits (Grievant Exhibits A-F) were entered into evidence without objection. During the hearing, Agency's Exhibit J was entered into evidence over the objection of the Grievant's attorney.

**APPEARANCES**

Grievant

Grievant's Attorney

Agency Representative

Witnesses for Agency: District Health Director  
Nurse Supervisor  
Nurse Manager

Witness for Grievant: Grievant

**ISSUE**

Whether the Group II Written Notice given on October 2, 2012 for failure to follow instructions and/or policy and failure to provide standard of care should be affirmed or rescinded. On the Written Notice, the Agency alleges that the nature of the offense is as follows:

Offense Dates: 08/08/2012 & 08/22/2012

“Offense codes 13 & 99: Failure to follow instructions/policy & failure to provide standard of care with regard to HIV counseling & testing practice; providing misinformation to a client in STI Clinic & developing an adversarial relationship with a client, compromising the standards of HIV Testing & STI Clinic services, erodes (sic) public trust in the care & services provided by the (Local) Health Department (LHD), diminishes the reputation among community & poss. partner agencies & lowers LHD staff morale (refer to attached Due Process Memorandum dated September 6, 2012).”<sup>1</sup>

### **BURDEN OF PROOF**

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

### **FINDINGS OF FACT**

1. The Grievant worked for the agency for seventeen years as a health counselor. The duties of a health counselor includes providing STI (Sexually Transmitted Infections) and HIV pre and post-test counseling and testing, evaluating risk behavior, blood testing, treatment follow-up, communicating with private providers, tracing sexual partners, bringing clients and contacts in for appropriate testing and treatment, and assisting person to identify ways to change behaviors to prevent re-infection or the spread of infections to others. Because of the sensitive nature of the subject matter, clients are sometimes agitated and reluctant to divulge information regarding their sexual history.<sup>2</sup>
2. The Grievant was terminated on October 2, 2012 as a result of the two offenses named in the Group II Written Notice.
3. The first offense is referred to in this case as Event 1. On August 8, 2012 a female client came to the clinic at the LHD for HIV testing. The Grievant, in his role as health counselor, escorted her from the lobby to the exam room. On the way to the exam room, the client and the Grievant spoke to each other. Before entering the exam room, the client turned around and walked out of the clinic. The next day, she went to another health clinic and had the HIV testing. At the other health clinic, she alleged complained about her treatment at the LHD.
4. The Grievant testified that, as he and the client walked to the exam room, the client said she wanted to be tested for HIV. He told her that he wanted her to come into the exam room so he could interview her before the testing. She would not enter the exam room.

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<sup>1</sup>Agency Exhibit J, Agency Exhibit C, p. 1-6.

<sup>2</sup>Testimony of Nurse Supervisor, Grievant Exhibit F.

- She said she just wanted to be tested. She refused to stay and left. The Grievant testified that she would have had testing if she had stayed.<sup>3</sup>
5. The Health Director of the LHD testified that he was informed by the Nurse Supervisor that there was a patient complaint regarding this incident. He directed the Medical Director to look into the matter. The Health Director said that the Medical Director called the patient.<sup>4</sup> Neither the Medical Director nor the patient testified. There was no written report from the Medical Director regarding the matter.
  6. The second offense is referred to in this case as Event 2. On the evening of August 22, a male client came to the LHD for the Sexually Transmitted Infection (STI) clinic because of his concern about possible exposure to syphilis. He was seen by a doctor and nurse at the clinic and was given a test for syphilis. The doctor's note said, "Await test results."<sup>5</sup> The Nurse Supervisor testified that the client should not have then seen a health counselor that night after seeing the nurse and the doctor. The correct procedure would have been for the client to leave and wait until the test results came in.<sup>6</sup>
  7. The Grievant was asked by a nurse to meet with the client. Although the Grievant was working the HIV clinic that night, he agreed to see the client since the health counselor working the STI clinic that night was not around at that time. The Grievant testified that after he talked briefly with the client, the client left. The Grievant, upon reviewing the chart, called the client shortly thereafter and told the client that he should begin the treatment for syphilis. Treatment for syphilis is sometimes started before the test results are known. The client decided to wait for the test results.
  8. The Nurse Supervisor testified that on August 28, 2012, she called the client to tell him that he had syphilis and that he should come in for treatment. The Nurse Supervisor testified that the client complained about the way that the Grievant had spoken to him.<sup>6</sup>
  9. On August 29, 2012, the Nurse Supervisor sent the Grievant a memorandum relating that he was placed on pre-disciplinary leave with pay pending the LHD's investigation of customer service complaints.<sup>7</sup>
  10. On September 6, 2012, the Nurse Supervisor sent the Grievant a six page memorandum outlining the details of events on August 8 and August 22 and giving the Grievant an opportunity to provide written responses to the memorandum.<sup>8</sup>

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<sup>3</sup>Testimony of Grievant.

<sup>4</sup>Testimony of Health Director.

<sup>5</sup>Agency Exhibit E, p. 4.

<sup>6</sup>Testimony of Nurse Supervisor.

<sup>7</sup>Agency Exhibit C, p. 1

<sup>8</sup>Agency Exhibit C, p. 2-7.

11. The Grievant wrote three written responses to the memorandum: two are dated August 8, 2012 and one is dated August 22, 2012. The second response is stamped as received by the LHD on September 14, 2012. The other two responses' stamp had the date received illegible. In his response to Event 1 with the female client, the Grievant describes his brief encounter with the client. He noticed the client was pacing the lobby. When he called her in for the interview, she seemed nervous or upset about something. When he asked, "Can we talk?" she instantly turned around and hysterically stated, "If I can't get tested here I know where else I can go..." He denied acting anything but professional with the client. In his response to Event 2 with the male client, he recalled being asked to interview a patient even though it was not his assignment that night. In his testimony, the Grievant said that he was concerned about the outbreak in syphilis that the community had been having. He believed that the client should start treatment right away. So he called the client to tell him to get treatment. The Grievant did not understand the note from the doctor to mean that he could not call the patient. During his testimony, the Grievant also expressed concern that the interview record did not match the client in question.<sup>9</sup>
12. On October 2, 2012, the Nurse Supervisor wrote a memorandum to the Grievant and a Group II Written Notice attached. The Grievant was terminated on that date.<sup>10</sup>
13. The written evidence included the Interview Record and other chart notes which the Nurse Supervisor testified were from Event 2. Upon examination of the four pages, I find that the pages do not appear to be from the same client. The client addresses on the first two pages are different. The dates do not correspond to the dates of the incident. On page 3, the date of the telephone call that the Nurse Supervisor made to the client was not the same date that the Nurse Supervisor testified that she called the client.<sup>11</sup>
14. The September 6<sup>th</sup> Memorandum from the Nurse Supervisor to the Grievant outlines the reasons for the termination. The memo quotes what the woman client in the first event said to someone at another health department who then relayed the quote to someone in the LHD who then related it to the Nurse Supervisor. None of the people in that chain testified except the Nurse Supervisor. The Nurse Supervisor did speak to a client on the telephone regarding the second event. She testified as to what the client said to her.

### **APPLICABLE LAW AND OPINION**

The Virginia Personnel Act, VA Code § 2.2-2900 et. seq., establishes the procedures and policies applicable to employment in Virginia. It includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance

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<sup>9</sup>Agency Exhibit C, p. 10-12, Testimony of Grievant.

<sup>10</sup>Agency Exhibit C, p. 7; Agency Exhibit J

<sup>11</sup>Agency Exhibit E, p. 1-4.

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 government interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653,656 (1989).

VA Code § 2.2-3000(A) provides:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management. To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employee disputes that may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Department of Human Resource Management has produced a Policies and Procedures Manual which include:

**Policy Number 1.60: Standards of Conduct.**

Policy 1.60 provides a set of rules governing the professional 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.

Offenses are grouped by levels, from Group I to Group III. Group I Offenses generally includes offenses that have a relatively minor impact on agency business operations but still require management intervention. Group II Offenses include acts of misconduct of a more serious nature that significantly impact agency operations. Group III Offenses generally include acts of misconduct of a most serious nature that severely impact agency operations.

The Nurse Supervisor issued a Group II Written Notices to the Grievant. The Agency alleges that the Grievant failed “to follow instructions/policy & failure to provide standard of care with regard to HIV counseling & testing practice; providing misinformation to a client in STI Clinic & developing an adversarial relationship with a client, compromising the standards of HIV Testing & STI Clinic services, erodes (sic) public trust in the care & services provided by the (Local) Health Department (LHD), diminishes the reputation among community & poss. partner agencies & lowers LHD staff morale.”

The responsibility of the hearing officer is to determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. To do this, the hearing officer reviews the facts de novo to determine

- (i) whether the employee engaged in the behavior described in the Written Notice;

(ii) whether the behavior constituted misconduct,  
(iii) whether the agency's discipline was consistent with the law and policy, and finally,  
(iv) 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.<sup>12</sup>

The evidence presented in this case does not prove that the employee engaged in the behavior described in the Written Notice and accompanying memorandum. There were no witnesses to the encounter of the clients and the Grievant. The Grievant testified that the events did not take place as described by the third to fourth hand accounts of the incidents as related in the memo. The written evidence regarding the event two is not credible. Other than the Grievant's account of events, the only other testimony regarding the events is the testimony of the Nurse Supervisor, who did not witness the events. The Exhibits presented do not convince this hearing officer that the Agency's version of the events is proven by a preponderance of the evidence. The events could have happened the way the agency described. The events could have happened the way the Grievant testified. In the end, I find that, given the evidence presented, the agency has not proven their case by the preponderance of the evidence.

### **DECISION**

I find that the Grievant did not engage in the conduct described in the written notice. The Agency has not sustained its burden of proof for the Group II Written Notice. The disciplinary action taken by the agency was not warranted or appropriate under the circumstances. The Group II Written Notice given to the Grievant on October 2, 2012 by the agency is hereby rescinded.

Since the Written Notice is rescinded, the Grievant is reinstated with full back pay and benefits.

### **ATTORNEYS' FEES**

Since this was a termination case at which the employee substantially prevailed, the Grievant is entitled to reasonable attorney's fees.

The counsel for the Grievant shall ensure that the hearing officer receives within 15 calendar days of the issuance of this decision, counsel's petition for reasonable attorney's fees. The fees petition shall include an affidavit itemizing services rendered, the time billed for each service, and the attorney's customary hourly rate not to exceed the amounts provided on EDR's website. A copy of the fees petition must be provided to the opposing party at the time it is submitted to the hearing officer. The opposing party may contest the fees petition by providing a written rebuttal to the hearing officer.<sup>7</sup>

### **APPEAL RIGHTS**

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<sup>12</sup>Rules for Conducting Grievance Hearings, EDR, Section VI.B.1.

<sup>13</sup>Rules for Conducting Grievance Hearings, EDR, Section VI.E.

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 14<sup>th</sup> St., 12<sup>th</sup> 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>14</sup>

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

January 1, 2013

Date

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Jane E. Schroeder, Hearing Officer

cc: Agency, Agency Representative, Employee, Counsel for Employee, EDR

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<sup>14</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.



POLICY RULING OF THE DEPARTMENT OF  
HUMAN RESOURCE MANAGEMENT

In the Matter of the  
Department of Health

February 14, 2013

The agency has requested an administrative review of the hearing officer's decision in Case No. 9983. For the reason stated below, we will not interfere with the application of this decision. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has directed that I conduct this administrative review.

The hearing officer listed the following in the PROCEDURAL HISTORY of this case:

The Grievant was employed by the agency as a health counselor. On October 2, 2012, the agency issued a Group II Written Notice to the Grievant for failure to follow instructions and/or policy and failure to provide standard of care. The Grievant was terminated from employment. The Grievant initiated a letter to EDR by counsel, to dispute the Group II Written Notice and request a hearing. On November 13, 2012, the hearing officer was assigned to hear the case.

A pre-hearing conference was held on November 15, 2012. The hearing date was set for December 12, 2012, and was subsequently held on that date. Four witnesses testified. The agency's exhibits (Agency Exhibits A-I) were entered into evidence without objection. The Grievant's exhibits (Grievant Exhibits A-F) were entered into evidence without objection. During the hearing, Agency's Exhibit J was entered into evidence over the objection of the Grievant's attorney.

*ISSUE*

Whether the Group II Written Notice given on October 2, 2012 for failure to follow instructions and/or policy and failure to provide standard of care should be affirmed or rescinded. On the Written Notice, the Agency alleges that the nature of the offense is as follows:

Offense Dates: 08/08/2012 & 8/22/12

Offense codes 13 & 99: Failure to follow instructions/policy & failure to provide standard of care with regard to HIV counseling & testing practice; providing misinformation to a client in STI Clinic & developing an adversarial relationship with a client, compromising the standards of HIV Testing & STI Clinic services, erodes (sic) public trust in the care & services provided by the (Local) Health Department (LHD), diminishes the reputation

among community & poss. partner agencies & lowers LHD staff morale  
(refer to attached Due Process Memorandum dated September 6, 2012.

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The relevant FINDINGS OF FACT in this case are as follows:

1. The Grievant worked for the agency for seventeen years as a health counselor. The duties of a health counselor includes providing STI(Sexually Transmitted Infections) and HIV pre and post-test counseling and testing, evaluating risk behavior, blood testing, treatment follow-up, communicating with private providers, tracing sexual partners, bringing clients and contacts in for appropriate testing and treatment, and assisting person to identify ways to change behaviors to prevent re-infection or the spread of infections to others. Because of the sensitive nature of the subject matter, clients are sometimes agitated and reluctant to divulge information regarding their sexual history.
2. The Grievant was terminated on October 2, 2012 as a result of the two offenses named in the Group II Written Notice.
3. The first offense is referred to in this case as Event I. On August 8, 2012, a female client came to the clinic at the LHD for HIV testing. The Grievant, in his role as health counselor, escorted her from the lobby to the exam room. On the way to the exam room, the client and the Grievant spoke to each other. Before entering the exam room, the client turned around and walked out of the clinic. The next day, she went to another health clinic and had the HIV testing. At the other health clinic, she alleged complained about her treatment at the LHD.
4. The Grievant testified that, as he and the client walked to the exam room, the client said she wanted to be tested for HIV. He told her that he wanted her to come into the exam room so he could interview her before the testing. She would not enter the exam room. She said she just wanted to be tested. She refused to stay and left. The Grievant testified that she would have had testing if she had stayed.
5. The Health Director of the LHD testified that he was informed by the Nurse Supervisor that there was a patient complaint regarding this incident. He directed the Medical Director to look into the matter. The Health Director said that the Medical Director called the patient. Neither the Medical Director nor the patient testified. There was no written report from the Medical Director regarding the matter.
6. The second offense is referred to in this case as Event 2. On the evening of August 22, a male client came to the LHD for the Sexually Transmitted Infection (STI) clinic because of his concern about possible exposure to syphilis. He was seen by a doctor and nurse at the clinic and was given a test for syphilis. The doctor's note said, "Await test results." The Nurse Supervisor testified that the client should not have then seen a health counselor that night after seeing the nurse and the doctor. The correct procedure would have been for the client to leave and wait until the test results came in.
7. The Grievant was asked by a nurse to meet with the client. Although the Grievant was working the HIV clinic that night, he agreed to see the client since the health counselor working the STI clinic that night was not around at that time. The Grievant testified that

- after he talked briefly with the client, the client left. The Grievant, upon reviewing the chart, called the client shortly thereafter and told the client that he should begin the treatment for syphilis. Treatment for syphilis is sometimes started before the test results are known. The client decided to wait for the test results.
8. The Nurse Supervisor testified that on August 28, 2012, she called the client to tell him that he had syphilis and that he should come in for treatment. The Nurse Supervisor testified that the client complained about the way that the Grievant had spoken to him.
  9. On August 29, 2012, the Nurse Supervisor sent the Grievant a memorandum relating that he was placed on pre-disciplinary leave with pay pending the LHD's investigation of customer service complaints.
  10. On September 6, 2012, the Nurse Supervisor sent the Grievant a six-page memorandum outlining the details of events on August 8 and August 22 and giving the Grievant an opportunity to provide written responses to the memorandum.
  11. The Grievant wrote three written responses to the memorandum: two are dated August 8, 2012 and one is dated August 22, 2012. The second response is stamped as received by the LHD on September 14, 2012. The other two responses' had the date received illegible. In his response to Event 1 with the female client, the Grievant describes his brief encounter with the client. He noticed the client was pacing the lobby. When he called her in for the interview, she seemed nervous or upset about something. When he asked, "Can we talk?", she instantly turned around and hysterically stated, "If I can't get tested here I know where else I can go ... " He denied acting anything but professional with the client. In his response to Event 2 with the male client, he recalled being asked to interview a patient even though it was not his assignment that night. In his testimony, the Grievant said that he was concerned about the outbreak in syphilis that the community had been having. He believed that the client should start treatment right away. So he called the client to tell him to get treatment. The Grievant did not understand the note from the doctor to mean that he could not call the patient. During his testimony, the Grievant also expressed concern that the interview record did not match the client in question.
  12. On October 2, 2012, the Nurse Supervisor wrote a memorandum to the Grievant and a Group II Written Notice attached. The Grievant was terminated on that date.
  13. The written evidence included the Interview Record and other chart notes which the Nurse Supervisor testified were from Event 2. Upon examination of the four pages, I find that the pages do not appear to be from the same client. The client addresses on the first two pages are different. The dates do not correspond to the dates of the incident. On page 3, the date of the telephone call that the Nurse Supervisor made to the client was not the same date that the Nurse Supervisor testified that she called the client.
  14. The September 6<sup>th</sup> Memorandum from the Nurse Supervisor to the Grievant outlines the reasons for the termination. The memo quotes what the woman client in the first event said to someone at another health department who then relayed the quote to someone in the LHD who then related it to the Nurse Supervisor. None of the people in that chain testified except the Nurse Supervisor. The Nurse Supervisor did speak to a client on the telephone regarding the second event. She testified as to what the client said to her.

## APPLICABLE LAW AND OPINION

The Virginia Personnel Act, VA Code § 2.2-2900 et. seq., establishes the procedures and policies applicable to employment in Virginia. It 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 government interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653,656 (1989).

VA Code § 2.2-3000(A) provides:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management. To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employee disputes that may arise between state agencies and those employees who have access to the procedure under § 2.2- 3001.

The Department of Human Resource Management has produced a Policies and Procedures Manual which include:

Policy Number 1.60: Standards of Conduct.

Policy 1.60 provides a set of rules governing the professional 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.

Offenses are grouped by levels, from Group I to Group III. Group I Offenses generally includes offenses that have a relatively minor impact on agency business operations but still require management intervention. Group II Offenses include acts of misconduct of a more serious nature that significantly impact agency operations. Group III Offenses generally include acts of misconduct of a most serious nature that severely impact agency operations.

The Nurse Supervisor issued a Group II Written Notice to the Grievant. The Agency alleges that the Grievant failed "to follow instructions/policy & failure to provide standard of care with regard to HIV counseling & testing practice; providing misinformation to a client in STI Clinic & developing an adversarial relationship with a client, compromising the standards of HIV Testing & STI Clinic services, erodes (sic)

public trust in the care & services provided by the (Local) Health Department (LHD), diminishes the reputation among community & poss., partner agencies & lowers LHD staff morale.”

The responsibility of the hearing officer is to determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. To do this, the hearing officer reviews the facts de novo to determine

- (i) whether the employee engaged in the behavior described in the Written Notice;
- (ii) whether the behavior constituted misconduct,
- (iii) whether the agency's discipline was consistent with the law and policy, and finally,
- (iv) 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.

The evidence presented in this case does not prove that the employee engaged in the behavior described in the Written Notice and accompanying memorandum. There were no witnesses to the encounter of the clients and the Grievant. The Grievant testified that the events did not take place as described by the third to fourth hand accounts of the incidents as related in the memo. The written evidence regarding the event two is not credible. Other than the Grievant's account of events, the only other testimony regarding the events is the testimony of the Nurse Supervisor, who did not witness the events. The Exhibits presented do not convince this hearing officer that the Agency's version of the events is proven by a preponderance of the evidence. The events could have happened the way the agency described. The events could have happened the way the Grievant testified. In the end, I find that, given the evidence presented, the agency has not proven their case by the preponderance of the evidence.

### *DECISION*

I find that the Grievant did not engage in the conduct described in the written notice. The Agency has not sustained its burden of proof for the Group II Written Notice. The disciplinary action taken by the agency was not warranted or appropriate under the circumstances. The Group II Written Notice given to the Grievant on October 2, 2012 by the agency is hereby rescinded. Since the Written Notice is rescinded, the Grievant is reinstated with full back pay and benefits.

### **DISCUSSION**

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer

to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In each instance where a request is made to this Agency for an administrative review, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent or is misinterpreted. In its request for an administrative review of policy violation by the hearing officer in making her decision, the agency raised several issues which appear to contest the facts of this case and the decision the hearing officer made in this case.

For example, the agency states, "The preponderance of the evidence supports VDH's decision to terminate the Grievant for conduct that resulted in three (3) Group II Written Notices, two of which were uncontested by the Grievant, yet they were not acknowledged or noted in the Hearing Officer's decision. Because the Hearing Officer's decision failed to account for the first two Group II Written Notices and failed to properly weigh the evidence regarding the third Group II Written Notice, the Hearing Officer's decision should be reversed. VDH's decision to terminate the Grievant should be affirmed." The appeal continues, in part, "The evidence discussed below and contained in the hearing transcript, exhibits, and in the Hearing Officer's January 1, 2013 decision itself clearly demonstrates that VDH was correct to issue the third Group II Written Notice and to terminate the Grievant for his repeated, egregious conduct."

In her decision, the Hearing Officer stated the following:

The evidence presented in this case does not prove that the employee engaged in the behavior described in the Written Notice and accompanying memorandum. There were no witnesses to the encounter of the clients and the Grievant. The Grievant testified that the events did not take place as described by the third to fourth hand accounts of the incidents as related in the memo. The written evidence regarding the event two is not credible. Other than the Grievant's account of events, the only other testimony regarding the events is the testimony of the Nurse Supervisor, who did not witness the events. The Exhibits presented do not convince this hearing officer that the Agency's version of the events is proven by a preponderance of the evidence. The events could have happened the way the agency described. The events could have happened the way the Grievant testified. In the end, I find that, given the evidence presented, the agency has not proven their case by the preponderance of the evidence.

Summarily, the Hearing Officer concluded that evidence did not support that the Grievant committed the violations as alleged by the agency. Because the Hearing Officer has the authority to make that determination, this Agency has no authority to modify that decision. Rather than a policy violation, it appears that the agency is contesting the evidence the Hearing Officer considered, how she assessed that evidence, and the resulting decision. Thus, we have no authority to interfere with the application of this decision.

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Ernest G. Spratley  
Assistant Director  
Office of Equal Employment Services

**COMMONWEALTH OF VIRGINIA**  
**Department of Human Resource Management**  
**Office of Employment Dispute Resolution**

In the matter of Case # 9983

**FEES ADDENDUM ORDER**

IT APPEARING THAT:

In Case # 9983, a termination grievance before this hearing officer, the Grievant substantially prevailed at hearing, and the hearing officer ordered the reinstatement of the Grievant. On January 9, 2013, the attorney for the Grievant submitted a motion and affidavit in support of the award of attorney's fees, with a copy sent to the agency representative. On January 11, 2013, this hearing officer sent an inquiry to the attorney for the grievant as to the total number of hours and billing hourly rate. On January 16, 2013, the attorney responded with a letter and time listing which showed total billable hours of 16.70 hours, and stated the attorney handled the case for a flat fee of \$2,850.00. Under the Department of Dispute Resolution rules, grievants are allowed to recover attorney's fees at their attorneys' customary hourly rate not to exceed \$131 per hour (\$158 per hour if the attorney's practice is located in Northern Virginia). In this case, the attorney's practice is in Bowie, Maryland, and the hearing was located in Northern Virginia.

On January 14, 2013, the agency requested an Administrative Review Request for this case. On February 19, 2013, the Department of Human Resource Management upheld the hearing officer's decision.

IT IS HEREBY ORDERED:

That the Grievant is awarded attorney's fees of \$2,638.60 (which is \$158.00 X 16.70 hours) to be paid by the agency where the Grievant worked.

Within 10 days of the issuance of this fees addendum, either party may petition EDR for a decision solely addressing whether the fees addendum complies with the Grievance Procedure Manual and the Rules for Conducting Grievance Hearings.

ORDERED this 21<sup>st</sup> day of March, 2013

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Jane E. Schroeder, Hearing Officer

cc: Agency, Agency Representative  
Counsel for Employee, Employee  
EDR