Issues: Group II Written Notice (unsatisfactory performance and failure to follow instructions), and Termination (due to accumulation); Hearing Date: 01/08/14; Decision Issued: 01/14/14; Agency: VDOT; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 10235; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 01/27/14; EDR Ruling No. 2014-3804 issued 02/27/14; Outcome: AHO's decision affirmed.**

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. 10235

Hearing Date: January 8, 2014
Decision Issued: January 14, 2014

PROCEDURAL HISTORY

Grievant was a senior human resource consultant for the Department of Transportation ("the Agency"). On October 17, 2013, the Grievant was charged with a Group II Written Notice for unsatisfactory performance and failure to follow instructions and/or policy. Because of the accumulation of Written Notices, the discipline was termination of employment. The grievant had a prior, active Group I Written Notice for unsatisfactory performance, a Group II Written Notice for failure to follow supervisor's instructions, and a counseling memorandum.

Grievant timely filed a grievance to challenge the Agency's disciplinary action, and the grievance qualified for a hearing. On December 4, 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 January 8, 2014, on which date the grievance hearing was held, at an agreed location. This was the first available date available to the parties.

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

APPEARANCES

Grievant
Counsel 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 his grievance filings, the Grievant requested rescission of the Group II Written Notice, reinstatement, back pay, and attorney's fees.

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 II Offenses to include acts of misconduct of such a more serious and/or repeat nature that require formal disciplinary action. 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. Absent mitigating circumstances, a repeat of the same, active Group I Offense should result in the issuance of a Group II Offense notice. Agency Exh. 4.

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 senior human resource consultant, with many years tenure. The current written notice charged:

> On 8/12/13, [Grievant] was assigned the task of sending weekly reports to the Policy Directorate beginning 8/23/13. On 9/4/13, [Ms. H] asked why there was a delay with the report. [Grievant] said he was not aware he had to send the report. Since that time the weekly reports have been sent with errors that required corrections. Another incident occurred in August when [Grievant] established a position but did not abolish a job. This error resulted in data errors being reported to Executives and negatively affected the overall Agency MEL. [Grievant] also did not follow standard operating procedures for a PAW action that was completed on 9/9/13. He allowed the hiring manager to complete it which was inaccurate. He insisted that [Ms. H] sign it because the hiring manager was

> anxious to make an offer. The new employee did not begin employment until 9/30/13. Again, this is another example of the lack of communications with his internal customers. Finally, [Grievant] sent a confidential letter regarding an employee's pay action to the wrong division administrator. [Ms. H] encouraged him to sort the letters before distribution [of] them but he said he had it under control. On 10/03/13, he sent out an incorrect Separation Notice about an employee's resignation which had to be corrected. This Group II Written Notice in addition to the active Group II Written Notice will result in the termination of employment.

Agency Exh 2, p. 3.

The Agency's witnesses testified consistently with the charge in the Written Notice of the conduct in question. The Grievant's acting supervisor since June 2013 testified that the series of incidents identified in the Written Notice were reflective of the Grievant's performance, particularly over the one and one-half months covered by the events. She testified that she was unaware of the Grievant's prior, existing disciplinary record when initiating this Written Notice. She testified to the events noted in the Written Notice, consisting of the five incidents.

The acting supervisor testified that all of the areas involved in the Written Notice were routine and fell within the Grievant's position and experience level. As for the weekly reports to the directorate, the evidence showed that the Grievant did not give adequate attention and utilized a "cut and paste" approach to the reports that repeatedly were not properly updated with current information. The supervisor had to remind the Grievant several times to abolish a position in the system following the creation of a new position. The Grievant also delivered a letter to the wrong administrator establishing an employee's pay adjustment, after being specifically admonished to ensure accuracy and after a rejected offer of assistance for sorting the letters correctly. The Grievant also lacked adequate communication and discretion when notifying Agency personnel regarding an employee resignation that was, instead, a transfer. As for the Grievant's actions regarding the completion of a PAW (pay action worksheet) for a new hire, the acting supervisor testified the deficiency was based on information from the Grievant.

The human resources and training director testified that she reviewed the performance issues and concluded that the Grievant's unsatisfactory job performance had been disciplined by three separate supervisors, and that the Group II level was appropriate with termination based on the accumulated disciplinary record.

The Grievant testified to his job history and experience in the human resources field, and corroborated the Agency's witnesses' contention that he had the experience to know the processes and the proper discretion to carry out his job duties. The Grievant disputed the incident over the PAW, stating that he was following the usual procedure to try to have new hires start on a pay date, and the Grievant adamantly denied that he had the hiring manager complete the PAW, as that is his function. The Grievant testified that he was not aware of the new hire's request for a later start date until afterwards, rendering his attempts to hurry along completion of the PAW unnecessary. As for the other performance issues, the Grievant essentially conceded the conduct but contended that the instances were insignificant mistakes and did not merit formal

discipline. The Grievant also testified that he was surprised by the discipline, and that he believed the discipline was motivated by retaliation for his voicing his opinion in an August 2013 meeting that the Agency's hiring was plagued by pre-selection and nepotism.

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. What is clear from the evidence is that the Grievant had a problem meeting expectations, and that constitutes a legitimate job performance issue. I find that the Agency has met its burden of proving the conduct in the Written Notice, except for the incident regarding the PAW. The evidence concerning the PAW is in equipoise, so the Agency has not shown unsatisfactory job performance for this incident. Given the circumstances of the Grievant's performance issues and the progressive nature of the prior discipline, I find that the conduct merited the Agency's disciplinary action of a Group II Written Notice. The Agency conceivably could have considered each instance as a separate Written Notice, but the Agency treated the multiple issues within one Group II Written Notice. With the active Group I Written Notice for the unsatisfactory job performance, a Group II for failure to follow instructions, and the counseling memorandum for unsatisfactory performance, the repeat nature of the present Written Notice justifies a Group II offense. Such disciplinary decision falls within the discretion of the Agency so long as the discipline does not exceed the bounds of reasonableness.

Based on the evidence presented, I conclude that the Agency has met its burden of proof of the offense (unsatisfactory job performance) and level of discipline—Group II with termination based on the accumulated Written Notices.

<u>Mitigation</u>

The Agency had leeway to impose discipline along the continuum less than Group II with termination. However, the Agency expressed its inability to mitigate the discipline further than a Group II because the Agency has exercised progressive discipline under the judgment of three supervisors. For circumstances considered, the Agency stated in the Written Notice, in Section IV:

> [Grievant] was issued a Group I Written notice for unsatisfactory performance 2/17/12. He received an overall below contributor rating on his 2011-2012 performance evaluation. [Grievant] received an overall contributor rating for the three month re-evaluation; however, he later received a Group II written notice (4/9/13) for failure to follow supervisor's instructions. On July 15, 2013, [Grievant] received a counseling memorandum for unsatisfactory performance related to the lack of sufficient documentation. Consideration of [Grievant's] due

> process response and the above documentation demonstrates a pattern of consistent unsatisfactory performance which substantiates the formal disciplinary action.

The Grievant asserts, reasonably, that mitigating circumstances could have been used to reduce the Group II Written Notice or to issue no discipline at all. 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).

As with all mitigating factors, the grievant has the burden to raise and establish any mitigating factors. *See e.g.,* EDR Rulings 2010-2473; 2010-2368; 2009-2157, 2009-2174. *See also* Bigham v. Dept. Of Veterans Affairs, No. AT-0752-09-0671-I-1, 2009 MSPB LEXIS 5986, at *18 (Sept. 14, 2009) citing to *Kissner v. Office of Personnel Management*, 792 F.2d 133, 134-35 (Fed. Cir. 1986). (Once an agency has presented a prima facie case of proper penalty, the burden of going forward with evidence of mitigating factors shifts to the employee). While the Grievant raised a couple of instances she believed were excessive tardiness undisciplined, one such employee was terminated. As for the other employee raised by the Grievant as an example, the Grievant admitted she was unaware of discipline, or the lack thereof. To the contrary, the Agency presented evidence of its policy of consistently enforcing the tardiness policy.

The Agency expressed its position that the prior Written Notices and counseling memorandum are aggravating circumstances more so than any mitigating circumstances. The hearing officer accepts, recognizes, and upholds the Agency's important role in expecting adequate job performance. The applicable standards of conduct provide stringent expectations of Commonwealth's employees, including performing assigned duties and responsibilities with the highest degree of public trust, devoting full effort to job responsibilities, and meeting or exceeding established job performance expectations. The Grievant asserts that the Agency has improperly considered mere mistakes to rise to the level of unsatisfactory job performance. However, the Grievant was well aware of the Agency's expectations regarding his performance, and there is no lack of notice to the Grievant given the prior discipline and counseling.

The Grievant asserts that the Agency's action is motivated by retaliation. For a claim of retaliation to succeed, the Grievant must show (1) he engaged in a protected activity; (2) he suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, whether management took an adverse employment action because the employee had engaged in the protected activity. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006); s*ee, e.g*., EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633. If the Agency presents a nonretaliatory business reason for the adverse action, then the Grievant must present sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation. *See EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 405 (4th Cir. 2005). Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

The Grievant's description of the protected activity is that he voiced at a meeting in August 2013 that the Agency was plagued by pre-selection and nepotism. The Grievant asserts that his discipline and job termination stems from the Agency's reaction and ill will in response

to his voicing his opinion. The Grievant engaged in protected activity, and he subsequently suffered an adverse employment action.

There is nothing to show that the Agency's handling of this discipline was in any way retaliatory beyond the Grievant's mere allegation. Grievant has not presented sufficient evidence to show that the Agency's discipline was motivated by improper factors. Rather, it appears that the determinations were based on the Grievant's actual conduct and job performance issues, all of which actions were primarily within the control of the Grievant.

While lesser discipline was within the discretion of Agency management, the Agency acted within its discretion by issuing a Group II Written Notice with termination.

There is no requirement for an Agency to exhaust all possible lesser sanctions or, alternatively, to show that the chosen discipline was its only option. While the Agency could have justified or exercised lesser discipline, I find no mitigating circumstances that render the Agency's action of a Group II Written Notice with termination outside the bounds of reasonableness. Accordingly, I find no mitigating circumstances that allow the hearing officer to reduce the Agency's action.

Under the EDR's Hearing Rules, the hearing officer is not a "super-personnel officer." Therefore, 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, even if he disagrees with the action. Even if the hearing officer would have levied a lesser discipline, the Agency has the management prerogative to act within a continuum of discipline as long as the Agency acts within the bounds of reasonableness. In this case, the Agency's action of imposing a Group II Written Notice is within the limits of reasonableness. The Hearing Officer, thus, lacks authority to reduce or rescind the disciplinary action.

DECISION

For the reasons stated herein, without the authority to reverse the Agency's action, I must uphold the Agency's Group II discipline with termination.

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.