Issue: Group I Written Notice (abusive language); Hearing Date: 02/28/14; Decision Issued: 03/03/14; Agency: DBHDS; AHO: Cecil H. Creasey, Jr., Esq; Case No. 10281; Outcome: No Relief – Agency Upheld.

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. 10281

Hearing Date: February 28, 2014
Decision Issued: March 3, 2014

PROCEDURAL HISTORY

Grievant is a forensic mental health technician ("FMHT") for the Department of Behavioral Health and Development Services ("the Agency"), serving Central State Hospital ("CSH"), and has been with the Agency three years. On August 16, 2013, the Grievant was issued a Group I Written Notice for using obscene or abusive language on July 13, 2013.

Grievant timely filed a grievance to challenge the Agency's disciplinary action, and the grievance qualified for a hearing. On February 13, 2014, 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 February 28, 2014, 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 Grievant was satisfied with the documents included among the Agency's exhibits. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant
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 I Written Notice.

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 I Offenses to include acts of minor misconduct that require formal disciplinary action. This level is appropriate for offenses that have a relatively minor impact on business operations but still require formal intervention. Agency Exh. 8.

The facility's Departmental Instruction 201, at 201-3, defines abuse to include use of language that demeans, threatens, intimidates or humiliates the person. Agency Exh. 8. Through training programs the Grievant attended, the Agency trained employees that abuse includes cursing at patients. Agency Exh. 7. The employee handbook, at Chapter 14, specifies abuse to include:

> Use of words, signs and/or gestures to a client or actions by an employee which are either commonly [understood] by persons to, or that the employee knows will for that particular client; humiliate, demean, disrespect, curse, harass or cause emotional anguish or distress, ridicule, or threaten harm to the client or which would be likely to incite and/or precipitate maladaptive and/or regressive behavior by the client.

Agency Exh 5.

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, with 3 years tenure. The Grievant had no record of prior disciplinary actions.

The Agency's witnesses, the investigator and Agency director, testified consistently with the charge in the Written Notice of the conduct in question. They testified to the reported language used by the Grievant with a patient, and the Grievant's acknowledgement of the interaction. The verbal exchange between the Grievant and a patient occurred during

oppositional behavior, instigated by the patient, and used the phrase "fuck you" or other iteration by both the patient and the Grievant. The verbal exchange was deemed to be loud and argumentative, and the investigator found the allegation to be substantiated. Agency Exhibit 2. The Agency director testified that the Grievant owned up to his behavior during the due process meetings, and she described her mitigation analysis that was contained in the Written Notice. The Written Notice included circumstances considered:

> DI 201 indicates that the normal disciplinary action for a substantiated allegation of abuse is the issuance of a Group III written notice and termination. [The Agency director] was successful in mitigating the required disciplinary action to a Group I written notice due to your otherwise satisfactory performance and ability to become a good role model to the patients and your peers. You will also be referred to the Department of Patient Relations and Staff Development for remedial training.

The Grievant asserts that he was using the language in a therapeutic way, and he testified that the patient proceeded to act compliant afterwards. The Grievant testified that he did not mean or intend to be abusive in any way toward the patient. The Agency witnesses testified that such cursing language is never deemed to be therapeutic, and that this is repeated during annual training.

There were many submissions of good character and commendations of the Grievant, and they show a consistent opinion of the Grievant's good, worthy and effective job performance and value to the Agency. Agency Exhibit 3.

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. I find that the conduct as described in the Written Notice occurred, and that the offense is considered properly Group I. Use of expletives is not condoned by the Agency and explicitly prohibited. While there is no suggestion of malice or intentional abuse with the language used, such decision falls within the discretion of the Agency so long as the discipline does not exceed the bounds of reasonableness.

Mitigation

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).

The Agency expressed significant mitigation within the Written Notice itself. 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 additional mitigating circumstances that render the Agency's action of a Group I Written Notice outside the bounds of reasonableness. Accordingly, I find that the Agency's action of imposing a Group I Written Notice for the July 13, 2013, offense is within the limits of reasonableness. The Agency had leeway to impose discipline along the permitted continuum. 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. The Hearing Officer, thus, lacks authority to reduce or rescind the disciplinary action.

DECISION

For the reasons stated herein, I uphold the Agency's Group I discipline.

APPEAL RIGHTS

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

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

   Director
   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.