Issues: Group II Written Notice (failure to follow policy) and Termination (due to accumulation); Hearing Date: 04/07/14; Decision Issued: 04/08/14; Agency: DBHDS; AHO: Cecil H. Creasey, Jr., Esq.; Case No.10304; Outcome: Partial Relief; **Administrative Review: EDR Ruling Request received 04/23/14; EDR Ruling No. 2014-3873 issued 05/14/14; Outcome: Remanded to AHO; Remand Decision issued 05/14/14; Outcome: Decision Reversed – Grievant's Termination Upheld; Administrative Review: DHRM Ruling Request received 04/23/14; DHRM Ruling issued 06/03/14; Outcome: AHO's Remand Decision affirmed; Judicial Review: Appealed to Dinwiddie County Circuit Court; Outcome: AHO's final decision affirmed (08/21/14).**

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. 10304

Hearing Date: April 7, 2014
Decision Issued: April 8, 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 for eight years. On February 6, 2014, the Grievant was issued a Group II Written Notice for having her cell phone, which is considered contraband, in the forensic building on January 1, 2014, contrary to established policy. Based on the accumulated discipline of a prior, active Group II Written Notice, the Agency elected to terminate the Grievant.

Grievant timely filed a grievance to challenge the Agency's disciplinary action, and the grievance qualified for a hearing. On March 10, 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 April 7, 2014, on which date the grievance hearing was held, at the Agency's facility.

Both sides submitted documents for exhibits that were accepted into the grievance record, without objection, 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
Advocate for Grievant
Agency Representative
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 reduction of the Group II Written Notice and reinstatement to her position.

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 a more serious and/or repeat nature that require formal disciplinary action. This level is appropriate for offenses that significantly impact business operations and/or constitute neglect of duty, insubordination, the abuse of state resources, violations of policies, procedures, or laws. A second active Group II Notice normally should result in termination; however, when mitigating circumstances exist, an employee may be suspended for up to 30 workdays and/or demoted or transferred with reduced responsibilities and a disciplinary salary action; or transferred to an equivalent position in a different work area with no change in salary. Agency Exh. 7, p 10-11.

The facility's Joint Instruction 1-8, Communication Devices, at ¶ H., states

> Cell phones are considered contraband and will not be allowed in a forensic building. Proper storage arrangements outside of the forensic units must be made prior to entering the forensic security checkpoints. Exceptions must be made under the specific authority of the Security Colonel or designee.

Agency Exh. 7, p 2. The Agency issued a clarification memo, providing the following:

> FOR STAFF WORKING IN BUILDING 96:
> STAFF MAY STORE THEIR PERSONAL CELLULAR PHONES IN THEIR LOCKERS LOCATED in the staff break room area.

The Grievant signed her receipt of the policy and clarifying memo on February 22, 2013. Agency Exh. 4, p. 6. The memo stated:

> Many cell phone models can search the internet, text and email pictures and videos to others, post the same pictures and video to social media sites, play video games, and the list goes on. If fallen into the wrong hands these abilities afford the patient(s) opportunities to plan, coordinate and engage in activity that may pose a risk to themselves, other patients, staff and the public. There is also the potential that photographs, and/or video recordings could be taken of patients, which is a clear violation of their privacy and HIPAA rights. Particularly, when contraband is discovered in a prohibited area, a breach in security has occurred and the hospital's security system on the whole has been weakened.
>
> It is critical that all staff fully understand the expectations of Joint Instruction 1-8; Communications Device. Personal cellular phone usage is prohibited in any setting in which individuals and/or patients are receiving services or receiving care. No cellular phone calls maybe placed or received. No text messages may be placed or received. The same rules apply while on duty at an alternate worksite i.e. HDMC, SRMC. Failure to comply with the Communications Device policy will be viewed as bringing contraband into the hospital and may result in disciplinary action. Any exemptions to this policy shall be approved by the Hospital Director.

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 8 years tenure. The Grievant had one active Group II Written Notice, issued May 25, 2011, for failure to follow instructions and/or policy.

The Agency's witnesses, the security director, registered nurse manager, and assistant chief nurse executive, testified consistently with the charge in the Written Notice of the conduct in question. They testified to the applicable policies, the purpose and importance of the contraband policy, particularly as it applies to cell phones. The Grievant was assigned to Building 96, a forensic building. The assistant chief nurse executive testified that contraband violations are always considered a Group II violation because it is failure to follow policy. The potential for harm is present regardless of whether the violation was intentional. The RN manager, who issued the Group II Written Notice, testified that she followed policy in issuing the termination because "more than two Group II" Written Notices results automatically in termination. On cross-examination, the RN manager testified that she does not make exceptions when following policy, wants to be consistent in every application, and leaves exceptions up to the grievance process.

Two witnesses who had worked with the Grievant testified to the Grievant's good character and her careful attention to following rules and policies. The Grievant testified that on the offense date, she was organizing a New Year's Day potluck event for the staff, and when she came to work she was carrying items from her car. Taking these things to the break room led her to put her phone in her pocket after clearing the security checkpoint. Because of this distraction,

she was not attentive to her routine of putting her cell phone in her locker. The Grievant returned to her car to retrieve more things for the event, with her cell phone still in her pocket. When she returned to the security checkpoint to re-enter, the security staff used a wand and did not detect the cell phone. She put her Agency radio in the same pocket, did not notice the cell phone, and she also wore her Agency smock over her pocket. In her grievance Form A, the Grievant wrote:

> I acknowledge the violation of the policy, however, there were mitigating circumstances surrounding this incident. I didn't purposely take my cell phone to my work area. Normally, I either leave my cell phone in my car or place it in my locker. This violation was solely committed because I was rushing with organizing my ward's New Year's holiday party. I was put in charge of the party, and my main focus was to ensure everything was in place for the party. I was rushing and overwhelmed with thoughts about preparing for the party. On the night of the party, I reported to my ward, grabbed a radio put it in my pocket. Next, I began going back and forth with carrying items from my car to the ward, while providing directions to co-workers, and telling them where to find and place items. Coordinating the party became chaotic. I was scatter-brained and pulled in so many different directions to the point I just forgot the cell phone was in my pocket. I didn't realize I had the cell phone in my pocket until four hours later. When I sat down and started talking with my supervisor, we heard a noise but didn't know the source of it. That's when I discovered my cell phone was in the same pocket as the radio. The weight of the radio pressed against the power button on my cell phone.
>
> I have successfully performed all assigned duties in a professional manner for the past eight years. As a professional, my work ethic and demeanor doesn't allow me to purposely violate company policy. I wouldn't go against company policy; I know better. The violation was committed because of a sincere oversight on my behalf. This was an honest mistake caused by human error. As such, I'm fervently and respectfully requesting reconsideration of this dismissal.

Agency Exh. 3, p. 1. The Grievant's testimony was consistent with this written account.

The Grievant submitted 26 letters of good character and recommendation, and they show a consistent opinion of the Grievant's good, worthy and effective job performance and value to the Agency. Grievant's Exh. 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 II—failure to follow established policy.

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).

For circumstances considered, the Written Notice states:

> You currently have an active Group II for Failure to Follow Instructions and/or Policy that was issued on 5/25/11. You were given the opportunity to provide mitigating circumstances for this offense; however, a review of your record and the information you provided during due process failed to provide sufficient reason to mitigate this action. Under the Standards of Conduct, the issuance of a second Group II written notice would normally result in discharge.

The Grievant cites to the circumstances surrounding her lapse in attention to her cell phone: the non-routine activities of her responsibility on January 1, 2014, of setting up the potluck holiday event for the staff and the fact that the security wanding did not identify the cell phone upon her repeat entry of the building. As reflected above, however, under the Standards of Conduct "[a] second active Group II Notice normally should result in termination . . . ." Further, while clearly agencies have wide latitude in exercising their option to mitigate the discipline of removal under policy, hearing officers can mitigate only when the discipline exceeds the bounds of reasonableness, that is, when the discipline is unconscionably disproportionate, abusive, or totally unwarranted. Thus, given that under policy, a second active Group II Written Notice normally results in termination, it is a rare case in such an instance where mitigation on the basis of prior service is warranted. This does not mean that mitigation by a hearing officer should never occur—just that mitigation is reserved for exceptional circumstances. I find that exceptional circumstances exist in this case that make job termination unconscionably disproportionate.

The Grievant normally goes from the security checkpoint to her locker and secures her cell phone in accord with institutional policy. On this occasion, the Grievant was distracted for a work-related reason—preparations for the holiday event. There is no suggestion that the event was unauthorized or non-work-related. When the Grievant returned to her car to retrieve more things for the event, she still had her cell phone inadvertently in her pocket. The security check upon her return to the building did not detect the cell phone in her pocket. Thus, the Agency's security check also played a mitigating role in the Grievant's lapse of attention to her cell phone. I find the two work-related factors actually contributed to the offense and provide mitigation that the Agency did not consider. For these reasons, I find that, although the Grievant violated the contraband policy, albeit inadvertently, mitigation weighs against termination as described herein.

The Agency's Written Notice indicates mitigating circumstances were considered but found to be insufficient. The Agency's witnesses essentially relied on the standard that two active Group II Written Notices automatically result in termination, leaving potential substantive mitigation to the grievance process. While I give great deference to the security role of the Agency, the soundness of the contraband policy, and the importance of consistent enforcement of the policies, there must be meaningful consideration of mitigation in every case. Here, the Agency has not expressed any mitigation analysis other than two Group II Written Notices normally (or automatically) result in termination. There are no aggravating circumstances identified. Accordingly, because of the mitigating reasons specific to this case described above, I find that the Agency's discipline falls outside the limits of reasonableness because it is unconscionably disproportionate to the offense when considering all the facts and circumstances.

DECISION

For the reasons stated herein, I uphold the Agency's issuance of the Group II Written Notice because the Grievant failed to follow policy. However, I reverse the termination as unconscionably disproportionate to the offense when considering all the facts and circumstances. Accordingly, the Grievant is reinstated to her former position or, if occupied, to an equivalent position, with full back pay, benefits, and seniority. The Grievant should be aware that her resulting disciplinary record of two active Group II Written Notices may lead to termination with any further Written Notices.

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. 10304

Hearing Date:	April 7, 2014
Original Decision Issued:	April 8, 2014
Remand Decision Issued:	May 14, 2014

PROCEDURAL HISTORY

The Agency sought administrative review of the hearing officer's original decision granting reinstatement to the Grievant. By administrative ruling issued May 14, 2014 (EDR Ruling No. 2014-3873), the Office of Employment Dispute Resolution ("EDR") remanded the grievance decision to the hearing officer to reverse the mitigation determinations and original hearing decision.

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 II (being the Grievant's second, active Group II Written Notice). The termination discipline (from accumulation of two active Group II Written Notices) was reversed with the Grievant reinstated, based on mitigating factors not considered by the Agency. The hearing officer considered the mitigation factors sufficient to render the termination outside the tolerable limits of reasonableness as unconscionably disproportionate to the offense. While recognizing that the agency's discipline in this case was harsh, EDR reversed the hearing officer's mitigation analysis as an abuse of discretion. (EDR Ruling No. 2014-3873). Accordingly, on remand and consistent with the administrative ruling, the hearing officer's decision must uphold the Agency's initial discipline, Group II with termination.

DECISION

For the reasons stated herein, on remand, the Agency's Group II 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:

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

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

COMMONWEALTH of VIRGINIA

SARA REDDING WILSON
DIRECTOR

Department of Human Resource Management

101 N. 14TH STREET
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RICHMOND, VIRGINIA 23219
(804) 225-2131
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RULING OF THE DEPARTMENT OF HUMAN RESOURCE MANAGEMENT

In the Matter of the
Department of Behavioral Health
and Developmental Services

June 3, 2014

The agency has requested an administrative review of the hearing officer's decision in Case No. 10304 on the basis that the agency believes the decision is inconsistent with Department of Human Resource Management (DHRM) Policy 1.60, Standards of Conduct. The agency also requested a review based on the belief that the decision was noncompliant with the Grievance Procedure. The agency head of the DHRM, Ms. Sara R. Wilson, has directed that I respond to this administrative review request. We have found no bases to intercede with the application of this decision.

The relevant facts, as enumerated by the hearing officer, are as follows:

> 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 for eight years. On February 6, 2014, the Grievant was issued a Group II Written Notice for having her cell phone, which is considered contraband, in the forensic building on January 1, 2014, contrary to established policy. Based on the accumulated discipline of a prior, active Group II Written Notice, the Agency elected to terminate the Grievant.

****

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 a more serious and/or repeat nature that require formal disciplinary action. This level is appropriate for offenses that significantly impact business operations and/or constitute neglect of duty, insubordination, the abuse of state resources, violations of policies, procedures, or laws. A second active Group II Notice normally should result in termination; however, when mitigating circumstances exist, an employee may be suspended for up to 30 workdays and/or demoted or transferred with reduced responsibilities and a disciplinary salary action; or transferred to an equivalent position in a different work area with no change in salary.

The facility's Joint Instruction 1-8, Communication Devices, at ¶ H., states:

> Cell phones are considered contraband and will not be allowed in a forensic building. Proper storage arrangements outside of the forensic units must be made prior to entering the forensic security checkpoints. Exceptions must be made under the specific authority of the Security Colonel or designee.

The Agency issued a clarification memo, providing the following:

> FOR STAFF WORKING IN BUILDING 96:
> STAFF MAY STORE THEIR PERSONAL CELLULAR PHONES IN THEIR LOCKERS LOCATED in the staff break room area.

The Grievant signed her receipt of the policy and clarifying memo on February 22, 2013. The memo stated:

> Many cell phone models can search the internet, text and email pictures and videos to others, post the same pictures and video to social media sites, play video games, and the list goes on. If fallen into the wrong hands these abilities afford the patient(s) opportunities to plan, coordinate and engage in activity that may pose a risk to themselves, other patients, staff and the public. There is also the potential that photographs, and/or video recordings could be taken of patients, which is a clear violation of their privacy and HTPAA rights. Particularly, when contraband is discovered in a prohibited area, a breach in security has occurred and the hospital's security system on the whole has been weakened.
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> It is critical that all staff fully understand the expectations of Joint Instruction 1-8; Communications Device. Personal cellular phone usage is prohibited in any setting in which individuals and/or patients are receiving services or receiving care. No cellular phone calls maybe placed or received. No text messages may be placed or received. The same rules apply while on duty at an alternate worksite i.e. HDMC, SRMC. Failure to comply with the Communications Device policy will be viewed as bringing contraband into the hospital and may result in disciplinary action. Any exemptions to this policy shall be approved by the Hospital Director.

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. ofAgr. & 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 8 years tenure. The Grievant had one active Group II Written Notice, issued May 25, 2011, for failure to follow instructions and/or policy.

The Agency's witnesses, the security director, registered nurse manager, and assistant chief nurse executive, testified consistently with the charge in the Written Notice of the conduct in question. They testified to the applicable policies, the purpose and importance of the contraband policy, particularly as it applies to cell phones. The Grievant was assigned to Building 96, a forensic building. The assistant chief nurse executive testified that contraband violations are always considered a Group II violation because it is failure to follow policy. The potential for harm is present regardless of whether the violation was intentional. The RN manager, who issued the Group II Written Notice, testified that she followed policy in issuing the termination because "more than two Group II" Written Notices results automatically in termination. On cross-examination, the RN manager testified that she does not make exceptions when following policy, wants to be consistent in every application, and leaves exceptions up to the grievance process.

Two witnesses who had worked with the Grievant testified to the Grievant's good character and her careful attention to following rules and policies. The Grievant testified that on the offense date, she was organizing a New Year's Day potluck event for the staff, and when she came to work she was carrying items from her car. Taking these things to the break room led her to put her phone in her pocket after clearing the security checkpoint. Because of this distraction, she was not attentive to her routine of putting her cell phone in her locker. The Grievant returned to her car to retrieve more things for the event, with her cell phone still in her pocket. When she returned to the security checkpoint to re-enter, the security staff used a wand and did not detect the cell phone. She put her Agency radio in the same pocket, did not notice the cell phone, and she also wore her Agency smock over her pocket. In her grievance Form A, the Grievant wrote:

> I acknowledge the violation of the policy, however, there were mitigating circumstances surrounding this incident. I didn't purposely take my cell phone to my work area. Normally, I either leave my cell phone in my car or place it in my locker. This violation was solely committed because I was rushing with organizing my ward's New Year's holiday party. I was put in charge of the party, and my main focus was to ensure everything was in place for the party. I was rushing and overwhelmed

with thoughts about preparing for the party. On the night of the party, I reported to my ward, grabbed a radio put it in my pocket. Next, I began going back and forth with carrying items from my car to the ward, while providing directions to co-workers, and telling them where to find and place items. Coordinating the party became chaotic. I was scatter-brained and pulled in so many different directions to the point I just forgot the cell phone was in my pocket. I didn't realize I had the cell phone in my pocket until four hours later. When I sat down and started talking with my supervisor, we heard a noise but didn't know the source of it. That's when I discovered my cell phone was in the same pocket as the radio. The weight of the radio pressed against the power button on my cell phone.

I have successfully performed all assigned duties in a professional manner for the past eight years. As a professional, my work ethic and demeanor doesn't allow me to purposely violate company policy. I wouldn't go against company policy; I know better. The violation was committed because of a sincere oversight on my behalf. This was an honest mistake caused by human error. As such, I'm fervently and respectfully requesting reconsideration of this dismissal.

The Grievant's testimony was consistent with this written account.

The Grievant submitted 26 letters of good character and recommendation, and they show a consistent opinion of the Grievant's good, worthy and effective job performance and value to the Agency.

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.

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 II—failure to follow established policy.

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.

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 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."

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For circumstances considered, the Written Notice states:

> You currently have an active Group II for Failure to Follow Instructions and/or Policy that was issued on 5/25/11. You were given the opportunity to provide mitigating circumstances for this offense; however, a review of your record and the information you provided during due process failed to provide sufficient reason to mitigate this action. Under the Standards of Conduct, the issuance of a second Group II written notice would normally result in discharge.

The Grievant cites to the circumstances surrounding her lapse in attention to her cell phone: the non-routine activities of her responsibility on January 1, 2014, of setting up the potluck holiday event for the staff and the fact that the security wanding did not identify the cell phone upon her repeat entry of the building. As reflected above, however, under the Standards of Conduct "[a] second active Group II Notice normally should result in

termination. . . ." Further, while clearly agencies have wide latitude in exercising their option to mitigate the discipline of removal under policy, hearing officers can mitigate only when the discipline exceeds the bounds of reasonableness, that is, when the discipline is unconscionably disproportionate, abusive, or totally unwarranted. Thus, given that under policy, a second active Group II Written Notice normally results in termination, it is a rare case in such an instance where mitigation on the basis of prior service is warranted. This does not mean that mitigation by a hearing officer should never occur—just that mitigation is reserved for exceptional circumstances. I find that exceptional circumstances exist in this case that make job termination unconscionably disproportionate.

The Grievant normally goes from the security checkpoint to her locker and secures her cell phone in accord with institutional policy. On this occasion, the Grievant was distracted for a work-related reason—preparations for the holiday event. There is no suggestion that the event was unauthorized or non-work-related. When the Grievant returned to her car to retrieve more things for the event, she still had her cell phone inadvertently in her pocket. The security check upon her return to the building did not detect the cell phone in her pocket. Thus, the Agency's security check also played a mitigating role in the Grievant's lapse of attention to her cell phone. I find the two work-related factors actually contributed to the offense and provide mitigation that the Agency did not consider. For these reasons, I find that, although the Grievant violated the contraband policy, albeit inadvertently, mitigation weighs against termination as described herein.

The Agency's Written Notice indicates mitigating circumstances were considered but found to be insufficient. The Agency's witnesses essentially relied on the standard that two active Group II Written Notices automatically result in termination, leaving potential substantive mitigation to the grievance process. While I give great deference to the security role of the Agency, the soundness of the contraband policy, and the importance of consistent enforcement of the policies, there must be meaningful consideration of mitigation in every case. Here, the Agency has not expressed any mitigation analysis other than two Group II Written Notices normally (or automatically) result in termination. There are no aggravating circumstances identified. Accordingly, because of the mitigating reasons specific to this case described above, I find that the Agency's discipline falls outside the limits of reasonableness because it is unconscionably disproportionate to the offense when considering all the facts and circumstances.

DECISION

For the reasons stated herein, I uphold the Agency's issuance of the Group II Written Notice because the Grievant failed to follow policy. However, I reverse the termination as unconscionably disproportionate to the offense when considering all the facts and circumstances. Accordingly, the Grievant is reinstated to her former position or, if occupied, to an equivalent position, with full back pay, benefits, and seniority. The Grievant should be aware that her resulting disciplinary record of two active Group II Written Notices may lead to termination with any further Written Notices.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found but the hearing officer determines that the disciplinary action is too severe, he may reduce the discipline. By statute, this Department 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.

The DHRM Policy No. 1.60 sets forth the Commonwealth's Standards of Conduct and the disciplinary process that agencies must utilize to address unacceptable behavior, conduct, and related employment problems in the workplace, or outside the workplace when that conduct has as impact on an employee's ability to do his/her job and/or influences the agency's overall effectiveness. The Standards of Conduct policy, though not all-inclusive, provides examples of performance and behavior that may be subjected to disciplinary action. In addition, the Department of Behavioral Health and Developmental Services (DBHDS) has promulgated guidelines that employees must follow when interacting with and treating clients. Those guidelines also set forth disciplinary actions for those employees who fail to follow those guidelines.

In his original decision, the hearing officer upheld the issuance of the Group II Written Notice but reinstated the grievant. The agency also appealed the decision on the basis that the decision was noncompliant with the Grievance Procedure. In a remand decision, the hearing officer reversed his original decision and reinstated the agency's disciplinary action. Based on the hearing officer's action, the DHRM has no reason to believe that the hearing decision is not in compliance with human resource management policy. Thus, this Agency has no bases to interfere with the application of this decision.

Ernest G. Spratley

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