Issue: Group I Written Notice (failure to follow instructions); Hearing Date: 08/11/14; Decision Issued: 08/19/14; Agency: VDFP; AHO: JohnV. Robinson, Esq.; Case No. 10370; Outcome: No Relief - Agency Upheld.

COMMONWEALTH OF VIRGINIA
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 10370

Hearing Officer Appointment: July 15, 2014
Hearing Date: August 11, 2014
Decision Issued: August 19, 2014

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge the issuance of a Group I Written Notice issued by Management of the Department of Fire Programs as described in the Grievance Form A dated March 17, 2014.

The parties duly participated in a first pre-hearing conference call scheduled by the hearing officer on July 18, 2014 at 2:00 p.m. The Grievant, the Agency's attorney and the hearing officer participated in the call. The Grievant confirmed he is seeking the relief requested in his Grievance Form A. Following the conference call, the hearing officer issued a Scheduling Order entered July 18, 2014, which is incorporated herein by this reference.

In this proceeding the Agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances.

At the hearing, the Agency was represented by its attorney and the Grievant represented himself.

Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing, namely Exhibits 1-6 and 8-18 in the Agency's binder, and all documents in the Grievant's binder, Exhibits A - D. Upon objection by the Grievant, the hearing officer declined to admit the Agency's Exhibit 7, as agreed by the Agency.[1]

[1] References to the Agency's exhibits will be designated AE followed by the exhibit number. References to the Grievant's exhibits will be designated GE followed by the exhibit number.

APPEARANCES

Representative for Agency
Witnesses
Grievant

FINDINGS OF FACT

1. The Grievant is employed as a FSTRS programmer by the Agency. AE 1.

2. It is important to the operations of the Agency that the Grievant follow the instructions of his supervisor (the "Supervisor" or the "IT Manager"), including instructions concerning when the Grievant must report to work and concerning communication with his Supervisor when he will be late.

3. In January 2014, the Grievant's hours during which he was assigned to work physically at the Agency's office location changed from 10:00 a.m. - 7:00 p.m. to 9:00 a.m. - 6:00 p.m. Most of the Agency's core IT customers work from approximately 8:30 a.m. to 4:30 p.m.

4. The IT Manager has supervised the Grievant since October 28, 2013.

5. While the Grievant received an Overall Rating of "Major Contributor" in his 2013 Performance Evaluation, two of the apposite reviews provided:

> Grievant has shown improvement in the area of getting to work on time; which has been discussed on several occasions. This area continues to be a concern of management although his work assignments have been completed on time...
>
> One area of improvement would be to continue to work on getting to work by the assigned time.

AE 9 at 4-5.

6. Similar comments were made by Management in the Grievant's 2012 and 2011 Performance Evaluations. AE 9 at 8-9 and 13.

7. The Grievant was instructed in writing and verbally to be at an important meeting in Training Room #1 at 8:30 a.m. on November 20, 2013, concerning the reorganization under the new Branch Chief. The Grievant worked late the previous night 11/19/13 but was instructed to "go home and be at the mandatory branch meeting the next morning." AE 11. The Grievant reported to work at 11

a.m. and the Supervisor and the Branch Chief met with the Grievant on November 20, 2013 to give the Grievant a verbal warning about attendance issues. AE 11.

8. On December 17, 2013, the Grievant arrived 30 minutes late for work and failed to notify the Supervisor of his late arrival as the Grievant had been instructed to do. AE 12. The Grievant was given a written counseling memo by the Supervisor on or about December 17, 2013. AE 12.

9. On Monday, January 27, 2014, the Grievant notified the Supervisor that the Grievant was not feeling well and would be in by 10:00 a.m. The Grievant never reported to work at all on January 27, 2014 and did not notify the Supervisor that he would not be coming in until late in the afternoon. AE 2 &14.

10. On Thursday, January 30, 2014, the Grievant texted the Supervisor at 8:59 a.m. that the Grievant would be in shortly. At 9:13 a.m. the Supervisor responded to the Grievant's text to request the exact time the Grievant would report to work. Having not heard from the Grievant, at 11:45 a.m., the Supervisor sent the Grievant a second text to determine when the Grievant would report to work. At 1:39 p.m. the Grievant texted the Supervisor that the Grievant would not be reporting to work on Thursday, January 30, 2014. AE 2 & 14.

11. On Tuesday, February 4, 2014, the Grievant texted the Supervisor at 8:59 a.m. that the Grievant would be 30 minutes late for work. The Grievant failed to report to work until after 10:10 a.m. AE 2 & 14.

12. On February 5 and 6, 2014, the Grievant arrived at work 12 and 15 minutes late, respectively, without notifying the Supervisor. AE 2 & 14.

13. The Grievant "acknowledged that accounts of my tardiness were factual." AE 1 at 10.

14. The testimony of the Agency witnesses was both credible and consistent on the material issues before the hearing officer. The demeanor of such Agency witnesses at the hearing was candid and forthright.

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).

Va. Code § 2.2-3000(A) 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.

In disciplinary actions, the Agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The Standards of Conduct (the "SOC") provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The SOC 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.

Consistent with the SOC Policy, the Grievant's infraction can clearly constitute a Group II offense:

> Examples: Failure to follow supervisor's instructions or comply with written policy.

SOC Attachment A. AE 3.

Pursuant to DHRM Policy 1.60, Standards of Conduct, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

In this proceeding, the Department's actions were clearly consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer. *Id.*

The Grievant argues that the Agency's punishment was meted out too long after the infractions. The offenses occurred January 27 - February 6, 2014. The Written Notice was issued to the Grievant on February 11, 2014. AE 2. Obviously, there was no material delay in issuing the discipline by the Agency according to DHRM policy. *See,* e.g., Policy Ruling of DHRM concerning the hearing officer's decision in Case Nos. 9682 - 4 (March 23, 2012).

The hearing officer also agrees with the Agency's attorney that each of the 5 cited offenses could have stood alone as a Group II offense and could potentially have lead to termination if accumulated. The Grievant argues that the discipline was too harsh for a first offense. The Agency argues that the action taken by Management was entirely appropriate and that it has, in essence, already taken full account of any mitigating factors. The Agency reduced the discipline to a Group I offense.

As previously stated, the Agency's burden is to show upon a preponderance of evidence that the discipline was warranted and appropriate under the circumstances. The hearing officer agrees with the Agency's attorney that the Grievant's disciplinary infractions justified the discipline by Management concerning the infraction. Accordingly, the Grievant's behavior constituted misconduct and the Agency's discipline is consistent with law and consistent with policy, being properly characterized as a Group I offense after giving effect to the Supervisor's mitigation.

EDR's *Rules for Conducting Grievance Hearings* provide in part:

> DHRM's *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances" such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance." . . . . A hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. 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. *Rules* § VI(B).

If the Department does not consider mitigating factors, the hearing officer should not show any deference to the Department in his mitigation analysis. In this proceeding the Department did consider mitigating factors in disciplining the Grievant and in fact mitigated the discipline.

While the Grievant might not have specified for the hearing officer's mitigation analysis all of the mitigating factors below, the hearing officer considered a number of factors including those specifically referenced herein, in the Written Notice and all of those listed below in his analysis:

1. the Grievant's good service to the Agency;

2. the fact that the Grievant often works long and extraordinary hours to serve the Agency and the quality of the Grievant's work;

3. Grievant's sickness during the relevant period;

4. the fact that the Grievant had no prior formal discipline;

5. the fact that the Grievant received an overall rating of "Major Contributor" in each of his performance evaluations for 2013 and 2011 (AE 9) and an overall rating of "Contributor" in his 2012 evaluation (AE 9); and

6. the stressful circumstances of the Grievant's work environment.

EDR has previously ruled that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518; and EDR Ruling 2010-2368. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. *Id.* Obviously, there were also aggravating factors which militate against the Grievant in this proceeding, including the numerous attempts by management to induce the Grievant to comply with valid instructions for the smooth operation of the Agency and the Grievant's behavior at the meeting on February 10, 2014. AE 16. In this case, the hearing officer would not be acting responsibly or appropriately if he were to reduce the discipline under the circumstances of this proceeding.

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).

DECISION

The Agency has sustained its burden of proof in this proceeding and the action of the Agency in issuing the Group I Written Notice and concerning all issues grieved in this

proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the Agency's action concerning the Grievant in this proceeding is hereby upheld, having been shown by the Agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

APPEAL RIGHTS

As the *Grievance Procedure Manual* sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to two types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must refer to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401 or e-mailed.

2. **A challenge that the hearing decision does not comply with grievance procedure** as well as a request to present newly discovered evidence is made to EDR. This request must refer to a specific requirement of the grievance procedure with which the decision is not in compliance. EDR's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219, faxed or e-mailed to EDR.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days.) A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or

2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of EDR before filing a notice of appeal.

ENTER: 8 / 19 / 2013

John V. Robinson

John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail transmission where possible and as appropriate, pursuant to *Rules for Conducting Grievance Hearings*, § V(C)).