Issue: Group II Written Notice with Suspension (failure to follow instructions); Hearing Date: 03/16/15; Decision Issued: 03/18/15; Agency: VDH; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 10551; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA

Office of Employment Dispute Resolution

Department of Human Resource Management

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 10551

Hearing Date: March 16, 2015
Decision Issued: March 18, 2015

PROCEDURAL HISTORY

Grievant is a field consultant for the Virginia Department of Health ("the Agency"), and he challenges the issuance of a Group II Written Notice, with five days suspension, issued on October 2, 2014, for unsatisfactory job performance and failure to follow instructions. The Grievant has an active prior Group II Written Notice, issued June 2, 2014, for unsatisfactory work performance, failure to follow instructions, and disruptive behavior. Agency Exh. 4.

Grievant timely filed a grievance to challenge the Agency's disciplinary action. On February 18, 2015, the Office of Employment Dispute Resolution ("EDR") appointed the Hearing Officer to conduct the grievance hearing. Through a pre-hearing conference with the parties, the grievance hearing was scheduled for the earliest date available for the parties and witnesses, March 16, 2015, on which date the grievance hearing was held, at the Agency's designated location.

Both the Agency and Grievant submitted documents for exhibits that were accepted into the grievance record, and they will be referred to as Agency's Exhibits and Grievant's Exhibits, respectively.[1] The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant
Advocate for Agency
Agency Representative
Witnesses

[1] Grievant's proposed exhibits nos. 3, 6, 7, 8, 9, and 10 were rejected as neither relevant nor material to the grievance issues.

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 under applicable policy)?
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?

The Grievant asserts in his written grievance (Form A) that he has "been unfairly treated with write ups that do not merit the incidents occurred."

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. However, *the employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline*. GPM § 5.8.

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 State Standards of Conduct, DHRM Policy 1.60, provides that Group II offenses include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action. This level is appropriate for offenses that have a significant impact on business operations and/or constitute neglect of duty, insubordination, the abuse of state resources, violations of policies, procedures, or laws. Agency Exh. 3. Failure to follow instructions and repeated instances of poor job performance specifically are considered Group II offenses. *Id*. The Standards of Conduct require Employees to:

- Perform their assigned duties and responsibilities with the highest degree of public trust.
- Devote full effort to job responsibilities during work hours.
- Meet or exceed established job performance expectations.
- Make work-related decisions and/or take actions that are in the best interest of the agency.
- Comply with the letter and spirit of all state and agency policies and procedures.
- Work cooperatively to achieve work unit and agency goals and objectives.
- Conduct themselves at all times in a manner that supports the mission of their agency and the performance of their duties.

Agency Exh. 3.

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

Grievant's job is to conduct inspections and reviews of health care facilities for the purpose of ensuring compliance with the Virginia Vaccines for Children Program (VVCP) and promoting quality health care practices. This includes examining vaccine storage and handling. Agency Exh. 6. The Grievant is experienced and has been in this position for five years.

The Group II Written Notice, issued October 2, 2014, charged the following:

> Offenses 11 (Unsatisfactory Performance), 13 (Failure to Follow Supervisor's Instructions/Comply with Written Policy): You provided incorrect program information both to a provider and to the Centers for Disease Control and Prevention, which created confusion and extra work for the provider and your supervisor to correct. It also demonstrates your lack of understanding about VVFC Program requirements. This is a violation of the expectations in your EWP and the Standards of Conduct policy.

Agency Exh. 2. As for circumstances considered, the Written Notice stated, "[t]he response to the due process memorandum does not provide any mitigating circumstances under which to reduce the disciplinary action from a Group II written notice. However, in light of your tenure with both the state and the Division of Immunization, I have elected to issue a suspension without pay in lieu of termination."

Testifying for the Agency were the Grievant's immediate supervisor and the Agency's program director. The Grievant's supervisor testified to the fragility of the vaccines the Agency controls, and the importance of the Grievant's responsibilities when visiting the health care facilities storing and dispensing the vaccines. She testified to the Provider Education Assessment and Reporting (PEAR) system that provides information to the Centers for Disease Control.

The supervisor testified that dorm-style refrigeration units are not permitted for the storage of vaccines. A dorm-style unit had temperature control and stability issues, and vaccines stored in such a unit must be returned to the manufacturer. She testified that identification of the types of permissible refrigeration units for storing vaccine is a serious matter, and that the Grievant has been trained on this important distinction. Regarding the circumstances of the Written Notice, at a particular facility, the Grievant reported the use of a dorm-style refrigeration unit and his report and actions were materially incorrect. The facility was actually using a permissible refrigeration unit, but the Grievant's mistake misinformed the health care facility and the CDC, causing significant effort to correct the error. The health care facility was confused by the Grievant's determinations and was asked to perform tasks during the site visit that were unnecessary. The supervisor also testified that the Grievant's conduct had an adverse impact on Agency operations, and others, including the supervisor, who had to repair the situation with the health care facility. Correcting the mistake with the CDC was a complex and time-consuming process. The supervisor testified that the Grievant has the experience to know what a dorm-style refrigerator is and to recognize one. In this case, the health care facility had a professional refrigeration unit that met all the requirements.

The supervisor also testified that a mitigating factor was that there were no wasted vaccines as a result of the Grievant's error, and that she did not wish to see the Grievant terminated from his position.

The program director testified that the discipline of the Grievant was consistent with the Agency's prior instances of discipline, and that the process is always the same. She also testified that the Grievant's mistake damaged the trust relationship the Agency must maintain with health care facilities in the vaccine program.

The Grievant testified that the PEAR system was new, and he was guilty of making a simple mistake—a "typographical error." The Grievant did not refute the substance of the erroneous report for which the Written Notice was issued. The Grievant asserted that the Agency's action was an overreaction and that his simple, unintentional mistake did not justify the issuance of the Group II Written Notice. The Grievant insisted that he innocently made a typographical error when checking the box indicating a dorm-style refrigerator. On cross-examination, the Grievant admitted that he wrote specifically in a text box on the questionnaire "[v]accine were removed immediately from a dorm-style refrigerator to the appropriate refrigerator." In fact, no vaccines were removed.

The Grievant showed that he has several prior years of a contributor rating on his performance reviews. Grievant Exh. 15. The Grievant testified in generalities to his disagreement with the Agency's bases for discipline, and he pointed out that other employees make mistakes. However, the Grievant provided no reliable evidence or documentation to refute the Agency's *prima facie* case of unsatisfactory work performance and failure to follow supervisor's instructions in this instance. Similarly, with respect to the Grievant's evidence that other employees also make mistakes, he did not provide evidence of any instances or disparate disciplinary events similar to the subject of this Written Notice.

An Agency co-worker who was not in the Grievant's division testified to the Grievant's good character and work ethic.

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).

Pursuant to applicable policy, management has 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*. As long as it acts within law and policy, the Agency is permitted to apply exacting standards to its employees.

I find that the Agency has met its burden of showing the Grievant's conduct as charged in the Written Notice. Further, I find that the offense is appropriately considered a Group II offense. Failure to follow supervisor's instructions is a policy designated Group II offense, and repeated instances of poor job performance is also designated as a possible Group II offense. The Grievant's contention that he made a simple typographical error indicating a dorm-style refrigerator is not credible. His actual composed text affirms that the mistake was not a mere typographical error but a substantive and significant error at the core of his job function. Aside from the mistake identifying the refrigerator as a dorm-style model, he indicated that vaccine was appropriately removed when, in fact, the vaccine was not moved. The Agency's evidence preponderates in showing the Grievant's error to be a substantive, serious error and not a mere typographical error. Identification of the types of permissible refrigeration units for storing vaccine is a serious matter. Thus, the Agency has borne its burden of proving the offending behavior, the behavior was misconduct, and Group II is an appropriate level offense.

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.

While the hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances, the hearing officer is permitted to mitigate a disciplinary action if, and only if, it exceeds the limits of reasonableness. There is no authority that requires an Agency to exhaust all possible lesser sanctions or, alternatively, show that termination was its only option. 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.

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 No. 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 No. 2010-2465 (March 4, 2010) (citations omitted).

The Agency presents a position in advance of its obligation and need to manage the important affairs of the Agency. The hearing officer accepts, recognizes, and upholds the Agency's important responsibility for its mission to the health care community. The Grievant's position placed him in a responsible role, and the Grievant's performance failure as documented by the Agency was contrary to the Agency's expectations and instructions. I find that the Agency has demonstrated a legitimate business reason and acted within the bounds of reason in its discipline of the Grievant.

A Group II Written Notice with five days suspension is arguably a harsh result, but the Agency has demonstrated mitigation and restraint since two active Group II Written Notices normally warrants termination. A Group II Written Notice may include suspension of up to 30 days. Regardless, however, 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, a hearing officer may not substitute his judgment for that of Agency management. I find no mitigating circumstances that render the Agency's action of a Group II Written Notice with five days suspension outside the bounds of reasonableness, particularly considering the other active Group II Written Notice. The conduct as stated in the written notices occurred. The conduct at issue involves the very essence of the Agency's purpose. The normal result of two Group II Written Notices is termination. Here, the Agency credibly asserts that it has exercised reasonable discretion and has already mitigated the discipline.

Finally, the Grievant asserted that the Agency's discipline of him was disparate treatment, but there was insufficient evidence presented to support the assertion. While the Grievant successfully demonstrated that all employees are capable of and actually do commit mistakes, there is nothing to show that the Agency's handling of this discipline was in any way disparate treatment beyond the Grievant's mere allegation. Grievant has not presented sufficient evidence to show that the Agency's discipline was applied inconsistently. Rather, it appears that

the determinations were based on the Grievant's actual conduct, all of which actions were within the Grievant's control. While lesser discipline was within the discretion of Agency management, the Agency acted within its discretion by issuing a Group II Written Notice.

Accordingly, I find no mitigating circumstances that allow the hearing officer to reduce the Agency's action.

DECISION

For the reasons stated herein, the Agency's issuance of the Group II Written Notice with five days suspension must be and 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
   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.[2]

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

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