Issues: Group II Written Notice (failure to follow policy), Group II Written Notice (failure to follow policy), and Termination (due to accumulation); Hearing Date: 11/26/13; Decision Issued: 12/02/13; Agency: DBHDS; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 10217; Outcome: Partial Relief; **Administrative Review: DHRM Ruling Request received 12/16/13; DHRM Ruling issued 01/14/14; Outcome: AHO's decision affirmed.**

COMMONWEALTH of VIRGINIA

Department of Human Resource Management
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 10217

Hearing Date: November 26, 2013
Decision Issued: December 2, 2013

PROCEDURAL HISTORY

Grievant was a direct service associate ("DSA") for the Department of Behavioral Health and Development Services ("the Agency"), serving [(facility)], with thirteen years tenure. On October 22, 2013, the Grievant was issued two Group II Written Notices, each for failing to comply with the facility's policy for calling in when absent for work. The offense dates were September 14, 2013, and October 7, 2013. The discipline for the second offense (October 7, 2013) was termination, based on the accumulated record of one active Group I and two active Group II Written Notices (including the other Written Notice issued concurrently). Before October 22, 2013, the Grievant had two active Written Notices: a Group I for unsatisfactory attendance, issued August 7, 2013; and, a Group II for refusal to work emergency overtime, issued August 11, 2011.

Grievant timely filed a grievance to challenge the Agency's disciplinary action, and the grievance qualified for a hearing. On November 13, 2013, the Office of Employment Dispute Resolution, Department of Human Resource Management, ("EDR") appointed the Hearing Officer. During the pre-hearing conference, the grievance hearing was scheduled for November 26, 2013, 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 her grievance filings, the Grievant requested rescission of the Group II Written Notices, reinstatement, and back pay.

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 opereations and/or constitute neglect of duty, insubordination, the abuse of state resources, violations of policies, procedures, or laws. Absent mitigating circumstances, a repeat of the same, active Group I Offense should result in the issuance of a Group II Offense notice. The purpose of the policy is set forth:

> The purpose of this policy is to set 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 conduct impacts an employee's ability to do his/her job and/or influences the agency's overall effectiveness.
>
> It is the intent of this policy that agencies follow a course of progressive discipline that fairly and consistently addresses employee behavior, conduct, or performance that is incompatible with the state's Standards of Conduct for employees and/or related agency policies. Disciplinary actions must be founded on the principles of due process and will employ a range of corrective and disciplinary actions that are applied based on the nature and history of the misconduct or unacceptable performance. Corrective and disciplinary actions must be administered through a prompt and fair process as described in this policy's Administrative Procedures. The ultimate goal of this policy and its procedures is to help employees become fully contributing members of the organization. Conversely, this policy is also designed to enable agencies to fairly and effectively discipline and/or terminate employees whose conduct and/or performance does not improve or where the misconduct and/or unacceptable performance is of such a serious nature that a first offense warrants termination.

Agency Exh. 9. In the policy's glossary, Progressive Discipline is defined:

> A system of increasingly significant measures that are utilized to provide feedback to employees so that they can correct conduct or performance problems. It is most successful when provided in a way that helps an employee become a fully contributing member of the organization. Progressive discipline also enables agencies to fairly, and with reliable documentation, terminate an employee who is unable or unwilling to improve his/her workplace conduct and/or job performance.

The facility's Attendance Policy establishes that daily attendance of staff is critical to facility operations. It requires employees

> to call in when they will not report to work as scheduled. The call-in deadline for all buildings/departments is at least two hours prior to the start of the shift/work day. Employees who fail to call in within the established time frames or who fail

> to call the proper person or telephone number as established by the building/department protocol may be subject to disciplinary action.

Agency Exh. 7. The policy provides for mitigating circumstances for unusual or emergency situations, and requires employees to provide adequate documentation to support their request for mitigation.

The Agency's Family and Medical Leave policy states, "An employee must comply with agency leave request procedure, absent unusual circumstances. Failure to do so may be grounds for delaying or denying an employee's request of FMLA qualifying leave." Agency Exh. 10.

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 DSA, with over 13 years tenure. Prior to October 22, 2013, the Grievant had an active Group I and a Group II Written Notice. Agency Exh. 4 and 5.

The first current Group II Written Notice charged:

> Failure to comply with Facility Policy VII.A(10)a "Attendance"— Specifically, on 09/14/13, you failed to follow the "Calling-In When Absent from Work" requirements. The call-in deadline for all buildings/departments is at least two hours prior to the start of the shift/work day. You called out at 6:06 a.m.

No suspension or termination was issued with this written notice, but circumstances considered included an active Group I and active Group II Written Notice on file. Agency Exh. 3. The second current Group II Written Notice charged:

> Failure to comply with Facility Policy VII.A(10)a "Attendance"— Specifically, on 10/07/13, you failed to follow the "Calling-In When Absent from Work" requirements. The call-in deadline for all buildings/departments is at least two hours prior to the start of the shift/work day. You called out at 6:55 a.m.

This Written Notice included job termination, and circumstances considered included an active Group I and <u>two</u> active Group II Written Notice on file. For circumstances considered, the Written Notice stated employment "is contingent upon maintaining satisfactory performance levels, which you have failed to demonstrate. Mitigation is not warranted in this case." Agency Exh 1.

The Agency's witnesses, the shift supervisor and the building manager, testified consistently with the charge in the Written Notice of the conduct in question. They testified to the resident population served, the policy rationale for the two-hour notice, and the impact on the facility operations when adequate notice of absence is not provided.

The Grievant is a caregiver for her granddaughter, and the Grievant offered as mitigating circumstances her granddaughter's medical condition for which she has on file her request for intermittent leave under the FMLA. The absences were not planned. The Grievant testified that on each occasion, September 14 and October 7, 2013, her granddaughter presented an emergent medical situation for her granddaughter that required her to provide medical attention. On each day, the Grievant testified that she called in when she realized she would have to miss work because of her granddaughter's care. For the September 14, 2013, occasion, the Grievant testified that she called in when it became apparent her granddaughter's condition was not resolving in time for the Grievant to come to work. The Grievant asserted that she tried to call in before the two hour deadline, but there is no corroboration for her attempts. No other witnesses or phone records were presented to counter the Agency's evidence that the Grievant did not call in before the two hour deadline.

For the occurrence on October 7, 2013, the Grievant testified she called in after her granddaughter's sitter advised her that she (the sitter) could not handle the granddaughter's medical condition that day and administer the required medication—a situation the Grievant could not have anticipated.

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 Notices occurred, and that the offense is properly considered Group II. Such decision falls within the discretion of the Agency so long as the discipline does not exceed the bounds of reasonableness. However, the Agency must act in accord with the purpose and procedures of the Standards of Conduct, which establish a progressive discipline plan. While the Grievant committed the offenses, the Agency has not complied with the progressive discipline provided by the Standards of Conduct. Corrective and disciplinary actions must be administered through a prompt and fair process as described in the Standards of Conduct. By issuing the two Group II Written Notices at the same time, the Grievant has been denied the progressive discipline contemplated by the Standards of Conduct. The timing of the discipline for the September 14 offense provided no feedback to the Grievant so that she could correct conduct or performance problems, as required by the Standards of Conduct.

The Group II Written Notice for the September 14, 2013, offense did not result in suspension or termination of employment. However, following the discipline issued for the September 14, 2013, occurrence, the Grievant had no opportunity to correct her behavior. The Group II Written Notice for the October 7, 2013, offense, an <u>identical</u> offense, resulted in termination based on the accumulation of Written Notices, including, in part, the Group II Written Notice for the September 14, 2013, offense. Issuing both Written Notices together that involve the same policy offense violates the purpose of the progressive discipline established by the Standards of Conduct. When issuing discipline or considering termination, the Agency should consider previous disciplinary actions that addressed the same or similar misconduct or performance. Regarding the termination decision, the September 14, 2013, offense was not a <u>prior</u> written notice. Because the termination discipline was not consistent with the Standards of Conduct, the Group II Written Notice for October 7, 2013, with termination, is reversed.

<u>Mitigation</u>

Regarding the remaining Group II Written Notice for the September 14, 2013, offense, the Agency had leeway to impose discipline along the permitted continuum. The Grievant expressed the emergency situation presented by her granddaughter's medical condition, but there was no actual medical attention sought that day (other than the Grievant's own attention to her granddaughter's care and medication administration). Given the nature of the Grievant's position with the Agency, and the Agency's unique needs to arrange for other staff members to work overtime to cover absences, the Grievant has an obligation to honor notification policy. Aside from the reversed Group II Written Notice for the October 7, 2013, offense, the Agency has exercised progressive discipline regarding the Grievant's prior Written Notices. The Grievant asserts, reasonably, that her mitigating circumstances could have been used to reduce the Group II Written Notice or to issue no discipline at all. As for the September 14, 2013, offense, the Agency's Group II Written Notice inherently had some restraint because there was no suspension or termination levied with the Written Notice for the September 14 offense. The level of discipline for the September 14, 2013, offense is fairly debatable. While the Hearing Officer may have reached a different level of discipline, he may not substitute his judgment for that of the Agency when the Agency's discipline falls within the limits of reasonableness.

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Office of Employment Dispute Resolution." Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

The agency has proved (i) the employee engaged in the behavior described in the written notice, (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy. Thus, the discipline must be upheld absent evidence that the discipline exceeded the limits of reasonableness. *Rules for Conducting Grievance Hearings* ("Hearing Rules") § VI.B.1.

On the issue of mitigation, EDR has ruled:

> Importantly, because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management. Rather, mitigation by a hearing officer under the *Rules* requires that he or she, based on the record evidence, make findings of fact that clearly support the conclusion that the agency's discipline, though issued for founded misconduct described in the Written Notice, and though consistent with law and policy, nevertheless meets the *Rules* "exceeds the limits of reasonableness" standard. This is a high standard to meet, and has been described in analogous Merit System Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.

EDR Ruling #2010-2483 (March 2, 2010) (citations omitted). EDR has further explained:

> When an agency's decision on mitigation is fairly debatable, it is, by definition, within the bounds of reason, and thus not subject to reversal by the hearing officer. A hearing officer "will not freely substitute [his or her] judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"

EDR Ruling 2010-2465 (March 4, 2010) (citations omitted).

As with all mitigating factors, the grievant has the burden to raise and establish any mitigating factors. *See e.g.,* EDR Rulings 2010-2473; 2010-2368; 2009-2157, 2009-2174. *See also* Bigham v. Dept. of Veterans Affairs, No. AT-0752-09-0671-I-1, 2009 MSPB LEXIS 5986, at *18 (Sept. 14, 2009) citing to *Kissner v. Office of Personnel Management*, 792 F.2d 133, 134-

35 (Fed. Cir. 1986). (Once an agency has presented a prima facie case of proper penalty, the burden of going forward with evidence of mitigating factors shifts to the employee).

The hearing officer accepts, recognizes, and upholds the Agency's important role in serving its population and ensuring the facility is properly staffed, which includes employees reporting to work on time and providing required notice of absences.

There is no requirement for an Agency to exhaust all possible lesser sanctions or, alternatively, to show that the chosen discipline was its only option. While the Agency could have justified or exercised lesser discipline, I find no mitigating circumstances that render the Agency's action of a Group II Written Notice outside the bounds of reasonableness. Accordingly, I find that the Agency's action of imposing a Group II Written Notice for the September 14, 2013, offense is within the limits of reasonableness. The Hearing Officer, thus, lacks authority to reduce or rescind the disciplinary action.

DECISION

For the reasons stated herein, I uphold the Agency's Group II discipline for the September 14, 2013, offense and reverse the Agency's Group II Written Notice and termination for the October 7, 2013, offense. 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 one active Group I and 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.