Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 09/04/14; Decision Issued: 09/05/14; Agency: DBHDS; AHO: Cecil H. Creasey, Esq.; Case No. 10420; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 10420

Hearing Date: September 4, 2014
Decision Issued: September 5, 2014

PROCEDURAL HISTORY

Grievant is a social worker for the Department of Behavioral Health and Development Services ("the Agency"), with nine years tenure. On January 27, 2014, the Grievant was issued a Group I Written Notice, for unsatisfactory attendance and failure to comply with Agency Policy #703—the facility's attendance policy. The offense date was December 31, 2013.

Grievant timely filed a grievance to challenge the Agency's disciplinary action, and the grievance qualified for a hearing. On July 30, 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 September 4, 2014, the first date available for the parties, on which date the grievance hearing was held, at the Agency's facility.

Both the Agency and the Grievant submitted documents for exhibits that were accepted into the grievance record, 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 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 I Written Notice.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency*. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .
> To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Agency relied on the Standards of Conduct, promulgated by the Department of Human Resource Management, Policy 1.60, which defines Group I Offenses to include acts of minor misconduct that require formal disciplinary action. This level is appropriate for repeated acts of minor misconduct or for first offenses that have a relatively minor impact on business operations but still require formal intervention. The purpose of the policy is stated:

> 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.

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 that four tardy events within a three calendar month period subjects the employee to a Group I Written Notice. The policy also provides for mitigating circumstances for unusual or emergency situations, and requires employees to provide adequate documentation to support their request for mitigation, and such requests must normally be filed no later than thirty calendar days after the event. Further, the policy provides that

> It is the responsibility of the employee to maintain a current knowledge of their own attendance record and the number of tardies, and occurrences that may be on the books. Failure or inability to do so will not serve to mitigate required disciplinary action.

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 employs the Grievant as a social worker, with nine years tenure.

The current Written Notice charged the Grievant with four instances of tardiness:

October 10, 2013; November 21, 2013; December 17, 2013; December 31, 2013

The Agency's witness, the director of social work, testified that the Grievant was issued the Group I Written Notice as prescribed by policy for four tardy instances within a three calendar month period. The director testified that the social workers must sign in when present, either by calling her office or her cell phone, email, personally appearing in her office, leaving a message on the telephone answering service, written note, or by using the computer software—Scotland Yard.

Agency's Exh. 3 provides contemporaneous documentation signed by the Grievant for each of the instances of tardiness. No explanation was noted on any of the four forms, and no requests for mitigation were received. The director also testified that the discipline for excessive tardiness is consistently applied. She also testified to the resident population served, the rationale for the tardiness policy, and the impact on the facility operations when employees to not provide adequate notice of absence or tardiness.

The Grievant testified that she had her reasons for the instances of tardiness, but she did not challenge the documented instances of tardiness when issued or seek mitigation until her response to the Agency's intent to issue the Group I Written Notice. The Grievant testified that she was actually on campus but had not signed in for work for a variety of circumstances, such as conversing with a co-worker or answering or making a telephone call. However, Grievant signed the contemporaneous leave request forms that documented the four instances of tardiness as charged in the Written Notice. Agency Exh. 3. The Grievant testified that the software, Scotland Yard, had not been installed on her computer until she requested it after the Group I Written Notice was issued. (Use of Scotland Yard was not mandatory.)

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 properly considered Group I, as it is specified in the attendance policy. Such decision falls within the discretion of the Agency so long as the discipline does not exceed the bounds of reasonableness.

Mitigation

Regarding the level of discipline and termination, the Agency had leeway to impose discipline along the permitted continuum, but the director testified that the Agency consistently applies the tardiness policy. Given the nature of the Grievant's position with the Agency, and the Agency's unique needs to arrange for other staff members to cover absences or tardies, the Grievant has an obligation to honor the attendance policy. The Grievant asserts, reasonably, that her mitigating circumstances could have been used to excuse the tardies or to issue no discipline at all. 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. The Grievant voiced her opinion that she should have some level of flexibility and the level of discipline was unexpected and not warranted for a professional. She did not present any evidence of disparate treatment or other mitigating factors.

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, such as a Notice of Improvement Needed, 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 I Written Notice for the 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 I Written Notice issued on January 27, 2014.

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.