Issue: Group II Written Notice with Suspension (failure to follow policy); Hearing Date: 08/29/14; Decision Issued: 09/02/14; Agency: VEC; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 10430; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA

Department of Human Resources Management
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION

In the matter of: Case No. 10430

Hearing Date: August 29, 2014
Decision Issued: September 2, 2014

PROCEDURAL HISTORY

Grievant is a supervisor for the Virginia Employment Commission ("the Agency"), with five years of service with the Agency as of the offense date. On May 22, 2014, the Grievant was charged with a Group II Written Notice for failure to follow policy, with suspension for five days. The Grievant had no prior, active disciplinary group notices.

Grievant timely filed a grievance to challenge the Agency's disciplinary action, and the grievance qualified for a hearing. On August 11, 2014, the Office of Employment Dispute Resolution ("EDR") appointed the Hearing Officer. Through pre-hearing conference, the grievance hearing ultimately was scheduled for the first date available between the parties and the hearing officer, August 29, 2014, on which date the grievance hearing was held at the Agency's facility.

The Agency submitted documents for exhibits that were, without objection, accepted into the grievance record, and they will be referred to as Agency's Exhibits, accordingly.

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 his grievance filings, the Grievant requests rescission or reduction of the Group II 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 its *Standards of Conduct*, DHRM 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. Examples of a Group II offense include failure to follow supervisor's instructions or comply with written policy.

The Agency also relies on DHRM Policy 2.20, *Types of Employment*, that addresses wage (or hourly) employees. Wage employees, according to the policy, are limited to working 1,500 hours per year from May 1 through April 30. The policy provides that no exceptions are permitted. Agency Exh. 4.

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 supervisor, with five years tenure, and he had no prior active Written Notices. The Written Notice charged:

> . . . you scheduled and allowed a wage employee to work over 1500 hours which is a direct violation of the Department of Human Resource Employment policy 2.20 and Modified Memorandum dated April 11, 2013, which prohibits a wage employee from working over 1500 hours. This policy was discussed with you verbally and written guidance was provided by your office manager and regional director on numerous occasions.

The Agency's witnesses, the human resources director, regional director, and local office manager, testified consistently with the charge in the Written Notice. They testified to the seriousness the Agency attached to adhering to the statewide policy as directed by the General Assembly, and to the notice to Agency staff, including the Grievant, of the Agency's strict adherence to the policy. Agency Exhs. 4, 5. The stated impetus for the statewide limitation was the Affordable Care Act's definition of a full-time employee as one working 30 or more hours per week. Nevertheless, the Grievant scheduled and allowed a wage employee to work more than the average of 29 hours per week during the month of April 2014 that pushed the wage employee's total yearly hours above the state policy maximum of 1,500. The wage employee accrued 1,513.5 hours during the wage year. Agency Exh. 7. The Agency witnesses confirmed that the Grievant was the only supervisor in the Agency who was responsible for a wage employee exceeding the yearly maximum.

The Grievant did not testify, but through his cross-examination of the Agency witnesses he pointed out the varying description of the hourly limitation on wage employees' hours, from an average of 29 per week (29 x 52 weeks = 1,508) to 1,500 per year. He also showed that his office was understaffed during April 2014—the period of time the wage employee worked more than the usual number of hours per week and exceeded the yearly maximum of either 1,500 or 1,508. Under either measure of the state maximum number of hours (1,500 or 1,508), the wage employee at issue exceeded the limit.

The Agency's timekeeping system, Timekeepers, does not permit changes or amendments once the submissions are approved, so employees' amended timesheets must be accounted for separately with an Excel spreadsheet. In this case, the wage employee had an amended timesheet during the year that added hours that did not show up in the Timekeepers

system. All supervisors were provided an Excel timesheet for keeping up with amended hours. The Grievant actually approved the wage employee's amended timesheet, but he did not keep up with the annual total as directed and required. Through his grievance filings, the Grievant asserts that the timekeeping system is, at least partly, responsible for his allowing the wage employee to exceed the maximum hours.

Based on the evidence presented not challenging or refuting the factual bases of the Written Notice, I find the Agency has proved the offense and level: Group II Written Notice. The policy violation was a significant offense given the Agency's repeated directives and warnings regarding the maximum hour policy for wage employees. The analysis moves to mitigation.

Mitigation

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, *even if he would levy lesser discipline,* 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*. A hearing officer does not have the same discretion for applying mitigation as management does.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Human Resource Management …." Va. Code § 2.2-3005. 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 Department of Human Resource Management." Under the *Rules for Conducting Grievance Hearings*, "[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. 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 Grievant produced no such mitigating evidence.

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 Agency presents a position that the policy (to limit wage or hourly employees to an average of 29 hours or fewer each week) is a statewide mandate that the Agency was intent on meeting. The Grievant points to mitigating circumstances such as the severe staff shortage in his office during April 2014, and the fact that the Timekeepers system did not account for amended timesheets. The hearing officer accepts, recognizes, and upholds the Agency's prerogative to strictly follow and implement its policies, and there is no showing that the Grievant's allowing the wage employee to exceed the mandated maximum hours was unavoidable. The Grievant's good work record, and discipline free tenure is insufficient to overcome the Agency's discretion in levying discipline. While the Agency's issuance of the Group II Written Notice with five days suspension is on the severe end of reasonable discipline for the offense, I find no mitigating circumstances that allow the hearing officer to reduce the Agency's action regarding the Group II Written Notice as outside the bounds of reasonableness.

DECISION

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