Issue: Group II Written Notice with Suspension (failure to follow policy/instructions); Hearing Date: 10/29/14; Decision Issued: 11/04/14; Agency: DOC; AHO: William S. Davidson, Esq.; Case No.10465; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 10465

Hearing Date: October 29, 2014
Decision Issued: November 4, 2014

PROCEDURAL HISTORY

The Grievant was issued a Group II Written Notice on July 16, 2014, for:

> VDOC Utilization Management process requires that referrals to an oral surgeon be approved by the Dental Director. OP 720.2 and OP 720.6 provide[s] guidance for dentists on oral surgery referrals. [Grievant] violated OP 720.2 and OP 720.6 when she failed to seek and obtain approval from the Dental Director to refer dental patients to an oral surgeon. [Grievant] had been previously directed by the Dental Director not to refer patients without approval from the Dental Director. [1]

Pursuant to this Written Notice, the Grievant was suspended for five days. [2] The Grievant timely filed a grievance to challenge the Agency's actions on July 17, 2014. [3] On October 1, 2014, this appeal was assigned to a Hearing Officer. A hearing was held at the Agency's location on October 29, 2014.

APPEARANCES

Attorney for Agency
Grievant
Witness

ISSUES

1. Did the Grievant violate Operating Procedure ("OP") 720.2 and OP 720.6?

2. Was the Agency's issuance of the Group II Written Notice an act of retaliation?

[1] Agency Exhibit 1, Tab 1, Page 1
[2] Agency Exhibit 1, Tab 1, Page 1
[3] Agency Exhibit 1, Tab 2, Page 1

AUTHORITY OF HEARING OFFICER

Code Section 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 Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government. [4] Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs,* 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) 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. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. The employee has the burden of proof for establishing any affirmative defenses to discipline such as retaliation, discrimination, hostile work environment and others, and any evidence of mitigating circumstances related to discipline. A preponderance of the evidence is sometimes characterized as requiring that facts to be established more probably than not occurred, or that they were more likely than not to have happened. 5 However, proof must go beyond conjecture. 6 In other words, there must be more than a possibility or a mere speculation. 7

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of the witness, I make the following findings of fact:

The Agency provided me with a notebook containing ten tabs and that notebook was accepted in its entirety as Agency Exhibit 1, without objection.

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[4] *See* Va. Code § 2.2-3004(B)
[5] *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991
[6] *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)
[7] *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

The Grievant provided me with a notebook containing eight tabs. There was an objection to Pages 12-30, based on relevancy. I deferred making a ruling on this objection until I heard evidence in this matter. Based on the evidence presented at the hearing, the Agency's objection was overruled and the Grievant's notebook was accepted in its entirety as Grievant Exhibit 1.

The Grievant in this matter serves in the capacity of a dentist for the Agency. In that capacity, she is subject to OP 720.6 and OP 720.2.

OP 720.6 at VIII(C)(4)(c), Oral Surgery, states in part as follows:

> i. A signed *Consent for Oral Surgery and Special Dental Procedures* 720_F31 will be required for all oral surgery cases.
>
> ii. Extractions are to be performed when indicated.
>
> iii. The facility dentist will perform most oral surgery
>
> iv. Complicated oral surgery that is beyond the capability of the facility dentist may be referred to an oral surgeon.
>
> (a) Pre-approval for outside referral to an oral surgeon must be obtained in instances when immediate care is not an issue.
>
> (b) If immediate care is provided, approval must be requested by the next working day. [8]

This Operating procedure became effective on October 1, 2013. As can be seen, this policy was changed on July 14, 2014. The change appears to be that the word "immediacy" was removed. The Grievant attempted to introduce a version of OP 720.6, which was dated October 1, 2010. That version at 720.6 at VIII(C)(4)(c)(iv), stated as follows:

> Complicated oral surgery that is beyond the capability of the facility dentist may be referred to an oral surgeon. Pre-approval for outside referral to an oral surgeon must be obtained in instances when immediacy is not an issue. [9]

The Grievant argued that the July 14, 2014, amendment to the October 1, 2013 version of this policy, added Section (iv)(b). It appears to me that this particular section was added with the October 1, 2013, amendment and the only change made on July 14, 2014, was to strike the word "immediacy," and insert the words "immediate care."

OP 720.6 sets forth a scale that attempts to classify the severity of the dental care required. That scale consists of four classes and indicates that simple wisdom tooth extractions and other extractions are a Class 2 dental issue. OP 720.6(IV)(H)(4)(b), sets forth what is contemplated as emergency dental treatment (Class 4) and defines it as:

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[8] Agency Exhibit 1, Tab 3, Page 6

[9] Grievant Exhibit 1, Tab 3, Page

> This class includes patients with facial swelling, uncontrolled bleeding, severe traumatic injuries, and other conditions that, if not treated immediately, will have an immediate effect on the health of the offender. [10]

On July 2, 2014, the Dental Director for the Agency gave the Grievant a list of patients that she had referred to an oral surgeon. This list commenced on November 7, 2013, and covered the period from that date through May 8, 2014. [11]

The Dental Director, pursuant to the Grievant telling him that all of these patients had been approved for sending to an oral surgeon, asked the Grievant to provide copies of the approvals.

Accordingly, the Grievant took the list and marked it so that you could determine which patients had approvals and which patients she deemed to be emergency referrals. [12] The Grievant argued that, based on her clinical assessment of her patient at the moment, that only she could make a proper assessment as to whether or not an emergency existed. The Grievant argued that a simple record review by the Dental Director should not be allowed to override her clinical assessment when she was the only person who was in a position to actually determine what the issue was with the patient in real-time.

Fortunately, I do not need to deal with the issue of whether or not emergencies actually existed. What is clear is that approvals were not granted prior to the referral and, in violation of OP 720.6, approvals were not secured within 24 hours. Indeed, many of the referrals were significantly outside of a 24 hour period for services rendered. By way of example, and using Agency Exhibit 1, Tab 8, Pages 2-3, for reference, Patient W received a referral on January 28, 2014, and the service was performed on February 4, 2014. Patient D received a referral on January 21, 2014, and the service was performed on February 4, 2014. Patient O received a referral on January 6, 2014, and the service was performed on March 10, 2014. Clearly, it would appear that this time-lapse between the referral and the service would indicate that an emergency was truly not present. And, regardless, there was no approval ever granted, after the fact, for these referrals.

OP 720.2(V)(B)(1), states as follows:

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[10] Agency Exhibit 1, Tab 3, Page 4
[11] Agency Exhibit 1, Tab 7, Pages 1-5
[12] Agency Exhibit 1, Tab 8, Pages 2-5

> Other than for medical emergencies as determined by the facility Health/Medical Authority, any referral for medical services beyond the services available in DOC facilities must be reviewed by the Utilization Manager (UM). [13]

This policy sets forth that the UM must review referrals other than emergencies. It is clear from the time-lapse from the purported emergency referrals and the actual date of services rendered that many of the Grievant's referrals were not emergencies. Consequently, there was also a violation of OP 720.2. The Agency incurred significant expense because of these referrals.

The Grievant alleges that this Group II Written Notice was issued in retaliation for her questioning a change in her work schedule. The uncontradicted evidence before me was that this Agency, at a management level beyond that of the Warden of this facility, made a determination that all physicians and dentists would be required to work a 5-day week. The Grievant had been working a 4-day (10 hrs per day) work week. The evidence is clear that the policy change affected all doctors and dentists and not just the Grievant. Other than the timing of this grievance and the change in Agency policy regarding work schedules for doctors and dentists, there was no testimony regarding retaliation and I find that there was no retaliation.

Further, the Grievant argued that the first time that she was aware of a violation of OP 720.6 and OP 720.2, was her receipt of an email from the Dental Director dated June 26, 2014. [14] However, in answer to a question that I posed to her, the Grievant specifically stated that, when she went to work, she had read all of the appropriate OP's that would apply to her as a dentist. Further, she gave no testimony as to the fact that she did not continue to maintain proper understanding of existing procedures. The Grievant's position is quite simply that, unless she was told exactly what she could or could not do, regardless of the actual policies, that she could not be held to be in violation of a policy. I find that not to be a valid reason for not following clearly enunciated policy.

MITIGATION

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the Agency disciplinary action." 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, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been

[13] Agency Exhibit 1, Tab 4, Page 12
[14] Grievant Exhibit 1, Tab 1, Page 6

employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

I find no reason to address mitigation in this grievance.

DECISION

For reasons stated herein, I find that the Agency has bourne its burden of proof in this matter and that the issuance of the Group II Written notice with suspension was appropriate.

APPEAL RIGHTS

You may file an administrative review request 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. You may fax your request to 804-371-7401, or address your request to:

Director of the Department of Human Resource Management
101 North 14th Street, 12th Floor
Richmond, VA 23219

2. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. You may fax your request to 804-786-1606, or address your request to:

Office of Employment Dispute Resolution
101 North 14th Street, 12th Floor
Richmond, VA 23219

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 of the original hearing decision. A copy of all requests for administrative review must be provided 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 administrative requests for a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.[15] 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.[16]

[15]An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant]

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William S. Davidson
Hearing Officer

judicial decision that the hearing decision purportedly contradicts. Virginia Department of State *Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

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