Issue: Group III Written Notice with Termination (failure to follow policy); Hearing Date: 09/04/15; Decision Issued: 09/08/15; Agency: DBHDS; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 10650; Outcome: Full Relief.

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. 10650

Hearing Date: September 4, 2015
Decision Issued: September 8, 2015

PROCEDURAL HISTORY

Grievant was employed as a housekeeper for ("the Agency"). On June 1, 2015, the Grievant was issued a Group III Written Notice, with termination, for failure to follow instructions and sleeping during work hours. The offense dates were May 12, 19, 22, and 26, 2015.

Grievant timely filed a grievance to challenge the Agency's disciplinary action, and the grievance qualified for a hearing. On July 28, 2015, 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, 2015, the first date available for the parties, 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 hearing officer admitted one exhibit designated as Hearing Officer's Exhibit (the initial version of the written notice).

APPEARANCES

Grievant
Advocate for 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 and presentation, the Grievant requested rescission of the Group III Written Notice and restoration to his job.

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. However, § 5.8 states *"[t]he employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline*." 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*, Agency Exh. C, which policy defines Group III Offenses as those acts of misconduct of such a severe nature that a first occurrence normally should warrant termination. This level is appropriate for offenses that, for example, endanger others in the workplace, constitute illegal or unethical conduct; neglect of duty;

disruption of the workplace; or other serious violations of policies, procedures, or laws. Sleeping during work hours and abuse or neglect of clients are among Group III offenses. 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.

Agency Exh. C.

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:

At the time of the offense, the Agency employed the Grievant as a housekeeper. The current Amended Written Notice charged the Grievant as follows:

> [The Grievant] did not work in assigned areas as instructed by his supervisor. He was also found sleeping during work hours on more than one occasion (5/12, 5/22, & 5/26). On Thursday, 5/25/2015 [ ], [Facility] Investigator, provided me with a video showing [the Grievant] outside his assigned work area on 5/19/15. He was walking down the female hall looking into their bedroom windows. He looked into a couple of windows stopping at one window and looking in for a long period of time. During this time he looked around apparently to see if anyone was watching. This violated the patient's privacy and instructions because he was told not to go to the woman's side unless he is directly told to clean it.

Agency Exh. B. The initial version of the Written Notice, provided to the hearing officer with the appointment documentation, charged the Grievant with only one offense date, 5/19/2015, and omitted any reference to the offense of sleeping during work hours. Hearing Officer Exhibit. When asked about the change, the Grievant's supervisor, who issued the Written Notice, said he amended it after consulting with Human Resources, but did not change the substance of the offenses. The supervisor was unsure when he issued the Amended Written Notice, as the date of issue was the same as the initial version, but it was after the due process meeting with the Grievant. Contrary to the supervisor's testimony, I find the substance of the Written Notice was most definitely changed with the Amended Written Notice.

This amendment to the Written Notice presents an impermissible disciplinary action because the Agency previously issued a formal (written) counseling memorandum to the Grievant for the exact same sleeping offense that was later amended to the original Written Notice. The supervisor issued the Grievant a counseling memorandum, issued May 27, 2015, that specified the same dates of sleeping offenses and provided:

> Action Taken-
> I told [the Grievant] that sleeping on the job will not be tolerated and if it happened again he would be disciplined using the standards of conduct and possibly terminated.
> He is also instructed not to be in a room for more than 1 Minutes (60 seconds) with the door shut and is to never sit in a room.

Agency Exh B, p 4.

Counseling, both informal (verbal) and formal (written) are disciplinary actions under the prescribed continuum established by the *Standards of Conduct*. Agency Exh. C. Administrative guidance interprets the *Standards of Conduct* as precluding the issuance of multiple, concurrent Group Notices *and related discipline* for a single alleged offense. *See* EDR Ruling No. 2001-071. While an agency has the discretion, upon new information or further reflection, to replace a level of discipline with a higher (or lower) one, there is no showing here that the counseling memorandum of May 27, 2015, was rescinded and replaced with the Group III Written Notice based on new information or further reflection. The Written Notice, issued June 1, 2015, was amended to include the exact sleeping infractions addressed by the counseling memorandum. Amending the Written Notice to include the offenses previously deemed worthy of a formal counseling constitutes rather a "piling on" to justify a termination based on cumulative offenses. For this reason, the elements of the Amended Written Notice pertaining to sleeping during work hours are dismissed as having been subject to and addressed by prior disciplinary action.

The remaning offense pertains to the allegation of the Grievant not working in his assigned areas. This allegation specifies one date, May 19, 2015. While the video evidence presented by the Agency at the grievance hearing covered five days, including May 19, 2015, the issue presented is whether the expanded offense dates may be considered. EDR rulings on administrative review have held that only the charges set out in the Written Notice may be considered by a hearing officer. *See* EDR Rulings Nos. 2007-1409; 2006-1193; 2006-1140;

2004-720. In addition, the *Rules* provide that "[a]ny issue not qualified by the agency head, the EDR Director, or the Circuit Court cannot be remedied through a hearing." *Rules for Conducting Grievance Hearings § I.* Under the grievance procedure, charges not set forth on the Written Notice (or an attachment thereto) cannot be deemed to have been qualified. Thus, such unstated charges are not before a hearing officer.

Based on the Amended Written Notice, the only offense date pertaining to the Grievant's location in an unauthorized place is for May 19, 2015. The Agency presented video evidence at the hearing of other dates (Agency Exh. H), and the Grievant's supervisor testified that the Grievant's conduct on April 29, 2015, was the conduct that merited termination. However, the date of offense is critical to the essence of a charge of discipline. I find that the Amended Written Notice must be limited to conduct that occurred on May 19, 2015, as specified in the Amended Written Notice, as no other dates of alleged misconduct are identified (aside from the sleeping allegations that are dismissed).

The Agency presented witness testimony that the standard arrangement among the housekeeping staff was to have the male staff attend to the male hallways and not the female hallways, with assignments of work shared equitably. The video evidence for May 19, 2015, shows the Grievant's presence on the co-ed hallway that was also busy with other foot traffic of males and females. While the Agency presented testimony from the Grievant's supervisor that he was verbally instructed not to clean the female hallways when the patients were present (unless directed to do so), the Grievant testified that he was often so directed and there were many times when he was the only housekeeper around to attend to such duties, by necessity. One such instance was captured on video on April 27, 2015, and presented by the Agency, when, according to the Grievant, he was called by a nurse to clean a room contaminated with feces. While the video evidence shows the Grievant on the female hallways on other dates, the video evidence for May 19, 2015, only shows the co-ed hallway.

With respect to the allegation that the Grievant was in an unassigned area, the Agency's proof falls short of proving misconduct on May 19, 2015. Even if April 29, 2015, had been included in the Amended Written Notice, the Agency's proof of misconduct is still insufficient. It is reasonable for the Agency to discipline an employee based on the conclusions of an internal investigation, but there was no formal investigation conducted. The video of the Grievant in the female hallway on April 29, 2015, showing him looking through windows, does not, standing alone, prove the rooms were occupied. This is consistent with the Grievant's testimony that the room was unoccupied and he was looking for excessive clutter on the patients' floors for later cleaning (a circumstance asserted by the Grievant and noted by the Agency on the Amended Written Notice). No agency witnesses testified that the rooms were occupied at the time. The Agency witnesses testified that the rooms could have been occupied. The grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. The Agency's reliance on the video evidence, alone, does not prove the Grievant was peeping at female patients. The Written Notice indicates privacy invasion, but the evidence fails to prove that allegation, without resorting to rank speculation. Considering an assumption that female patients could have been present and in a state of undress, the evidence, at most, fails to reach a preponderance of the evidence without some direct evidence of actual privacy intrusion. The burden of proof requires more than conjecture. *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956). In

other words, to prove by a preponderance of the evidence, there must be more than a possibility or a mere speculation. *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945).

While the Agency presented evidence that, generally, the male housekeepers were designated to work the male patients' areas and not the female areas when occupied, no witnesses described the admonition as an absolute prohibition. There is no direct evidence that on May 19, 2015, the Grievant was in any area other than the co-ed hallway. Considering the April 29, 2015, video evidence, which I have ruled to be outside the limited scope of the Amended Written Notice, the Agency presented no direct evidence that the Grievant was specifically directed in any manner that day.

The Agency also presented many witnesses who testified to the Grievant's perceived conduct years earlier. However, none of the old instances resulted in a Written Notice. The testimony of these witnesses, similar to amending the written notice to include the sleeping offenses, appears to be piling on with matters beyond the scope of the Amended Written Notice. While such prior alleged misconduct could be relevant to show a pattern of repeated misconduct, such was not shown here with respect to the issue narrowly contained in the Amended Written Notice.

Summary

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 grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. For the reasons stated, the sleeping offenses are dismissed as improperly included in the Amended Written Notice. For the remaining allegation of misconduct occurring on May 19, 2015, the Agency has not borne its burden of proof. For these reasons, I need not address any mitigating factors.

DECISION

For the reasons stated herein, I reverse the Amended Group III Written Notice. Accordingly, the termination is reversed, and the Agency is ordered to **reinstate** Grievant to Grievant's same position prior to removal, or, if the position is filled, to an equivalent position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

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.