

Issue: Group II Written Notice (failure to follow instructions and insubordination);
Hearing Date: 08/27/15; Decision Issued: 09/08/15; Agency: DMAS; AHO: Cecil
H. Creasey, Esq.; Case No. 10648; Outcome: No Relief – Agency Upheld;
**Administrative Review: EDR Ruling Request received 09/23/15; EDR Ruling No.
2016-4237 issued 10/20/15; Outcome: AHO's decision affirmed; Administrative
Review: DHRM Ruling Request received 09/23/15; DHRM Ruling issued 12/14/15;
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. 10648

Hearing Date: August 27, 2015
Decision Issued: September 8, 2015

PROCEDURAL HISTORY

Grievant is an appeals intake supervisor for the Department of Medical Assistance Services (“the Agency”). On March 24, 2015, the Grievant was issued a Group II Written Notice, for failure to follow instructions and insubordination. The offense date was March 2, 2015.

Grievant timely filed a grievance to challenge the Agency’s disciplinary action, and the grievance qualified for a hearing. On July 22, 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 August 27, 2015, 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
Counsel 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 II Written Notice based on alleged misapplication of policy.

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. 3, which policy defines Group II Offenses as those that significantly impact business operations and/or constitute neglect of duty, insubordination, the abuse of state resources, violations of policies, procedures, or laws. Insubordination and failure to follow instructions as described in the Written Notice are consistent with a Group II offense. 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. 3.

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 an appeals intake supervisor. The current Written Notice charged the Grievant as follows:

On March 2, 2015, you refused to follow the direct instructions of your Division Director, [], and the guidance of both your direct supervisor, [] and your Agency's Human Resource Division, by rejecting your Division Director's instructions and proceeding to terminate the employment of a DMAS Appeals Division staff member, [].

Agency Exh. 2. The conduct is confirmed through email exchanges documented at Agency Exh. 16.

The Agency's witnesses, including the Division Director, Human Resources Director, and direct supervisor, all testified consistently with the facts alleged in the Written Notice. The Grievant testified that the facts stated in the Written Notice were accurate.

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. Such decision for discipline falls within the discretion of the Agency so long as the discipline does not exceed the bounds of reasonableness.

Based on the manner, tone, and demeanor of the witnesses, I find all the witnesses credible. The witnesses' testimony and the Grievant's explicit admission of the offending conduct satisfies the Agency's burden to show that the Grievant was guilty of the charged conduct of insubordination and that such conduct constituted a Group II offense.

Mitigation

The Grievant asserts policy requirements that support his actions, even though his division director specifically instructed him not to terminate the affected wage employee. Mitigating circumstances may serve to reduce or negate discipline. As with all mitigating factors, the grievant has the burden to raise and establish any mitigating factors. *See e.g., EDR Rulings Nos. 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).

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 pursuant to § 2.2-1202.1." 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. *Rules for Conducting Grievance Hearings, VI(B)*. 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. I find that the Grievant's contention that his policy argument militates against discipline must be considered as a potential mitigating factor that could reduce or reverse the discipline.

The Grievant maintains that his construction of DHRM Policies 1.45, 2.20, and 1.60 required him to terminate the wage employee's employment as the "appointing authority" over the wage employee and, thus, the final arbiter for the continued employment or termination of

the affected employee. *See* Attachment to Grievance Form A, Agency Exh. 1; Grievant Exhs. 2, 4. While the Grievant may be correct, in that he had hiring and firing authority over the affected employee, that authority does not trump or negate higher management direction and instruction. Further, the Grievant may be correct in his judgment that the wage employee's work performance justified termination. In this case, however, the Grievant directly disobeyed higher management direction and instruction not to fire the employee when he did so. Agency Exh. 16. The Grievant's disregard of a direct order from his superior satisfies the definition of insubordination, *i.e.*, defiance of authority or refusal to obey orders. The Grievant, or any employee who believes higher management's direction or instruction is unlawful or against established policy, may pursue proper channels for relief. In this case, the Grievant elected solely to defy upper management's direct instruction and risk the consequences of such unilateral conduct—discipline in the form of a Group II Written Notice. The Grievant has not shown that he received insufficient notice of upper management's direction and instruction, or that management's direction and ultimate discipline was somehow based on improper motive.

The Grievant bears the burden of showing that the Agency's discipline constituted, or was based on, a misapplication of policy. I find the Grievant has not shown such circumstances.

Regarding the level of discipline, the Agency had leeway to impose discipline along the permitted continuum. The Grievant's position placed him in a responsible role, and the Grievant's refusal to follow direct instruction from higher management may only be justified by compelling reason. I find the Grievant's policy construction insufficient basis for him to disregard his management's direct instruction. While a 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, as it does in this case.

Grievant's Request for Rehearing

On August 31, 2015, the Grievant filed electronically with the hearing officer his Request for Rehearing or Exclusion of Evidence Based on the Agency's Due Process Violation and for Sanctions Based on Agency's Fraud on the Tribunal. The Grievant asserts that the Agency improperly raised, for the first time at the hearing, an allegation of racial animus and EEOC complaints concerning the Grievant's job behavior. The Grievant seeks

1. Reopening of the hearing for additional evidence; or
2. Assurance from the hearing officer that he will not consider the EEOC charges or any allegations of racism; and
3. Production by the Agency of all documentation related to the EEOC charges.

Neither the *Grievance Procedure Manual* nor the *Rules for Conducting Grievance Hearings* provides for a motion for rehearing directly to the hearing officer. Such requests for relief must be sought and addressed with EDR after the hearing officer's decision. However, I will state that I did not consider the EEOC charges or references by Agency witnesses as any evidence of racial bias or animus on the Grievant's part or as motivation for imposing the discipline. Further, I have not considered such implications or inferences, if any, in my determination of this grievance whatsoever. The motivation or reasons, regardless of merit, for

the division director's instruction to the Grievant are nonessential factors for consideration of insubordination in this circumstance. Any other relief sought under the post-hearing motion is not within my procedural jurisdiction or power to address.

DECISION

For the reasons stated herein, I uphold the Agency's discipline of Group II Written Notice.

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.

A handwritten signature in blue ink, appearing to read "Cecil H. Creasey, Jr.", is positioned above a horizontal line.

Cecil H. Creasey, Jr.
Hearing Officer

¹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.