Issue: Group III Written Notice with Termination (sleeping during work hours); Hearing Date: 11/23/15; Decision Issued: 12/21/15; Agency: UVA; AHO: John V. Robinson, Esq.; Case No. 10699; Outcome: No Relief - Agency Upheld.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 10699

Hearing Officer Appointment: October 8, 2015
Hearing Date: November 23, 2015
Decision Issued: December 21, 2015

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge the issuance of a Group III Written Notice issued September 8, 2015 by the University of Virginia, Facilities Management ("UVA", the "Department" or the "Agency"), as described in the Grievance Form A dated September 8, 2015.

The Grievant is seeking the relief requested in her Grievance Form A, namely removal of the Group III offense and reinstatement. Because of language barriers, and problems contacting the Grievant, the hearing officer sent the Grievant a letter dated October 20, 2015, which is incorporated herein by this reference. Ultimately, a conference call was scheduled and held on November 5, 2015. The Grievant, the interpreter, the Agency's attorney, and the hearing officer participated in the call. The hearing officer issued a Scheduling Order entered on November 9, 2015, which is incorporated herein by this reference.

In this proceeding the Agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances. Of course, the Grievant bears the burden of proof concerning any affirmative defenses.

At the hearing, the Grievant represented herself and the Agency was represented by its attorney. Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing, namely exhibits 1-7 in the Agency's exhibit binder.[1]

At the hearing, the Grievant sought to introduce certain exhibits seen for the first time by the hearing officer at the hearing, namely 4 photographs of co-workers using cell phones and an

[1] References to the agency's exhibits will be designated AE followed by the exhibit number.

e-mail, sent to the Agency's attorney on November 19, 2015. The Agency, by counsel, objected to the admission of the proposed exhibits because they were not exchanged with the Agency before the deadline established in the Scheduling Order, before 5:00 p.m. on Monday, November 16, 2015. For the same reason, the Agency objected to the proposed use by the Grievant of her daughter as a witness - pursuant to the Scheduling Order, the parties were required to exchange the names of their proposed witnesses by the same deadline.

In *City of Hopewell v. County of Prince George, et als.*, 240 Va. 306, 314, 397 S.E.2d 793, 797 (1990), the Virginia Supreme Court specifically left open the question whether the trial judge in that case even had the discretion to allow a rebuttal witness to testify where Petersburg had not previously named such witness in accordance with the court's pretrial order entered January 30, 1989. In any event, the Court decided that the trial judge clearly had not abused his discretion in refusing to allow such witness to testify even under circumstances where Petersburg was arguing that there were good reasons why the witness was not named on the witness list filed by the deadline in the pretrial order. By contrast, in this proceeding the Grievant advances no good reasons for her failures.

The Virginia Supreme Court looks with favor upon the use of stipulations and other pre-trial (or in this proceeding, pre-hearing) techniques which are designed to narrow the issues or settlement of litigation. *McLaughlin v. Gholson*, 210 Va. 498, 500, 171 S.E.2d 816, 817 (1970). The Scheduling Order in this proceeding and, specifically, the parties' stipulated deadline concerning exchange of witness lists and exhibits, was a set of rules which the parties agreed to live by and constituted precisely such a pre-hearing technique. To have allowed the Grievant at the hearing to have admitted into evidence the proposed documents and introduce a new witness which the Agency could not prepare to counter, would have thwarted the rules the parties themselves agreed to abide by and violated fundamental principles of fairness, notice and due process. Accordingly, the hearing officer is comfortable with his decision not to disregard the Scheduling Order.

APPEARANCES

Representative for Agency
Grievant and Interpreter
Witnesses

FINDINGS OF FACT

1. During the time relevant to this proceeding (the "Period"), the Grievant was employed by the Agency as a housekeeper. The Grievant has been with the Agency for approximately 13 years.

2. On August 13, 2015, at approximately 3:00 p.m. the Grievant's immediate supervisor ("Supervisor M") went to the 4th floor of a particular hall to find the Grievant.

3. Supervisor M solicited the help of the lead worker, neither of whom could find the Grievant and so they proceeded to search the entire building. After going floor to floor looking and shouting loudly for the Grievant for approximately 20 minutes, they returned to the 4th floor where the Grievant was assigned to work and where her cleaning bucket was visible.

4. Unable to find the Grievant, Supervisor M loudly called out her name as he walked throughout the hallway checking all of the 4th floor's closets and rooms. Because both Supervisor M and the lead are men, Supervisor M asked a female employee to assist them by checking the women's restroom on the 4th floor to see if the Grievant was there.

5. The female co-worker unlocked the door and as she opened it, all 3 heard the Grievant snoring loudly within. The Grievant's feet and cell phone could be seen as she slept in a stall, clearly not being used for its intended purpose but for the grievant to sleep in the locked space. The three of them stood at the bathroom door for a few minutes before leaving the area.

6. By policy, the housekeepers are not to use any restroom except that on the first floor and if they are cleaning a restroom, the restroom door should be propped open, not locked. After approximately 5 minutes, the Supervisor confronted the Grievant in the hallway of the 4th floor.

7. This incident occurred just three weeks after the Grievant was found by a co-worker on July 21, 2015 sleeping during work hours.

8. At that time, the grievant, defended her actions to supervision by stating that she was resting, not sleeping, because she works another job and gets tired.

9. Management was extremely lenient to not discipline the Grievant on this occasion but sternly counseled her on expectations to contact supervision if she felt a need to rest, particularly during times that are not her regular break or lunch period. The Grievant was specifically advised that future incidents would result in disciplinary action.

10. Sleeping during work hours is an egregious violation of the Standards of Conduct as the employee fails to perform any amount of work while doing so, costing the department significant time and money and contributing to low worker morale and trust. In this instance, even more resources were lost as the time of 3 other employees was wasted during the Department's efforts to locate the Grievant to ensure her safety.

11. The Grievant's sleeping on the job has negatively affected the morale of her co-workers and the Department's ability to maintain consistent quality standards.

12. During a predetermination meeting on August 14, 2015, the Grievant informed management that her stomach hurt and that she was not sleeping. When management countered that three people observed her sleeping, she admitted she was tired while denying that she was a sleep. The Grievant admitted during the hearing that she was at fault for not calling to say that her stomach hurt and that presumably she needed a break from work.

13. The Grievant has been previously counseled on meeting performance expectations including receiving in 2014, two Written Letters of Counseling for Unsatisfactory Performance and Failure to Follow Instructions. The Grievant received a third Written Letter of Counseling on August 25, 2015 when management discovered her taking an authorized break to sit in a student lounge and talk on her cell phone just 40 minutes into her shift.

14. The Grievant's performance issues did negatively impact the Agency's operations.

15. The Department has fully accounted for all mitigating factors in determining the corrective action taken concerning the Grievant. This finding is discussed in greater detail below.

16. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.

17. The Department's actions concerning this grievance were reasonable and consistent with law and policy.

18. The testimony of the witnesses called by the Agency was both credible and consistent on the material issues before the hearing officer. The demeanor of such Agency witnesses at the hearing was candid and forthright.

APPLICABLE LAW, ANALYSIS AND DECISION

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).

Va. Code § 2.2-3000(A) 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.

In disciplinary actions, the Agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60 (the "SOC"). AE 7. The SOC provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The SOC serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

The Grievant's disciplinary infractions were reasonably classified by management as a Group III offense. The Grievant argues that the Agency has misapplied policy and acted unjustly. However, sleeping during working hours is specifically cited as a Group III offense in Attachment A to the SOC, and the Grievant was previously specifically cautioned by management concerning this particular infraction on July 22, 2014. AE 5.

The Agency has met its evidentiary burden of proving upon a preponderance of the evidence that the Grievant violated Policy No. 1.60 and that the violations rose to the level of a Group III terminable offense.

The Grievant has alleged retaliation but has failed to carry her burden of proof in this regard. An agency may not retaliate against its employees. To establish retaliation, a grievant must show he or she (1) engaged in a protected activity; *See Va. Code § 2.2-3004(A)(v) and (vi)* (2) suffered a materially adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse employment action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, retaliation is not established unless the grievant's evidence shows by a preponderance of the evidence that the agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn there from may be considered on the issue of whether the Agency's explanation was pretextual. *See, EDR Ruling No. 2007-1530, page 5* (Feb. 2,

2007) and *EDR Ruling No. 2007-1561* and 1587, page 5 (June 25, 2007). This is addressed in greater detail below.

The Grievant has not described the protected activity in which she engaged which gave rise to the alleged retaliation. The Grievant did show management photographs she took of co-workers using cell phones but this only happened after the discipline in this case. Management apparently acted on at least one of the photographs. The Grievant has also not borne her burden of proving that a causal link exists between the discipline and any alleged protected activity.

The Grievant also raised the affirmative defenses of Agency corruption, discrimination and that she was "set up." However, neither these nor any other affirmative defenses were supported by any meaningful probative evidence at the hearing and, in any event, the hearing officer finds there is insufficient evidence in the record to even begin to decide that the Grievant has met her evidentiary burden of proof in this regard.

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 Grievant asserts that the discipline is too harsh. The Agency did consider mitigating factors, including the Grievant's past good service to the Agency.

EDR's *Rules for Conducting Grievance Hearings* provide in part:

> The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances" such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance." 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. *Rules* § VI(B) (alteration in original).

If the Department does not consider mitigating factors, the hearing officer should not show any deference to the Department in his mitigation analysis. In this proceeding the Department did consider mitigating factors in disciplining the Grievant.

The Grievant has specifically raised mitigation as an issue in the hearing. While the Grievant might not have specified for the hearing officer's mitigation analysis all of the mitigating factors below, the hearing officer considered a number of factors including those specifically referenced herein, in the Form A, in the Written Notice and all of those listed below in his analysis:

1. the Grievant's past good service to the Agency;

2. the newly assigned work areas;

3. the Grievant's limited understanding and proficiency in English;

4. the Grievant's cultural and religious background;

5. the Grievant's age;

6. the fact that the Grievant is a single mother and works 2 jobs;

7. the Grievant's 13 years of service; and

8. the many demands of the Grievant's job.

EDR has previously ruled that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518; and EDR Ruling 2010-2368. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. *Id.*

Here the offense was very serious, and of course, there were also aggravating factors in play including the warnings to the Grievant by the supervisors concerning specific performance infractions, the fact that the Grievant was combative to management and the Grievant's refusal to take responsibility and trying to shift the blame to others. Clearly, the hearing officer would not be acting responsibly or appropriately if he were to reduce the discipline under the circumstances of this proceeding.

Pursuant to SOC, management is given 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, 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.

In this proceeding, the Agency's actions were consistent with law and policy. The Agency appropriately determined that the Grievant's violations of Agency policies concerning

sleeping on the job warranted a Group III Written Notice and termination under the circumstances. Accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer.

In EDR Case No. 8975 involving the University of Virginia ("UVA"), a grievant received a Group III Written Notice with removal for falsifying records on five (5) separate dates. Although the evidence supported only one of those instances, the hearing officer upheld the disciplinary action. The grievant appealed to EDR asserting that the disciplinary action was inappropriate in that the grievant did not engage in as much misconduct as alleged by UVA. The Director upheld the hearing officer's decision:

> The grievant's arguments essentially contest the hearing officer's determinations of fact as they relate to the proper sanction for the misconduct. Such determinations are within the hearing officer's authority as the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate. In this case, while it appears that the hearing officer did find that the grievant did not engage in as much misconduct as alleged by the University, it was still determined that the grievant had falsified a state record with the requisite intent, generally a Group III offense under the Standards of Conduct. [footnote omitted] Upon review of the record, there is no indication that the hearing officer abused his discretion in making these findings or that the facts were not supported by the hearing record. Consequently, this Department has no basis to disturb the hearing decision.

EDR Ruling Number 2009-2192; February 6, 2009.

The hearing officer decides for the offenses specified in the written notice (i) the Grievant engaged in the behavior described in the written notice; (ii) the behavior constituted misconduct; (iii) the Department's discipline was consistent with law and policy and that there are no mitigating circumstances justifying a further reduction or removal of the disciplinary action.

DECISION

The Agency has sustained its burden of proof in this proceeding and the action of the Agency in issuing the written notice and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the Agency's action concerning the Grievant is hereby upheld, having been shown by the Agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

APPEAL RIGHTS

As the *Grievance Procedure Manual* sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to two types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must refer to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401 or e-mailed.

2. **A challenge that the hearing decision does not comply with grievance procedure** as well as a request to present newly discovered evidence is made to EDR. This request must refer to a specific requirement of the grievance procedure with which the decision is not in compliance. EDR's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219, faxed or e-mailed to EDR.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days.) A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or

2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal

with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of EDR before filing a notice of appeal.

ENTER: 12 / 21 / 2015

John V. Robinson

John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail and/or facsimile transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).