Issue: Group III Written Notice with Termination (workplace violence, threatening and disruptive behavior); Hearing Date: 11/18/15; Decision Issued: 12/02/15; Agency: UVA; AHO: Cecil H. Creasey, Jr.; Case No. 10700; Outcome: Partial Relief; **Administrative Review: EDR Ruling Request received 12/16/15; EDR Ruling No. 2016-4282 issued 01/08/16; Outcome: AHO's decision affirmed.**

COMMONWEALTH of VIRGINIA

Department of Human Resource Management
Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 10700

Hearing Date: November 18, 2015
November 30, 2015
Decision Issued: December 2, 2015

PROCEDURAL HISTORY

Grievant, an administrative assistant with the University of Virginia School of Medicine ("Agency"), was issued a Group III Written Notice, with job termination, on September 8, 2015. Agency Exh. 2. The discipline was issued under the authority of the State Standards of Conduct, DHRM Policy 1.60. Grievant timely filed a grievance to challenge the Agency's action. On October 8, 2015, the Office of Employment Dispute Resolution, Department of Human Resource Management ("EDR") appointed the Hearing Officer. The hearing was scheduled at the first date available between the parties and the hearing officer, November 18, 2015, at which time the grievance hearing was held at the Agency's offices. Because of the unavailability of a witness, the hearing was continued and reconvened by telephone on November 30, 2015.

Both sides submitted exhibits that were admitted into the grievance record, and they will be referred to as Agency's or Grievant's Exhibits, numbered respectively. The hearing officer has carefully considered all evidence presented.

The Grievant has two active Group Notices, a Group I for disruptive behavior issued January 26, 2015, and a Group II for policy violation issued September 17, 2012. The Grievant also received a counseling memorandum on May 30, 2014, for inappropriate behavior. Agency Exhs. 8, 9, 10.

APPEARANCES

Grievant
Advocate and Representative 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 under applicable policy)?
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?

The Grievant requests rescission of the Group III Written Notice and reinstatement.

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 States Human Resources Policy No. 1.60, Standards of Conduct, defines the progressive discipline that is expected from Agency management. Agency Exh. 14. The Policy requires that agencies follow a course of progressive discipline that fairly and consistently addresses employee behavior, conduct, or performance that is incompatible with the state's Standards of Conduct. The ultimate goal of this policy and its procedures is to help employees become fully contributing members of the organization. Conversely, this policy is also designed to enable agencies to fairly and effectively discipline and/or terminate employees whose conduct and/or performance does not improve or where the misconduct and/or unacceptable performance is of such a serious nature that a first offense warrants termination.

Under Policy 1.80, *Workplace Violence*, "workplace violence" is defined as:

> Any physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties. It includes, but is not limited to, beating, stabbing, suicide, shooting, rape, attempted suicide, psychological trauma such as threats, obscene phone calls, an intimidating presence, and harassment of any nature such as stalking, shouting or swearing.

Prohibited conduct includes, but is not limited to:

- injuring another person physically;
- engaging in behavior that creates a reasonable fear of injury to another person;
- engaging in behavior that subjects another individual to extreme emotional distress;
- possessing, brandishing, or using a weapon that is not required by the individual's position while on state premises or engaged in state business;
- intentionally damaging property;
- threatening to injure an individual or to damage property;
- committing injurious acts motivated by, or related to, domestic violence or sexual harassment; and
- retaliating against any employee who, in good faith, reports a violation of this policy.

Employees violating this policy will be subject to disciplinary action under Policy 1.60, Standards of Conduct, up to and including termination, based on the situation.

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. The operable facts alleged by the Agency are set forth in the Agency's Group III Written Notice. Agency Exh. 2. It states that on August 18, 2015, the Grievant became upset when questioned by her manager about the Grievant's recording of a staff meeting earlier in the day. The manager questioned the propriety of her recording, and the Grievant loudly responded she was recording because of the lies, especially those by her co-worker, SF, pertaining to the Grievant's earlier grievance of a Written Notice for disruptive behavior. The Grievant later confronted SF about what the Grievant considered lies. The confrontation was overheard by other staff and brought to the attention of the manager. The manager notified the Grievant that the Agency was placing the Grievant on paid administrative leave during investigation and that the Grievant must not report to work the next day.

The next day, August 19, 2015, the Grievant reported to work because she was not notified in writing that she was on administrative leave. When the manager asked the Grievant to honor management's directive, the Grievant refused to leave without something in writing. Management called police officers to the scene, and the Grievant left after receiving management's written directive to do so. In his call requesting police assistance, the manager indicated the Agency was in the process of terminating Grievant's employment.

The Grievant's manager and co-worker, SF, testified consistently with the allegations. SF testified that she felt threatened by the Grievant's multiple outbursts toward her, and that she was on edge the morning of August 19, 2015, when the Grievant unexpectedly appeared at work. SF testified that she did not want to file a police report or have the Grievant arrested. The department head physician testified that the Grievant's conduct disrupted the business of the department, particularly on August 19, 2015, when the Grievant came to work despite direction otherwise, prompting management to call for police assistance. The department head also testified that there was tension with the Grievant.

The Grievant testified that she did not threaten SF, that her conduct was not threatening and that, in fact, she was the victim of ongoing mistreatment and retaliation by her supervisor and co-workers. The Grievant testified that her multiple complaints have not been addressed by the Agency. A physician, Dr. S., testified that the Grievant had good work ethic, that he was able to work well with her, and that he would hire her. The Grievant also called her immediate supervisor as a witness, and the supervisor testified that the Grievant had satisfactory annual evaluations but that the Grievant was not well suited to the teamwork situation the office required. One of the responding police officers also testified that he did not witness any disruptive behavior, and that the Grievant left on August 19, 2015, peacefully. The Grievant's

mother also testified for the Grievant, stating that the work situation caused the Grievant much stress.

The Grievant testified to obtaining the recording of the 911 call her manager made to the police on August 19, 2015. The Grievant played the recording, and in that call the manager referred to the planned termination of the Grievant's employment. This was before the Agency went through the pre-disciplinary due process steps. The Grievant, who has been employed with the Agency for over 20 years, testified that she has asked multiple times for a transfer to another department and that the Agency has been planning to find a way to terminate her employment.

The manager of employee relations testified that the Grievant has had frequent contact with his department over her years of employment and complaints about her situation, but another person was primarily assigned to handle her department's issues. He testified that his knowledge of this or any incidents is dependent upon the information he is provided, that his information about her current situation evolved as more was provided to him. He also testified to his communication with the Grievant regarding her termination.

The Agency has shown that the Grievant's conduct occurred as alleged in the Written Notice, but not the conclusion of threatening conduct under Policy 1.80. I find that the Grievant, on August 18, 2015, complained disruptively about SF's alleged lying during the Grievant's prior grievance hearing. The Grievant's conduct on August 18, 2015, was disruptive, as was her conduct the following day, in deliberate disobedience of her manager's directive not to come to work while on administrative leave. I do not find that the Grievant's conduct was threatening as contemplated by Policy 1.80, but her conduct on both August 18 and 19 had an adverse affect on the operations of the Agency. If threatening, the conduct was not of the character that would justify the most severe discipline of a Group III offense, since Policy 1.80 is written to apply as a range of potential discipline, depending on the severity of the offense. Nothing about the agency's response to the conduct suggested an explicit, severe, or immediate threat from the Grievant. Thus, I find the Grievant's conduct was disruptive, not threatening, and that the discipline should be reduced, accordingly, to a Group II Written Notice for disruptive behavior. Under the Standards of Conduct, absent mitigating circumstances, a repeat of the *same, active* Group I Offense (of disruptive conduct) should result in the issuance of a Group II Written Notice.

The disciplinary record of two Group II and one Group I Written Notices is sufficient to support the Agency's election to terminate employment. Under the administrative rulings from EDR, when the reduced discipline still supports termination, the termination should be upheld. While the 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. The Agency has the discretion to act within the continuum of disciplinary options. The Agency has proved (i) the employee engaged in the behavior described in the Written Notice (as recharacterized herein as the lesser offense of disruptive behavior), (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy (as reduced from Group III to Group II). Thus, the termination must be upheld absent evidence that the discipline exceeded the limits of reasonableness. *Rules for Conducting Grievance Hearings* ("Hearing Rules") § VI.B.1. Further, § VI.B.1, provides:

> When the hearing officer sustains fewer than all of the agency's charges, the hearing officer may reduce the penalty to the maximum reasonable level sustainable under law and policy so long as the agency head or designee has not indicated at any time during the grievance process or proceedings before the hearing officer that it desires that a lesser penalty be imposed on fewer charges.

While the number of charges remains the same, the policy directive to the hearing officer is clear—to maintain the maximum reasonable discipline for active Group I and two Group II Written Notices. Thus, termination, unless the Agency indicates a lesser penalty may be imposed, is supported by the disciplinary record. The Agency most definitely has not indicated a lesser penalty, and there are no mitigating circumstances to reduce the maximum reasonable discipline elected by the Agency.

Mitigation

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 Office of Employment Dispute Resolution." 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.

Regarding the level of discipline, the Agency had leeway to impose discipline along the permitted continuum. Given the nature of the Written Notice, as decided above, the impact on the Agency, and the repeated disruptive behavior, I find no evidence or circumstance that allows the hearing officer to reduce the discipline further than explained above. The Agency has proved (i) the employee engaged in the behavior described in the written notices (as modified), (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy. Thus, the discipline of termination must be upheld absent evidence that the discipline exceeded the limits of reasonableness. *Rules for Conducting Grievance Hearings* ("Hearing Rules") § VI.B.1.

Termination is the normal disciplinary action for the disciplinary record of at least two active Group II Written Notices unless mitigation weighs in favor of a reduction of discipline.

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 Employment Dispute Resolution." Va. Code § 2.2-3005(C)(6). 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.

Under the *Rules for Conducting Grievance Hearings*, an employee's length of service and satisfactory work performance, standing alone, are not sufficient to mitigate disciplinary action. On the issue of mitigation, the Grievant bears the burden of proof. The Grievant has questioned the existence of consistent discipline and asserted improper motive by the Agency. The Grievant has also suggested a bias against her by her manager.

The Grievant requested access to her computer and email account for preparation for her grievance hearing, and I ordered the Agency to produce the documents. The Agency did not produce the documents, asserting that the computer and email accounts were irretrievably destroyed following the Grievant's job termination. The Grievant requested access to these documents contemporaneously with her job termination and grievance, and I find that the Agency has acted improperly in denying the Grievant this access. This conduct gives rise to an adverse inference against the Agency that there was an improper motive, as asserted by the Grievant. Hearing Rules § V.B. The Grievant proffered that she maintained documents on her computer regarding the Agency's motivation to get rid of her. I find that the Agency was looking for a basis to terminate the Grievant, and, unfortunately for her, she gave them one. The manager's pre-disciplinary 911 telephone call on August 19, 2015, referencing the Grievant's impending termination, corroborates the Agency's intent. The question becomes what effect, under the circumstances presented, does the adverse inference create. The improper motive that is imputed to the Agency escalated the discipline to the most severe level—Group III. However, the Group III Written Notice based on threatening behavior is rendered moot by the finding herein that the Grievant's conduct was properly a Group II level offense. I find the Grievant's conduct was completely within her responsibility, and that her conduct of directly disobeying her manager's order not to come to work on August 19, 2015, is an aggravating factor (and one that might have supported a separate Group Notice).

Under the EDR's Hearing Rules, the hearing officer should give the appropriate level of deference to actions by Agency management that are found to be consistent with law and policy, even if he disagrees with the action. However, in light of the applicable standards, the Hearing Officer finds no basis that provides any authority to reduce or rescind the disciplinary action further than the reduction from Group III to Group II. However, in this case, the Agency's action of termination based on the accumulation of discipline is within the limits of

reasonableness, even for the reduced Group II Written Notice for disruptive behavior (considering the accumulation of active Written Notices).

DECISION

For the reasons stated herein, the Agency's Group III Written Notice is reduced to a Group II offense issued September 8, 2015, for disruptive behavior—not threatening behavior. However, because of the accumulation of active Written Notices, the termination 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.