Issue: Group I Written Notice (disrespectful behavior); Hearing Date: 12/15/16; Decision Issued: 12/19/16; Agency: DARS; AHO: Cecil H. Creasey, Jr.; Case No. 10904; Outcome: No Relief – Agency Upheld.

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. 10904

Hearing Date: December 15, 2016
Decision Issued: December 19, 2016

PROCEDURAL HISTORY

Grievant is a policy and planning specialist with the Department of Aging and Rehabilitative Services (the Agency), with many years of service and without prior, active disciplinary record. On July 12, 2016, the Agency issued to the Grievant a Group I Written Notice, for unsatisfactory performance.

Grievant timely filed a grievance to challenge the Agency's disciplinary action, and the grievance qualified for a hearing, excluding ancillary issues included in the grievance. *See* Qualification Ruling No. 2017-4417 (October 6, 2016). On November 15, 2016, 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 December 15, 2016, the first date available for the parties, on which date the grievance hearing was held, at the Agency's designated location.

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

APPEARANCES

Grievant
Counsel 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 her grievance filings and presentation, the Grievant requested rescission of the Written Notice.

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 State *Standards of Conduct*, DHRM Policy No. 1.60, which defines Group I Offenses to include acts of minor misconduct that require formal disciplinary action. 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:

The Agency employed the Grievant as a policy and planning specialist, with a long tenure at the Agency and without any prior, active formal discipline. The Written Notice provided:

> On June 22, 2016, [the Grievant] engaged in conduct that was combative, disruptive, and disrespectful towards her supervisor. On June 29, 2016, she again displayed behavior that was disrespectful and unprofessional. See attached copy of the Due Process Notice (DPN).

Agency Exh. A.

The Grievant's supervisor testified consistently with the Written Notice, noting that she had been the Grievant's direct supervisor since January 2016. In January 2016, the supervisor informally counseled the Grievant regarding her combative and disrespectful conduct at a training meeting in January. Agency Exh. D. In the DPN, the supervisor specifically recounted that the Grievant accused her of appearing to be "hiding something." The supervisor testified that the Grievant's prior supervisor noted counseling instances for similar conduct. As for the

instances noted in June 2016, the supervisor testified that, based on the record of informal counseling, the formal Written Notice was appropriate to address the unprofessional attitudinal conduct. The supervisor also testified that the Grievant was a valued employee of the Agency, otherwise did a good job, and had much to offer the Agency.

The Grievant testified that she did not intend to be disrespectful or unprofessional in her conduct, and that she apologized to the people involved in January 2016. Further, regarding the June 2016 incidents, she was simply trying to get answers from or provide information to her supervisor regarding the subjects at hand. The Grievant was anxious over having to start keeping timesheets. *See* Due Process Notice (DPN) Response, Agency Exh. A, p. 3. In her DPN Response, the Grievant did not deny accusing her supervisor of appearing to be "hiding something," but at the hearing the Grievant testified she did not recall making that comment. The Grievant also testified that she did not consider her supervisor's email in January 2016 to be a formal counseling memorandum.

As circumstances considered, the Written Notice provided:

> The attached response to the DPN as well as [the Grievant's] years of service and prior job performance were taken into consideration. However, due to multiple instances of similar behavior and the issuance of related written and verbal counseling in January 2016, formal disciplinary action is warranted.

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.

There is necessarily a subjective element to any supervisor's determination that a subordinate employee has not acted professionally and as directed or expected. Here, there is evidence of a history of counseling by the supervisor of similar and related performance and conduct issues, concerning the Grievant's behavior, demeanor, and attitude.

On the evidence presented, I find the Agency has shown that the employee engaged in disrespectful behavior described in the Written Notice, albeit conduct not necessarily as severe as the descriptive adjectives can be interpreted, and that the behavior constituted misconduct. While the Grievant's conduct may be on the more subtle end of the range of unprofessional behavior, there is no requirement that conduct must be particularly overt or extreme before it may be disciplined. Behavior may be subtle and understated, and yet still inappropriate.

"Counseling is *typically* the first level of corrective action but is not a required precursor to the issuance of Written Notices." *Standards of Conduct*, ¶ B.1. (emphasis in original); Agency Exh. C. EDR's *Rules for Conducting Grievance Hearings* (*Rules*) provides that "a hearing officer is not a 'super-personnel officer'" therefore, "in providing any remedy, 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." *Rules* § VI(A). More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

> (i) the employee engaged in the behavior described in the Written Notice,
> (ii) the behavior constituted misconduct, and
> (iii) the agency's discipline was consistent with law and policy,
>
> the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.

Rules § VI(B). The conduct shown by the Agency is not objectively severe enough to be characterized as disruptive. However, even when the conduct is on the more minor end of the continuum, the Agency has discretion to utilize the disciplinary process. Further, while lesser options are available for the Agency, there is no requirement that an Agency issue formal counseling before it levies a Written Notice. Certainly, as the Grievant urges, a formal counseling memorandum may be more fitting. However, a hearing officer "will not freely substitute his or her judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'" *See Rules* § VI(B)(1) note 10 citing to *Davis v. Department of Treasury*, 8 M.S.P.R. 317, 1981 MSPB LEXIS 305, at 5-6 (1981). *See also Mings v. Department of Justice*, 813 F.2d 384, 390 (Fed. Cir. 1987) (the MSPB "will not disturb a choice of penalty within the agency's discretion unless the severity of the agency's action appears totally unwarranted in light of all factors").

Based on the manner, tone, and demeanor of the testifying supervisor, I find that she has reasonably described a behavior concern that she, as the supervisor, is positioned to address. I also find that, based on the evidence and the Grievant's credible testimony, the Grievant has not acted in deliberate disregard of her supervisor's direction and expectation. Further, the conduct at issue is not shown to be particularly combative and disruptive—behavior adjectives included in the Written Notice. Accordingly, the Written Notice did not charge the Grievant with insubordination (an offense more in line with behavior described as combative and disruptive). The Grievant's behavior described by the supervisor's testimony is more accurately described as contentious and disrespectful—unsatisfactory conduct the supervisor is still empowered to manage. Thus, based on these findings, the Written Notice will be upheld but modified, consistent with this decision.

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. Although the Grievant asserts she did not have adequate notice of her supervisor's expectations, the email memorandum to her from January 2016, establishes the supervisor's view, if not explicit notice of further discipline. Indeed, no discipline occurred until the interactions in June 2016. The Grievant also asserted that her research of other agency discipline turned up no instances of discipline for similar behavior conduct, but that is insufficient to show the Agency has acted in a disparate manner. There is no showing of instances of inappropriate or unprofessional conduct, known to Agency management, that was handled differently. Finally, as for the potential for improper motive, I find no indication of an improper motive. The Agency, through the Grievant's supervisor, has, with the exception of the disciplined behavior, noted that the Grievant is a valued, contributing employee with much to offer the Agency.

Thus, to accept the Grievant's invitation to rescind the Group I Written Notice, even though one might be inclined to do so, would exceed my role of hearing officer that is clearly defined and limited to not being a super-personnel officer.

DECISION

For the reasons stated herein, I uphold the Agency's discipline of a Group I Written Notice, but modify it to describe the improper conduct as contentious and disrespectful behavior rather than combative and disruptive.

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.