Issues: Management Actions (assignment of duties and misapplication of policy), and Retaliation (grievance activity); Hearing Date: 07/07/16; Decision Issued: 07/28/16; Agency: DSS; AHO: John V. Robinson, Esq.; Case No. 10809; Outcome: No Relief - Agency Upheld; **Administrative Review: EDR Ruling Request received 08/12/16; EDR Ruling No. 2017-4408 issued 09/30/16; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 08/12/16; DHRM Ruling issued 10/06/16; Outcome: AHO's decision affirmed.**

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 10809

Hearing Officer Appointment: May 17, 2016
Hearing Date: July 7, 2016
Decision Issued: July 28, 2016

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge the Permanent Removal of Supervisory Duties by the Department of Social Services described in the Grievance Form A dated November 16, 2015.

The Grievant is seeking the relief requested in her Grievance Form A, including reinstatement of her previous duties.

EDR Qualification Ruling Nos. 2016-4308 and 2016-4309 provide as follows:

> At the hearing, the grievant will have the burden of proving that the change in her job responsibilities was adverse and disciplinary. If the hearing officer finds that it was, the agency will have the burden of proving that its decision was reasonable, based in fact, and carried out in accordance with the discretion granted to the agency under policy. Should the hearing officer find that the change in her duties was adverse, disciplinary, and unwarranted and/or inappropriate under this standard, he or she may order the agency to restore the grievant's supervisory responsibility, just as he or she may rescind any formal disciplinary action. This qualification ruling in no way determines that the grievant's change in job duties constituted unwarranted informal discipline or was otherwise improper, but only that further exploration of the facts by a hearing officer is warranted. The grievance is qualified as to the grievant's challenge to the permanent changes in her job responsibilities.
>
> In the grievance, the grievant also contends that the agency's decision to remove her supervisory duties was retaliatory in nature and a misapplication and/or unfair application of policy. Because the grievant's claim of informal disciplinary action qualifies for a hearing, EDR considers it appropriate to send these alternative theories and claims regarding the changes in the grievant's job duties for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues. As with the

grievant's claim that the change in her job duties was disciplinary, the grievant will have the burden of proving that the agency's action was retaliatory and/or contrary to state or agency policy.

EDR Qualification Ruling Nos. 2016-4308 and 2016-4309 at 4. [Footnotes omitted].

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 1-38, 52-64 and 67-183 in the Grievant's exhibit binder and 1-10 and R-1 in the Agency's exhibit binder.[1]

At the hearing, the Grievant sought to introduce certain exhibits not in compliance with the Second Amended Scheduling Order. The Agency, by counsel, objected to the admission of the proposed exhibits and the hearing officer sustained the objection.

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.

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 Orders 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 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 Second Amended Scheduling Order.

The Scheduling Orders and the Protective Order entered by the hearing officer are hereby incorporated herein by this reference.

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

APPEARANCES

Representative for Agency
Grievant
Witnesses

FINDINGS OF FACT

1. During the time relevant to this proceeding (the "Period"), the Department of Social Services employed the Grievant as an Exception Processing Unit Manager within the Division of Child Support Enforcement ("DCSE").

2. In approximately 2012-13, certain issues between the Grievant and her employer began to surface.

3. These issue escalated when the Grievant made allegations against DSS present and past employees of age discrimination, racial discrimination, harassment and retaliation.

4. Management of DSS brought in an independent investigator from a different state agency to investigate the allegations of the Grievant and also allegations of a former DSS employee, TG, that she was the subject of racial discrimination, harassment and retaliation at the hands of the Grievant. AE 2 at 12.

5. The investigator in a report dated November 14, 2014, found no basis for the Grievant's allegations and found, to the contrary, that the Grievant was "an extremely unpleasant, toxic supervisor and coworker." AE 2 at 13.

6. The investigator interviewed "ten current DSS employees all of whom worked with or were supervised by [the G]." AE 2 at 12.

7. The report stated that "witness after witness described unending intimidating, aggressive, mean, belittling, abusive, child-like behavior to which [the Grievant] currently subjects her subordinates and others with whom she works and to which she subjected former subordinates." AE 2 at 13.

8. When the Grievant read the report on December 8, 2014, the report traumatically impacted the Grievant and the Grievant suffered to such an extent that the Grievant needed to take short-term disability leave from December 8, 2014 until June 8, 2015.

9. In May 2015, members of the State Disbursement Unit testified during a previous grievance hearing of the Grievant, that the Grievant subjected subordinates to disruptive, bullying and intimidating behaviors. AE 2 at 22.

10. When the Grievant returned to work on June 8, 2015, the Grievant's supervisor (the "Supervisor") informed the Grievant that as a temporary measure, he was suspending the Grievant's personnel management duties and that SC who had provided this function while the Grievant was out, would continue this function until a final decision was made.

11. The Supervisor attempted to work with the Grievant to improve her communication and interpersonal skills and her management style but the Supervisor believes these efforts bore little if any fruit.

12. The antagonism between the Grievant and her co-workers continued and continues.

13. In November 2015, the Supervisor determined that it is in the best interests of the effective operation of the EPU and DSS that the personnel management duties of the Grievant be permanently removed and the Grievant was so informed by her Supervisor.

14. The Supervisor assigned additional tasks and responsibilities to the Grievant to make up for the approximately 30% of management duties which were removed.

15. The Grievant's job title changed to "Project Manager & Asst." and her pay band, salary and other benefits have not been affected by the change in her job duties.

16. The primary intent of the management action taken by the Supervisor was not disciplinary but for effective operational reasons and the Supervisor provided numerous factors taken into account to substantiate his operational decision.

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

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

19. 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).

An adverse employment action is defined as a "tangible employment action constitut[ing] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[2] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment."[3] Merely because a new job assignment is less appealing to the employee, does not constitute an adverse employment action.

Since the removal of her personnel management duties, the Grievant no longer supervises any employees whereas she formerly managed a team of five. Though the Grievant reports to the same supervisor, the Grievant was expected to follow instructions given to her by the acting supervisor, during the Period (since retired), who was previously her subordinate and occupied the Grievant's former position as the manager of the work group.

The hearing officer finds that the Grievant has established that her reassignment to a new role was an adverse employment action. The change in her responsibilities was significant enough to constitute an adverse employment action.

The Grievant has alleged retaliation and a misapplication and/or unfair application of policy but the hearing officer agrees with counsel for the DSS that the Grievant has failed to provide any probative evidence in this regard and has failed to carry her burden of proof.

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).

Pursuant to the 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. In this case, management properly decided to reduce the contemplated Group II Written Notice described in the Notice of Intent

[2] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[3] *See*, e.g. Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).

dated July 21, 2015 to a counseling memorandum, as was its prerogative. 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. While the Agency's removal of the Grievant's personnel management duties did constitute an adverse employment action, such removal was not for disciplinary reasons but for operational reasons.

DECISION

The Grievant has not sustained her burden of proof in this proceeding and the action of the Agency in removing the Grievant's managerial responsibilities 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.

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: 7/ 28 /2016

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 where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).