Issues: Group II Written Notice (failure to follow instructions/policy), Group II Written Notice (failure to follow instructions/policy), and Termination; Hearing Date: 07/13/16; Decision Issued: 07/29/16; Agency: UVA; AHO: John V. Robinson, Esq.; Case No. 10826; Outcome: No Relief; Agency Upheld.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 10826

Hearing Officer Appointment: May 23, 2016
Hearing Date: July 13, 2016
Decision Issued: July 29, 2016

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge the issuance of 2 Group II Written Notices, both issued on April 5, 2016, by the University of Virginia ("UVA" or the "Agency"), as described in the Grievance Form A dated May 3, 2016. The Grievant's employment with the University of Virginia was terminated pursuant to the accumulation of these 2 Group II Written Notices and the Grievant challenges this termination.

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

The hearing officer issued a Scheduling Order entered on June 3, 2016, 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 primarily represented herself and also had an advocate present. 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 1-20 in the Agency's exhibit binder and the 30 documents the Grievant e-mailed to the hearing officer and Ms. Pai by the exchange deadline on July 6, 2014.[1]

[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 designed GE followed by the exhibit number.

At the hearing, the Grievant sought to introduce certain exhibits seen for the first time by the Agency at the hearing, namely a stack of documents about 2" high delivered to the hearing officer but never exchanged with the Agency, as required by the Scheduling Order. 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 Wednesday, July 6, 2016.

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 failure.

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 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
Witnesses

FINDINGS OF FACT

1. During the time relevant to this proceeding (the "Period"), the Grievant was employed by the Agency as a procurement specialist in the business office of the Agency Parking and Transportation. The Grievant has been under the supervision of the Business Office Manager (the "Supervisor") for approximately 4 years.

2. The Agency policy allows employees of the Parking and Transportation Business Operations Office to access or stay in the office beyond work hours (approximately 8:00 a.m. - 5:15 p.m.) if they have prior approval from their supervisor.

3. The Grievant never requested such approval from the Supervisor.

4. The Grievant was informed of the policy on multiple occasions before the disciplinary infractions at issue. AE 3.

5. Nevertheless, the Grievant was present in the office during unauthorized times, including those recited in the Written Notice, on February 17, 2016 (6:20 p.m.), February 18, 2016 (6:48 p.m.), February 25, 2016 (7:54 p.m.) and March 9, 2016 (6:13 p.m.).

6. The Grievant failed to follow a 4th letter of counseling dated January 6, 2016, concerning workplace expectations, (the "Fourth Letter of Counseling"), which instructed the Grievant amongst other things, as follows:

> The Parking and Transportation front office (including the P&T Business Office) is considered "closed" after 5:15 PM, Monday thru Friday, and all day during the weekends. Any special requests to be present in the office after closing or on the weekends should be submitted to me in writing at least five business days prior to the date(s) in question. AE 3.

7. The Agency enforces such a policy for safety and security reasons.

8. On April 5, 2016, the Supervisor issued a Group II Written Notice to the Grievant for failure to follow instructions and/or policy. AE 3.

9. On March 22, 2016, the Grievant left work for an excused, pre-planned and management approved doctor's appointment from 11:00 a.m. to approximately 1:30 p.m.

10. By policy and pursuant to the Fourth Letter of Counseling, the Grievant was "to return to work after the appointment as planned or notify [the Supervisor] by phone should circumstances change." AE 2 and 3.

11. The Grievant returned to work at 4:26 p.m. without notifying her Supervisor of her late arrival despite her Supervisor's previous instructions.

12. Punctuality and reliable attendance are essential for members of the Business Office team because failure to follow policy and procedures is detrimental to operations.

13. On April 5, 2016, the Supervisor issued a second Group II Written Notice to the Grievant for failure to follow instructions and/or policy. AE 2.

14. Pursuant to the SOC (as defined below) and the second Group II Written Notice, the Agency terminated the Grievant's employment effective April 6, 2016. AE 2.

15. The Grievant has an active Group I Written Notice for failure to follow instructions and/or policy. AE 5.

16. The Grievant was made aware of workplace expectations and policies numerous times. Management determined the Grievant's behavior to be unreasonable and detrimental to the mission of the department. The Grievant's continued refusal to follow instructions and policy created work slowdown and distraction to the work unit.

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

18. 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.

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

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

21. 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 19. 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 Group II offenses. The Grievant argues that the Agency has misapplied policy and acted unjustly. However, failure to follow supervisor's instructions or comply with written policy is specifically cited as a Group II offense in Attachment A to the SOC, and the Grievant has an active Group I Written Notice and was previously specifically cautioned by management numerous times concerning this particular infraction. AE 3 and 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 each of the violations rose to the level of a Group II offense. Pursuant to the SOC, the second Group II Written Notice normally results in discharge. AE 19, Attachment A.

The Grievant has alleged retaliation and nepotism but has failed to carry her burden of proof in this regard. 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 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.

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 Notices and all of those listed below in his analysis:

1. the Grievant's 16 years with the Agency;
2. the Grievant's past good service to the Agency;
3. the assigned work areas and related distractions;
4. the Grievant's disability;
5. the construction going on; and
6. 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 offenses were very serious, and of course, there were also aggravating factors in play including the active Group I Written Notice and the warnings to the Grievant by the Supervisor concerning specific performance infractions, the fact that the Grievant was combative to management and the Grievant's refusal to take responsibility. 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 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. 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 the need to follow instructions and/or written policy warranted the 2 Group II Written Notices and termination under the circumstances. Accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer.

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 notices 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: 07/ 29/ 2016

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).