Issue: Administrative Review of Hearing Officer's Decision in Case No. 9300, 9301, 9302; Ruling Date: June 8, 2010; Ruling #2010-2632; Agency: Virginia Department of Health; Outcome: Hearing Decision in Compliance.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Virginia Department of Health
Ruling Number 2010-2632
June 8, 2010

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 9300, 9301, and 9302. For the reasons set forth below, this Department will not disturb the decision.

FACTS

The pertinent facts of this case, as set forth in the hearing decision in Case 9300, 9301, and 9302, are as follows:

> The Virginia Department of Health employed Grievant as an Office Service Specialist II at one of its Facilities. She had been employed by the Agency since 1994. Other than the facts giving rise to these disciplinary actions, Grievant's work performance was satisfactory to the Agency. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.
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> A Client called the Facility and told an employee, Ms. P, that she wish [sic] to cancel her maternity clinic visit because she did not have enough money to pay on her account. Ms. P told the Client that it was very important for her and the baby that she keep her appointment and not to worry about payment that day. On June 16, 2009, the Client went to the clinic for her regular prenatal care visit. After the checkup, Grievant asked the Client to pay the balance owed by the Client. The Client said that she did not have any money at the moment and that she would pay the balance on the next visit. The Clients said she was "going through a really hard situation at the time". Grievant began talking in a loud voice such that others in the waiting area could overhear Grievant. Grievant told the Client that she needed to pay the balance at that moment. The Client started to cry and told Grievant that she had called a few hours before her appointment to say that she did not have any money to pay and that another employee told the Client not to miss the appointment. Grievant told the Client that she was the supervisor and that she

did not care what other people told the Client on the phone. Grievant was not actually a supervisor at that time. Grievant told the Client that the Client needed to pay the balance at that moment, that the Client was lying to Grievant and that Grievant needed the money right at that moment.

Ms. P observed Grievant's "very ugly" interaction with the Client. Ms. P walked to the Client and took the Client to the registration desk to calm her down. Grievant followed Ms. P and the Client over to the registration desk and continued to question the Client. Grievant asked the Client "was her husband lazy or just couldn't find a job?" Ms. P considered Grievant's interaction with the Client to be "very ugly" and "very embarrassing".

Agency managers investigated the circumstances of Grievant's interaction with the Client. On July 15, 2009, the Business Manager sent Grievant a Due Process Memorandum advising Grievant of possible disciplinary actions against her and providing her with an opportunity to respond to the allegations before a decision was made. The memorandum also instructed Grievant as follows:

> You are not to discuss this issue with any district staff, nor have any contact with any health department clients concerning the incident of June 16, 2009.

Grievant and another employee, Ms. C, had been working with each other for several years and were friends. On July 17, 2009, Grievant went to the Facility where Ms. C worked to fax documents regarding a grievance. Ms. C was surprised to see Grievant at that Facility and asked Grievant what she was doing. Grievant said "they are trying to fire me." Grievant stated that everyone knew about the allegations and that they (The District Office) said Grievant had harassed a client, attacked the client, called the client a liar, and claimed that Grievant was a supervisor. Grievant stated that the client had written a letter but that the client could not have written that letter because the client did not speak enough English to write the letter. Grievant told Ms. C that "she was fighting it".

On July 31, 2009, the Supervisor sent an email to staff in the office including Grievant. The email stated:

> You may use your cell phones during your breaks and your lunch. You are not allowed to take cell phone calls during regular work hours UNLESS IT IS AN EMERGENCY! When you are using your cell phones please take them outside to talk.

On August 18, 2009, the Supervisor observed that Grievant was not assisting other employees working at the maternity clinic scheduled from 8:30 a.m. to 10 a.m. At approximately 10 a.m., the Supervisor noticed that the

door to the Nurse Supervisor's office was closed. The Supervisor observed the Nurse Supervisor walking into her office. When the Nurse Supervisor walked into the office, the Supervisor noticed that Grievant was in the office talking on her cell phone. The Nurse Supervisor did not interrupt Grievant. The Nurse Supervisor closed the door and stood outside of her office waiting for Grievant to finish her telephone call. The Nurse Supervisor waited for least [sic] 15 minutes before Grievant left the office. Grievant walked past the Supervisor and said she was going outside to take her 15 minute break.

After the Supervisor finish working with a client at approximately 11 a.m., the Supervisor identified several patient charts that needed "destroy dates" written on them. The Supervisor wrote a note to Grievant saying "please make sure these charts have the appropriate destroy date on them and then file in the appropriate places." The Supervisor took the charge to Grievant's workspace. Shortly thereafter, Grievant took the charts back to the Supervisor and told the Supervisor that the task was at the bottom of her priority list.

At noon, Grievant announced to the Supervisor that she was going to lunch. Grievant left the building. At 12:30 p.m., the Supervisor located Grievant in the nutritionist's office. The Supervisor told Grievant that she needed Grievant to work up front in the clinic. Grievant said that she had more important things to do. The Supervisor asked what was more important than doing her job and Grievant replied that she was not allowed to tell the Supervisor because it was private. The Supervisor then told Grievant "to come up front now and do your job." Grievant refused saying that she "had to make a phone call". The Supervisor told Grievant that "your phone call would have to wait since we had patients to take care of and to come to the front immediately." Grievant picked up the phone and said that she had to call the Business Manager at the District Office.

At approximately 1:30 p.m., Grievant told the Supervisor that she was going to the District Office to meet with the Business Manager. Grievant did not have an appointment to meet with the Business Manager. When Grievant arrived at the District Office, the Business Manager met with Grievant to hear Grievant's concerns.[1]

Based on the preceding *Findings of Fact* the hearing officer reached the following *Conclusions of Policy*:

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action." Group II offenses

[1] Decision of the Hearing Officer in Case 9300, 9301, and 9302, issued April 20, 2010 ("Hearing Decision"), at 2-4. Footnotes from the hearing decision have been omitted here.

"include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

Disruptive behavior is a Group I offense. On June 16, 2009, Grievant engaged in disruptive behavior because she upset the Client by disregarding the Client's explanation regarding the lack of payment, causing the Client to cry, falsely claiming to be a supervisor, and distracting Ms. P from her duties. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

The Agency contends that Grievant's behavior on June 16, 2009 rose to the level of a Group II offense. The Agency has not presented evidence showing that Grievant's behavior was contrary to policy or a supervisor's instructions. The Agency has not presented evidence showing that Grievant's behavior met any of the other standards necessary to establish a Group II offense. Grievant's behavior in itself was not so egregious as to support a Group II Written Notice.

Grievant contends that there is no basis to take disciplinary action against her for the events of June 16, 2009. She denies that the interaction occurred as the Agency claims. The Agency presented evidence of the letter of complaint submitted by the Client and confirmed the contents of that letter through credible testimony of other employees who observed Grievant's interaction with the Client. The Agency has presented facts to support the issuance of disciplinary action against Grievant.

Failure to follow a supervisor's instruction is a Group II offense. On July 15, 2009, the Business Manager, a supervisor instructed Grievant that she was "not to discuss this issue with any district staff, nor have any contact with any health department clients concerning the incident of June 16, 2009." Two days later, Grievant spoke with Ms. C and told Ms. C that Grievant had harassed a client, attacked the client, called the client a liar, and claimed that Grievant was a supervisor. Grievant stated that the client had written a letter but that the client could not have written that letter because the client did not speak enough English to write the letter. Grievant's comments to Ms. C were about the incident on June 16, 2009 and were contrary to the Business Manager's instruction thereby justifying the issuance of a Group II Written Notice.

Grievant argues that the Commonwealth did not have the authority to tell her with whom she could speak and that the Commonwealth could not remove her right to free speech. The Agency's instruction to Grievant was consistent with its authority to operate the Agency's business. The Agency did not limit Grievant's ability to speak with the Department of Employment

Dispute Resolution staff or with staff of the Department of Human Resource Management or with legal counsel. The Agency's instruction was designed to minimize disruption among its employees. Grievant was obligated to comply with that instruction.

The Hearing Officer will assume for the sake of argument that Grievant's use of her cell phone and attempts to make telephone calls were protected activities. The Hearing Officer will make this assumption because for some of the calls Grievant intended to communicate with the Department of Employment Dispute Resolution and with Agency Managers regarding her grievances and concerns regarding how she was treated in the workplace. Even with this assumption, there remains sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a supervisor's instructions. On August 18, 2009, the Supervisor instructed Grievant to review charts, write the appropriate "destroy dates" on those charts and then file the charts. Grievant refused to perform the task thereby acting contrary to a supervisor's instruction. The Agency's issuance of a Group II Written Notice for the events of August 18, 2009 must be upheld.

Upon the accumulation of two active Group II Written Notices, an agency may end an individuals employment with the agency. In this case, Grievant has accumulated two Group II Written Notices. Grievant's removal must be upheld based upon the accumulation of disciplinary action.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution…." 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.

Grievant argues that she had been suffering from depression and anxiety and had to increase the dosage of her medication in the six months prior to the disciplinary actions. Insufficient evidence has been presented to establish a causal relationship between Grievant's depression and her behavior that gave rise to the disciplinary actions.

> In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce further the disciplinary actions.
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> An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity; (2) suffered a materially adverse action; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse 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 therefrom may be considered on the issue of whether the Agency's explanation was pretextual.
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> Grievant engaged in protected activity because she filed grievances. Grievant suffered a materially adverse action because she received disciplinary action. Grievant has not established a causal link between the adverse action and the protected activity. The Agency did not take disciplinary action against Grievant because of her protected activities.[2]

Based on the above *Conclusions of Law*, the hearing officer reached the following decision:

> For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with suspension on July 24, 2009 is **reduced** to a Group I Written Notice. Grievant's suspension from July 29, 2009 through July 31, 2009 is **reversed**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with a five work day suspension on August 10, 2009 is **upheld**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action on October 9, 2009 is **upheld**. Grievant's removal based upon the accumulation of disciplinary action is **upheld**.[3]

DISCUSSION

By statute, this Department has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions … on all matters related to procedural compliance with the grievance procedure."[4] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this

[2] *Id.* at 5-7.
[3] *Id.* 7-8.
[4] Va. Code § 2.2-1001(2), (3), and (5).

Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[5]

Findings of Fact

The first objection raised by the grievant appears to be a challenge to the hearing officer's conclusions as drawn from his analysis of factual findings.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[6] and to determine the grievance based "on the material issues and grounds in the record for those findings."[7] Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. As long as the hearing officer's findings are based upon evidence in the record and the material issues of the case, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings.

In this case there is evidence to support key findings such as (1) that on June 16, 2009, the grievant had a very ugly incident with a client which rose to the level of Group I offense; (2) the grievant failed to follow the instruction not to discuss the June 16th incident with others; and (3) the grievant refused an order to destroy files. Accordingly, this Department has no basis for substituting its judgment for that of the hearing officer with respect to those findings.[8]

Mitigation: Motive and Inconsistent Discipline

Section VI(B)(1) of the *Rules for Conducting Grievance Hearings ("Rules")* provides that an example of mitigating circumstances includes "improper motive, such as retaliation or discrimination." As with all mitigating factors, the grievant has the burden to raise and establish any mitigating factors.[9]

Here, the grievant asserts that she has to "assume" that the true reasons she was disciplined are because: (1) she takes anti-depressants; and (2) the agency was concerned about the possibility that she would "go postal," a situation that the agency allegedly perceived would be exacerbated by her purported affinity to firearms, an attraction the grievant denies. While the grievant states that she must "assume that the termination was upheld" because she takes antidepressants and/or because of concerns of her "going postal," she has not provided evidence that any such concerns led to her termination. Mere

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[5] *See Grievance Procedure Manual* § 6.4(3).
[6] Va. Code § 2.2-3005.1(C).
[7] *Grievance Procedure Manual* § 5.9.
[8] *See e.g.* Testimony of the grievant's supervisor beginning at approximately 25:30 and Ms. P beginning at approximately 1:20:00.
[9] *See e.g.*, EDR Rulings 2010-2473; 2010-2368; 2009-2157, 2009-2174. *See also* Bingham 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).

supposition or assumption does not meet a grievant's burden of raising and establishing a mitigating factor.[10]

Also, while the grievant appears to deny that she ever treated Ms. C. improperly, she seems to plead in the alternative, that to the extent that she may have spoken badly of clients in the presence of other clients, other employees have done so as well. In other words, the grievant seems to argue that the hearing officer erred by not considering evidence of inconsistent discipline among employees.

Inconsistency in the application of discipline for similar misconduct by other employees is clearly a potential mitigating factor.[11] However, as noted above, as with all mitigating factors, the grievant has the burden to raise and establish any mitigating factors. In this case, a review of the hearing record indicates that she did not appear to present this argument to the hearing officer at hearing. Accordingly, the hearing officer cannot be found to have erred in failing to consider this allegedly inconsistent discipline.[12]

Ineffective Counsel

The grievant asserts that she had ineffective counsel. She asserts that her advocate discouraged her from writing down information regarding the testimony of hostile witnesses.

Under the grievance process, parties to a grievance have the right to represent themselves, to utilize the services of an attorney, or to use a lay advocate to represent their interests. The grievance procedure does not guarantee that any particular advocate will provide effective counsel and this Department is reluctant to acknowledge any sort of general "ineffective counsel" objection. Courts have recognized in similar forums that there is no absolute right to effective counsel.[13] We find no persuasive reason to reach a different result under the grievance process.[14] Even if this Department had adopted a standard for effective counsel, based on this Department's review of the hearing record including a recording of the

[10] While there was testimony during the hearing that some in the office where the grievant worked harbored concerns that the grievant might lose control, the grievant offered no evidence linking such concerns to the discipline that led to her discharge.
[11] *Rules for Conducting Grievance Hearings* § VI(B)(1).
[12] *See e.g.* EDR Ruling #2010-2473.
[13] *See* Williams v. Wynne, 533 F.3d 360 (5th Cir. 2008) (the Sixth Amendment right to effective assistance of counsel is a criminal concept with no relevance to administrative or civil proceedings, thus, the Sixth Amendment right to effective assistance of counsel did not apply to the appellant's non-criminal, administrative discharge hearing under the Air Force Board for the Correction of Military Records ("AFBCMR"). *See also*, Brown v. Department of the Treasury, 152 Fed. Appx. 919 (Fed Cir. 2005)(a civil client is bound by both the acts and omissions of chosen counsel)(unpublished opinion); Testa v. the Merit Systems Protection Board ("MSPB") No. 98-3218 1999 U.S. App. LEXIS 5057 at *6 (Fed. Cir. Mar. 23, 1999)(same)(unpublished opinion).
[14] Our reluctance to adopt any sort of effective counsel standard here does not mean that this Department is precluded from ever finding that a representative's actions are beyond review. *See, e.g.*, EDR Ruling No. 2007-1579 in which this Department ordered the reopening of a grievance when apparent miscommunication between an employee and an attorney led to the premature withdrawal of a grievance).

hearing, it is difficult to see how the representation in this case would have fallen short of any such standard.

Grievant Not Permitted to Speak

The final objection by the grievant is the assertion that the hearing officer "would not let [her] speak." The grievant did not specify at what point during the hearing this allegedly occurred.

In this case, the grievant testified on her own behalf.[15] Based on a review of a recording of the hearing decision, this Department found no evidence that the hearing officer improperly denied the grievant the opportunity to speak at any point during the hearing.

APPEAL RIGHTS AND OTHER INFORMATION

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.[16] Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.[17] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[18]

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Claudia T. Farr
Director

[15] Hearing recording beginning at 2:39:00.
[16] *Grievance Procedure Manual* § 7.2(d).
[17] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[18] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).