

**IN THE COMMONWEALTH OF VIRGINIA, DEPARTMENT OF HUMAN
RESOURCE MANAGEMENT, OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

IN RE: CASE NO.: 11809

DECISION OF HEARING OFFICER

HEARING DATE: APRIL 21, 2022

DECISION DATE: MAY 6, 2022

I. INTRODUCTION

The grievant commenced this matter by filing her Form A on January 23, 2022, challenging the issuance of a Group II Written Notice and her termination from employment on January 25, 2022. No explanation was given to why the Form A is dated prior to the issuance of the formal discipline. The Written Notice cited her for misconduct for three incidents: (1). Arriving 15 minutes late on January 5; (2). Calling in late to report tardiness and tardiness on January 17; and (3). Late reporting of her absence on January 18.

The Department of Human Resource Management (“DHRM”) appointed me as Hearing Officer on March 7, 2022. A prehearing conference was scheduled for March 18 and the parties notified by electronic mail. At the scheduled time, I attempted to but was unable to contact the grievant by phone. In consultation with counsel for the school, a hearing date of April 21, 2022, was set. I issued a prehearing order and transmitted it to the parties. Approximately two weeks prior to the hearing I spoke with the grievant by telephone. She apprised me that she was still unrepresented by an advocate or legal counsel. I referred her to materials available on the DHRM website for guidance in representing herself in the grievance. For the reasons below, I uphold the issuance of the written notice and the termination of the grievant from employment with the school.

II. APPEARANCES

The hearing was held as scheduled on April 21, 2022 at the school. It was represented by counsel and a representative from the school was present throughout the hearing. A third individual from the school, an Employee Relations Consultant, was also present serving as an observer, without the objection of the grievant. Prior to the hearing the school had proffered twelve exhibits. The grievant raised no objection to their admission into the record, which I did. One witness testified on behalf of the school.

The grievant was self-represented throughout the hearing. She testified as her only witness and offered no exhibits.

III. ISSUE TO BE DECIDED

Whether the school acted appropriately in issuing the grievant a Group II Written Notice and terminating her from employment on January 25, 2022?

III. FINDINGS OF FACT

The grievant served as an employee at Virginia Tech in the Housekeeping Department for several years prior to her termination from employment. Throughout those years she consistently received ratings of Contributor in her annual evaluations. The school issued her a Group I Written Notice for tardiness and absenteeism on October 20, 2021. On January 5, 2022 the school issued a Group II Written Notice for poor attendance resulting in her being in a leave without pay status. The school did not suspend the grievant as part of the Group II Written Notice. Neither of these disciplines were formally grieved by the grievant.

On January 5th she was late for the start of her shift by no more than 15 minutes. She had texted her immediate supervisor that she was running late. She did not call the established phone

number to report her tardiness until after the shift had commenced.

The grievant was again late for work on January 17. She reported the tardiness 1 hour 46 minutes after the scheduled start of her shift. She arrived for work approximately 90 minutes after calling to report the tardiness, a total delay of approximately 3 hours 15 minutes. The following day, she called in to report her tardiness 2 hours 41 minutes after the scheduled start time.

The established policy of her Department (Page 11 of the school's exhibits) sets forth the proper procedure for an unexpected absence or tardiness. It requires a minimum of 30 minutes prior notice. An employee is required to leave a short message, identifying herself and including a reason for the absence or tardiness. In the case of tardiness, the employee is expected to provide a projected arrival time. In January 2022 the grievant was aware of this policy.

V. ANALYSIS

The Commonwealth of Virginia provides certain protections to employees in Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary actions. The Department of Employment Dispute Resolution has developed a Grievance Procedural Manual (GPM) and Rules for Conducting Grievance Hearings (the Rules). This manual sets forth the applicable standards for this type of proceeding. Section 5.8 of the GPM provides that in disciplinary grievances the agency has the burden of going forward with the evidence. It has the burden of proving, by a preponderance of the evidence, that its actions were warranted and appropriate. The Rules state that in a disciplinary grievance (such as this matter) a hearing officer shall review facts de novo and determine:

I. Whether the employee engaged in the behavior described in the Written Notice.

II. Whether the behavior constituted misconduct.

III. Whether the discipline was consistent with law and policy; and

IV. Whether there were mitigating circumstances justifying the reduction or removal of the disciplinary action, and, if so, whether aggravating circumstances existed that would overcome the mitigating circumstances. I will discuss these considerations in the order presented.

The grievant candidly concedes the accuracy of the allegations against her in the subject Written Notice (dated January 25, 2022). The sole exception is the January 5 tardiness. She testified that she believed that she was no later than 8 minutes late in reporting to work. She did, however, provide an explanation for the tardiness on each of the three dates. Those explanations are:

- On January 5, she encountered unexpected difficulties while refueling her vehicle prior to getting to work and while on her way to work.
- On January 17, the alarm on her new phone failed to wake her up.
- She testified that on January 18, the alarm again malfunctioned. When she then eventually called in, she testified that she was not feeling well.

The school issued this discipline pursuant to DHRM Policy 1.60 (the “Standards of Conduct”). Under that policy an agency may issue a Group II Written Notice for failure to report to work without proper notice. Group II level offenses are those acts or omissions “of a more serious nature that significantly impact the agencies services and operations.” Tardiness can also

be disciplined by the issuance of a Group I offense, being an offense that have a relatively minor impact on the agency's operations.

A Custodial Operations Supervisor testified that the unexpected absence of an employee creates issues in the Department due to other employees having to cover the duties of the absent employee. The staffing of the Department does not make providing such coverage a simple matter, either for the Supervisor or other employees. The duties of a housekeeper are important, even if not as time critical as certain other employees of the school. Foreseeable exceptions can be imagined. No evidence was provided that any of these situations arose during any of the absences of the grievant. The Supervisor characterized the individual offences of the grievant included in this disciplinary action as "small." I certainly agree with that assessment as to the January 5 tardiness of a short amount of time. The reporting policy, to the extent that it requires 30 minutes advance notice is arguably unreasonable when applied to the situation in which the grievant testified she found herself on that morning. The school chose to aggregate three violations into this one disciplinary action. I find only the last two dates to be of any consequence.

Viewing the January 17 and January 18 offenses as a pattern of misconduct, the school acted appropriately in classifying this as a Group II level offense. Under the Standards of Conduct the school had the options of either discharging the grievant from employment or lesser punishment such as suspension without pay for up to 30 days, demotion, or transfer. Discharge from employment was an option only because of the prior active Group II level offense. I am required to defer to the discretion of the school in its choice of level of discipline, provided that the choice is reasonable. *Rules*, Section VI(A). Because the prior Group II was issued less than three weeks prior to the one being grieved in this case, which prior discipline was for the same type of misconduct, I cannot find that the school acted unreasonably. If the grievant had presented

evidence of taking reasonable steps to address the alleged failures of her phone after being late on January 17, the case for termination might have been weaker. I find no aggravating or mitigating factors in this case.

This discipline was consistent with law and policy. I understand the position of the grievant that the prior disciplinary actions arose from events related to her having post-COVID issues. Although I have no doubt the road to her termination commenced with those issues, I cannot consider them in this matter. Those prior disciplines were not grieved by her. Even if consideration would be proper, the grievant presented no convincing evidence that the January 17 and January 18 events were the result of any condition providing her protected status under any Federal or State law or regulation.

VI. DECISION

For the reasons stated above, I hereby uphold the issuance of the January 25, 2022 Group II Written Notice and the termination of the grievant from employment.

APPEAL RIGHTS

You may file an administrative review request within fifteen 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 fifteen calendar days of the date the decision was issued. You must provide a copy of all 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.^a

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

ORDERED this 6th day of May 2022.

/s/Thomas P. Walk
Thomas P. Walk, Hearing Officer
