

COMMONWEALTH OF VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 11919

Hearing Officer Appointment: February 6, 2023

Hearing Date: May 8, 2023

Decision Issued: June 14, 2023

PROCEDURAL HISTORY AND ISSUES

The Grievant was until recently an Administrative Assistant at the Virginia Department of Fire Programs (the “VDFP” or the “Department” or the “Agency”). The Grievant requested an administrative due process hearing to challenge the termination of her employment pursuant to several Written Notices (5 Group IIs and a Group I), each issued on November 30, 2022 (with termination due to the accumulation of Written Notices, effective November 30, 2022), by management of the VDFP, as described in the Grievance Form A dated December 29, 2022. The issues for hearing are those delineated by the Grievant in her Form A.

The Grievant has raised the issues specified in her Grievance Form A and is seeking varied relief, including rescission, restoration of benefits and removal of the Written Notices from her record.

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.

On February 24, 2023, at 3 pm, the parties held a first prehearing conference call via GOOGLE MEET. The Grievant, her attorney, the Agency attorney and the hearing officer participated in the call.

The parties all agreed that email is acceptable as a sole means of written communication.

Following the first prehearing conference call, the hearing officer entered on February 26, 2023, a Scheduling Order, incorporated herein by this reference.

On May 1, 2023, at 9 am, the parties held a second prehearing conference call via GOOGLE MEET. The Grievant, her attorney, the Agency attorney and the hearing officer participated in the call.

Following the first prehearing conference call, the hearing officer entered on May 2, 2023, a Status Report & Zoom Instructions, incorporated herein by this reference. Pursuant to this document, the parties resolved certain issues, including the contested cost of the Agency's document production.

At the hearing, the hearing officer received various documentary exhibits into evidence, namely all exhibits in the Agency's white exhibit binder and all exhibits in the Grievant's blue binder.¹

The hearing officer recorded the hearing.

The parties submitted their post-closing briefs on May 31, 2023.

¹ References to the agency's exhibits will be designated AE followed by the exhibit number. The Grievant's exhibits are designated GE followed by the page number.

APPEARANCES

Representative for Agency
Grievant
Legal Counsel
Witnesses

FINDINGS OF FACT

1. During the time relevant to this proceeding (the "Period"), the Grievant was employed by the Agency in one of its Divisions as an Administrative Assistant. Essentially, the Grievant worked and maintained the office functions for the Division while her Supervisor worked primarily in the field.
2. The Division is a tenant in the building of another State agency, which is a secure facility (the "Facility") with rigorous security protocols mandating by policy, amongst other things, that the Grievant badge in at certain entry points to gain access to the Division's suite, etc. The Grievant had no approval to telework and, accordingly, was expected to physically report to work at the Facility from 8am to 4:30pm Monday to Friday. AE 38 at 3.
3. The Facility access badge histories bolster the VDFP's assertions that the Grievant did not report to work on the days asserted in the subject Written Notices.
4. The Grievant performed a vital function for the VDFP as an experienced Administrative Assistant with significant and substantial training invested in the Grievant by the Agency in all aspects of her employment.

5. Pursuant to her employee work profile, amongst other things, the Grievant is required to provide administrative office support assistance to her Supervisor and all fire service customers throughout the Commonwealth, especially within training and operations. The Grievant is required to adhere to her established work schedule and to work modified schedules to address business needs and backlogs. AE 13. The Grievant's typical work schedule was Monday – Friday, 8 am – 4:30 pm.
6. Accordingly, attendance at and performance of, Grievant's work is critical for the orderly and efficient functioning of the Agency, especially as her Supervisor was required to focus on field operations.
7. Despite this critical need, Grievant committed repeated violations over a lengthy period of the Agency's attendance and other policies.
8. The Grievant failed to report to work as scheduled, had unplanned leave and excessive absences and failed to perform important work duties, materially and adversely affecting Agency operations.
9. On November 30, 2022, the Grievant was issued a Group II Written Notice (AE 2) for failure to report to work.
10. The Grievant failed to physically report to the Facility, as required by her assigned work schedule, on August 19, 22, 25, 29 and 30, 2022.
11. The badge reports confirm that the Grievant failed to report to the Facility on the dates indicated above. AE 40.
12. On November 30, 2022, the Grievant was issued a Group II Written Notice (AE 3) for failure to report to work.

13. The Grievant failed to physically report to the Facility, as required by her assigned work schedule, on September 1, 15, 16 and 27, 2022
14. The badge reports confirm that the Grievant failed to report to the Facility on the dates indicated above. AE 40.
15. When the Grievant worked in the Facility during the Period her badge would be swiped multiple times during the day. AE 40 at 20 to 32 (showing all access for the grievant from 8/15/2022 to 11/3/2022).
16. For example, on August 15th, Grievant arrived at work at 10:23am by badging the elevator, and then at 10:23am entering the VDFP office. *Id.* at 20.
17. On 8/15/2022, Grievant badged 12 times. On 8/16/2022, she badged 7 times. On 8/17/2022, she badged 14 times. On 8/23/2022, she badged 14 times. On 8/24/2022, she badged in 8 times. On August 31, 2022, she badged 11 times. On September 2, 2022, she badged 12 times. *Id.* at 20-22. All days where she was at work there is a similar pattern, except the days she just chose not to come to work at all.
18. The Grievant did not swipe her badge either at the Facility elevator, the VDFP office or anywhere in the building on the days indicated in her Written Notices in August or September, 2022.
19. While the Grievant claimed that on occasion, cleaning staff would admit her to the VDFP suite without her having to badge in, on the above dates, the only person to access the VDFP office was a non-employee cleaning person, usually in

the evening, but in all events, way after the time Grievant should have arrived. AE 40 at 36-43.

20. Grievant conceded that cleaning staff did not admit her to the VDFP office on many of the above dates.
21. The Grievant had a history of attendance issues and was counseled on her need to comply with all attendance requirements multiple times, and to not take time off when she had no available leave. AE 15-20.
22. In 2020, The Branch Chief of Training and Operations issued Grievant a Counseling Memorandum regarding Grievant failing to give notice and leaving the workplace in the middle of the day or informing her Supervisor she would not come to work on a given day. “Several of these incidents have resulted in the Division Office to be closed and inaccessible to our stakeholders.” AE 16 at 1. The “Formal Written Counseling” cited several previous counseling sessions with Grievant due to her attendance infractions.
23. On November 13, 2020, Grievant received a Notice of Improvement Needed/Substandard Performance for her “untimely requests for leave” and her “attempt to engage in teleworking without prior approval.” AE 19. She was instructed, “Teleworking also requires prior approval from the **Executive Director**. Id. (emphasis added).
24. The Grievant failed to identify leave in payroll records by simply not submitting time, resulting in an overpayment to her. AE 20.
25. The concerns regarding attendance continued, as evidenced by an email written to human resources by the Supervisor on May 2, 2022, advising that he talked to

Grievant about absences, early dismissals, not permitting teleworking, work being taken home and not completed properly/timely, and Cornerstone sessions not properly added (the exact issued addressed in her Group I). AE 21.

26. In this email Supervisor explained that Grievant has failed to properly notify him of her attendance infractions, and that “I have told her many times that I understand what is going on with her life, but something has to give. I have told her that maybe she needs to leave the agency and do what’s really important and that’s to be with her family.” *Id.*
27. There are few reasons an employee can be approved for leave without pay, none of which Grievant demonstrated by simply not coming to work, not putting in her time, and taking time off. AE 9 at 30-33.
28. Teleworking requires a specific process and multiple layers of approval. *Id.* at 1. At no time relevant to the Period was Grievant approved to telework. Any telework had to be approved by the Executive Director, not her Supervisor.
29. Grievant was counseled about her ongoing absences in her 2020 and 2021 performance reviews. AE 13.
30. On November 30, 2022, the Grievant was issued a Group II Written Notice (AE 4) for violations of timekeeping policies; namely, for failing to submit weekly timesheets between the dates of September 4 and October 1, 2022, specific weeks of which were noted in the due process. AE 4.
31. The importance of timesheet submission had been specifically discussed with Grievant by the Supervisor: “Despite receiving previous instructions and

guidance, you still have failed to submit your timesheets sheets [sic] for the above time frame.” Id.

32. On November 30, 2022, the Grievant was also issued a Group II Written Notice (AE 4) for failing to submit weekly timesheets between the dates of October 2 and October 29, 2022, specific weeks of which were noted in the due process. AE 5.
33. Considerable time and effort have been expended by the Agency over the years to no avail to get Grievant to comply with appropriate timesheet submission policies and procedures. *See, e.g., testimony of Accounting Supervisor* and AE 25.
34. On July 26, 2022, after investing considerable hours to correct the timesheets, the Accounting Supervisor advised the Supervisor, “[Grievant] is current with all of her timesheets entered into Cardinal. Please review all of her timesheets submitted for approval. As it currently stands she is currently 50 hours in pay dock status. For the week of July 25th to August 7th please ensure her timesheet is entered and approved by August 9th to capture any additional missed hours.” AE 26.
35. When the subject timekeeping issues arose in October 2022, the Supervisor was asked by the Deputy Branch Chief if, when the Accounting Supervisor had sent a July 26, 2022 email about Grievant not submitting time sheets, if the Supervisor talked with Grievant about entering time moving forward. AE 38 at 3. The Supervisor responded, “Yes I talked to [Grievant] on submitting time.” Id. (emphasis added). He added that her hours were “0800- 4:30pm.” Id.
36. This constituted a direct instruction by the Supervisor to Grievant. Accordingly, The Grievant violated both policy and instructions in not submitting her required timesheets in September and October, 2022.

37. The Grievant completely failed to make any attempt to put in her time from September 17, 2022, through October 31, 2022. She did not access the timekeeping system at all from September 12, 2022, through the date of her due process notification November 3, 2022. AE 27 at 4-5.
38. The Supervisor only put in Grievant's time after the fact from September through October 2022. It was at all times Grievant's responsibility to put in her time and Grievant admitted that it was her duty to submit her time in accordance with policy.
39. The Grievant received significant training on timekeeping policy and its importance. AE 37.
40. The Grievant repaid over \$1,200 for being paid for time she didn't work and failing to submit timesheets. Ae 29 at 9.
41. On November 30, 2022, the Grievant was issued a Group II Written Notice (AE 6) for violations of DHRM Policy 4.30; namely, for failing to request and receive leave approval for time off on October 19, 20 and 21. AE 6.
42. DHRM 4.30 requires that employees seek approval prior to taking time off. Grievant sought it after the fact.
43. On December 21, 2022, the Supervisor notified the Chief of Training and Operations that Grievant was absent from work on October 19, 20, and 21, 2022 and did not request leave, or submit leave requests properly for these days. AE 43 at 1. This prompted the entire review of Grievant's timesheets and attendance.
44. The Grievant had been counseled multiple times about using leaving and was instructed that she was not permitted to go on LWOP. Furthermore, the

Supervisor did not have the authority to approve the LWOP, even if he purported to do so after the fact. AE 9, 15, 16, 18, 19 and 20.

45. The Grievant was responsible for knowing her leave balance. She was out of leave. AE 28 at 4. Accordingly, from October 19 to October 21, 2022, the Grievant was “ineligible” for sick leave. *Id.*
46. On November 30, 2022, the Grievant was issued a Group I Written Notice (AE 7) for poor performance after the Agency discovered that the Grievant failed to properly process training sessions including 56 training sessions impacting approximately 1,120 students. AE 7.
47. Grievant’s core responsibilities in her Employee Work Profile included preparing certificates and maintaining training records, preparing school packages for instruction and processing completed school pages and maintaining school records. AE13 at 2.
48. The Grievant failed to adequately perform these work duties and as a result promotional opportunities for certain individuals were adversely impacted.
49. 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.
50. The Department’s actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.
51. The Department’s actions concerning this grievance were reasonable and consistent with law and policy.

52. 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 9. 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 did not follow state and agency policies concerning work attendance.

Specifically, DHRM Policy 1.25-Hours of Work states, amongst other things, that Management establishes and adjusts the work schedules of employees in the Agency to meet the hours of public, business, operational, and customer need and to permit flexibility in employee scheduling to meet work/life needs when possible.

Employees have concomitant responsibilities, as follows:

1. Adhere to their assigned work schedules.
2. Take breaks and lunch periods as authorized.
3. Notify management as soon as possible if they are unable to adhere to their schedules, such as late arrivals or early departures.
4. Work overtime hours when required by management. Non-exempt employees must not work additional hours that have not been authorized by management.
5. Charge appropriate leave time to hours scheduled but not worked, requesting leave approval in advance, if possible.

Under the SOC, employees are expected to report to work as scheduled and seek approval from a supervisor in advance for any changes to the established work schedule, including the use of leave and late or early arrivals and departures.

The Facility's Security Directive requires that employees badge into the VDOT building where the Division is a tenant. It states, "All persons issued a VDOT Badge that contains access privileges shall swipe their VDOT Badge at a card reader, if one exists, upon entering a VDOT Facility. No VDOT Badge Holder shall 'piggyback' through an access controlled door without swiping their VDOT Badge at the card reader." AE 40 at 12.

In addition, the VDFP Agency Access Control Policy explains the importance of access control cards, and the need to only allow those with permission to enter the VDFP offices. AE 14 at 7-9. The Grievant received this policy in 2018 after she allowed a person to enter the facility without permission and was given a Notice of Improvement Needed/Substandard Performance. *Id.* at 1-9.

According to Agency policy, "Payroll policy gives reasonable assurance that the agency accurately and promptly processes payroll and that the agency is in compliance with applicable laws and regulations." AE 37 at 3.

The policy states, "Non-exempt FTE's are responsible for tracking and entering their daily hours worked and leave requests in TAL." AE 37 at 4. It also indicates the importance of tracking time for payment in compliance with the Fair Labor Standards Act. *Id.*

It states, "Non-exempt employees are required to complete weekly timesheets; therefore, entries for LWOP hours must be included in the weekly timesheet submitted for supervisor approval. LWOP hours are accounted for through the timesheet." *Id.* at 11.

In the case of each Group II violation, the Grievant's disciplinary infractions were reasonably classified by management, each as a Group II offense. Failure to report to work without proper notice/approval and failure to follow policy and/or instructions are each listed in the SOC as a Group II offense and a second Group II normally results in discharge. AE 8

. In the case of the Group I violation, the Grievant's disciplinary infractions were reasonably classified by management, as a Group I offense. The SOC list unsatisfactory work performance as a Group I level offense. AE 8 at 21

The Grievant argues that the Agency has not carried its burden of proof, has misapplied policy and acted unjustly in issuing the discipline. However, the hearing officer agrees with the Agency's attorney that the various offenses are appropriately classified at the Group II or I level, as designated, with the Agency appropriately exercising the discipline and ending the Grievant's employment due to accumulation of several Group II Written Notices.

The Agency has met its evidentiary burden of proving upon a preponderance of the evidence that the Grievant violated numerous policies, including Policy No. 1.60 and that the violations each rose to the level of a Group II or I offense, as designated.

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 Grievant asserts that the discipline is too harsh. The Agency did consider mitigating factors, including the Grievant's past good service to the Agency.

DHRM's *Rules for Conducting Grievance Hearings* provide in part:

DHRM's *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." *Rules* § VI(B).

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.

The Grievant has asserted that the discipline was unwarranted. 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 in the Written Notice, the Form A, the hearing, those referenced herein and all of those listed below in this analysis:

1. the demands of the Grievant's work environment;
2. the Grievant's long tenure at the Agency;
3. the effect of the COVID-19 pandemic;
4. the Grievant's performance ratings and popularity;
5. the Grievant's lack of prior formal discipline; and
6. past performance by the Grievant.

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 policies are important to the proper functioning, appearance and reputation of the Agency, and the Grievant held an important position where management of necessity relied on her to attend work and to perform her duties in strict conformity with Agency policies, as she

had undertaken to do. The hearing officer would not be acting responsibly or appropriately if he were to reduce the discipline under the circumstances of this proceeding.

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 DHRM Policy 1.60, Standards of Conduct, and 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. *Id.*

In this proceeding, the Agency's actions were consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer.

In EDR Case No. 8975 involving the University of Virginia ("UVA"), a grievant received a Group III Written Notice with removal for falsifying records on five (5) separate dates. Although the evidence supported only one of those instances, the hearing officer upheld the disciplinary action. The grievant appealed to EDR asserting that the disciplinary action was

inappropriate in that the grievant did not engage in as much misconduct as alleged by UVA. The Director upheld the hearing officer's decision:

The grievant's arguments essentially contest the hearing officer's determinations of fact as they relate to the proper sanction for the misconduct. Such determinations are within the hearing officer's authority as the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate. In this case, while it appears that the hearing officer did find that the grievant did not engage in as much misconduct as alleged by the University, it was still determined that the grievant had falsified a state record with the requisite intent, generally a Group III offense under the Standards of Conduct. [footnote omitted] Upon review of the record, there is no indication that the hearing officer abused his discretion in making these findings or that the facts were not supported by the hearing record. Consequently, this Department has no basis to disturb the hearing decision.

EDR Ruling Number 2009-2192; February 6, 2009.

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 notice 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

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Employment and 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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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]

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.

ENTER 6/14/ 2023

John Robinson

John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by e-mail transmission as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).