

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

DIVISION OF HEARINGS

In the matter of: Case No. 11904

Hearing Officer Appointment: November 22, 2022
Hearing Dates: January 23 & February 1, 2023
Decision Issued: February 20, 2023

PROCEDURAL HISTORY AND ISSUES

The Grievant was until recently a certified Hearings Officer at the Virginia Employment Commission (the “VEC” or the “Agency”). The Grievant requested an administrative due process hearing to challenge the issuance on October 3, 2022, of a Group II Written Notice for violations of Written Notice Offense Code 01 <Attendance/Excessive Tardiness> by the VEC, with termination due to the accumulation of Written Notices, effective October 3, 2022.

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.

The parties held the hearing over 2 days, January 23, 2023, and February 1, 2023 (*see, Scheduling Order of November 29, 2022, Status Report & Scheduling Order of November 23, 2022 and following correspondence*).

At the hearing, the hearing officer received various documentary exhibits into evidence, namely exhibits 1-23 in the Agency's exhibit binder.¹

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

The hearing officer recorded the hearing.

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 as a Hearing & Legal Services Officer I. AE 6.
2. The Grievant performed a vital function for the VEC as an experienced and senior certified hearing officer assessing and adjudicating State unemployment claims.
3. Pursuant to her employee work profile, the Grievant is required to adhere to her established work schedule and to work modified schedules to address business needs and backlogs. AE 6.

¹ References to the agency's exhibits will be designated AE followed by the exhibit number. The Grievant did not offer any exhibits.

4. Accordingly, attendance at and performance of, Grievant's work is critical for the orderly and efficient functioning of the Agency.
5. Despite this critical need, Grievant committed repeated violations over a 10-month period of the Agency's attendance policies.
6. The Grievant failed to report to work as scheduled, had unplanned leave and excessive absences, materially and adversely affecting Agency operations. AE 7.
7. On December 10, 2021, the Grievant was issued a Group 1 Written Notice for excessive absences, unplanned leave and failure to notify her supervisor when Grievant was unable to report to work as scheduled. The Grievant was notified that the VEC expected the situation to be corrected immediately and was warned that the Grievant may be subjected to further disciplinary action as outlined in the Standards of Conduct, to include termination. The Grievant did not grieve this Written Notice.
8. On January 20, 2022, the Grievant was issued a Group II Written Notice and ten (10) days suspension for Grievant's continued pattern of excessive absences, unplanned leave and failure to report to work as scheduled. Grievant was notified again that the behavior needed to be corrected immediately and that if another offense occurred, Grievant would be subjected to further disciplinary action as outlined in the Standards of Conduct, to include termination. The Grievant did not grieve this Written Notice.
9. On July 28, 2022, the Grievant was issued a Group II Written Notice and a thirty (30) day suspension for Grievant's excessive absences. Again, Grievant was notified that Grievant's behavior needed to be corrected immediately in

accordance with the Standards of Conduct or if not corrected, further disciplinary action could ensue. The Grievant did not grieve this Written Notice.

10. Grievant returned to work after her suspension on August 29, 2022.
11. In violation of Agency attendance policies, concerning the present proceeding, Grievant was late for work on 9/09/22, 9/16/22, and 9/19/22. The Grievant called out from work on 9/20/22, 9/21/22 and 9/22/22, also in violation of such policies.
12. No Doctor's note covered the timeframe of the Grievant's tardies or absences in this grievance, as the Grievant freely admitted in the hearing.
13. 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.
14. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.
15. The Department's actions concerning this grievance were reasonable and consistent with law and policy.
16. 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. AE 4.

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.

AE 4.

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. AE 3.

The Grievant's disciplinary infractions were reasonably classified by management as a Group II offense. Failure to report to work without proper notice/approval and failure to follow policy are each listed in the SOC as a Group II offense and a second Group II normally results in discharge. AE 3.

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 level 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 rose to the level of a Group II offense.

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 long commute;
5. the Grievant's past medical diagnoses; 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 policy is 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 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.

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]

ENTER 2/20/2023

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).

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