

Issue: Group III Written Notice with Termination (absence in excess of 3 days without authorization);
Hearing Date: 07/10/18; Decision Issued: 07/12/18; Agency: SVHEC; AHO: John V.
Robinson, Esq.; Case No. 11212; Outcome: No Relief - Agency Upheld.

**COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution**

DIVISION OF HEARINGS

In the matter of: Case No. 11212

Hearing Officer Appointment: May 21, 2018

Hearing Date: July 10, 2018

Decision Issued: July 12, 2018

**PROCEDURAL HISTORY, ISSUES
AND PURPOSE OF HEARING**

The Grievant requested an administrative due process hearing to challenge the issuance of a Group III Written Notice with termination issued by Management of the Southern Virginia Higher Education Center (the "Agency"), as described in the Grievance Form A dated May 8, 2018. The Grievant is seeking the relief requested in her Grievance Form A, namely reinstatement.

The hearing officer issued a Scheduling Order entered on May 24, 2018 (the "Scheduling Order"), which is incorporated herein by this reference.

On May 24, 2018, the Grievant participated in an initial pre-hearing conference call and agreed to participate in her grievance hearing on July 10, 2018. However, on the morning of July 10, 2018, the Grievant informed the hearing officer and the Agency that she did "not wish to proceed with the grievance against [the Agency]" and would not participate in the hearing which

she had requested. The Grievant did not participate as scheduled and the Agency represented by its attorney, proceeded to present its case. The 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 Agency into evidence at the hearing¹.

No open issues concerning non-attendance of witnesses or non-production of documents remained by the conclusion of the hearing.

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.

APPEARANCES

Representative for Agency
Witnesses for Agency

FINDINGS OF FACT

1. The Grievant was employed by the Agency as an Associate Director of Customized Training.
2. The Grievant supervised 3 Agency employees and the Agency only has a total of 52 employees to fulfil its critical educational mission. The Agency oversees a comprehensive collection of need-based workforce programming, training and research-based services targeted at revitalizing the regional economy by increasing the competitiveness of Southern Virginia business and industries.

¹ References to the Agency's exhibits will be designated AE followed by the exhibit number.

3. Staffing and timely attendance by staff are critical.
4. Pursuant to Agency Attendance Policy 1.25:

Employees are expected to:

- adhere to their assigned work schedules,
- take breaks and lunch periods as authorized,
- notify management as soon as possible if they are unable to adhere to their schedules, such as late arrivals or early departures, and
- work overtime hours when required by management.

AE 4.

5. The Grievant violated policy by failing to call in and failing to show for duty on April 2, 3 and 4 and 5, 2018. The Grievant has provided no Doctor's note for these absences.
6. Prior to these unauthorized absences, the Grievant had violated the attendance policy numerous times and had received numerous warnings and counselings.
7. On April 9, 2018, the Grievant's supervisor issued a Group III Written Notice with termination for absence in excess of 3 workdays without authorization.
AE 3.
8. The Grievant's absences disrupted Agency operations, adversely affecting the Agency's operations.
9. The testimony of the Agency witnesses was credible. The demeanor of the Agency witnesses was open, frank and forthright.

ADDITIONAL FINDINGS, 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. AE 5. 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.

Pursuant to DHRM Policy No. 1.60 and Agency policy, the Grievant's conduct of failing to notify her supervisor of her absence from work and failing to show for work on April 2, 3, 4, & 5, 2018 could clearly constitute a Group III offense, as asserted by the Agency. Absence in excess of 3 workdays without authorization is specifically included as an example of a Group III Offense in the SOC. AE 5. In this instance, the Agency appropriately determined that the Grievant's violations of its attendance policy constituted a Group III Offense.

As previously stated, the Agency's burden is to show upon a preponderance of evidence that the discipline was warranted and appropriate under the circumstances. The hearing officer agrees with the Agency's attorney that the Grievant's disciplinary infractions on April 2, 3, 4, and 5, 2018 justified the Group III Written Notice by Management. Accordingly, the Grievant's behavior constituted misconduct and the Agency's discipline is consistent with law and consistent with policy, being properly characterized as a Group III terminable offense.

In this case, the Grievant was clearly given by the Agency both pre-discipline and post-discipline constitutional and policy due process rights. AE 3.

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 did not specifically raise mitigation and 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, those referenced herein and all of those listed below in his analysis:

1. the Grievant’s years of service to the Agency; and
2. the demands of the Grievant’s work environment.

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 attendance policy is important to the proper functioning of the Agency and the Agency issued to the Grievant significant prior progressive counseling and discipline concerning attendance and notification infractions. 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 EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

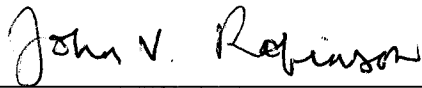
or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

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: 7/12/2018



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 EEDR before filing a notice of appeal.