

Issue: Group III Written Notice with Termination (sleeping during work hours); Hearing Date: 08/15/18; Decision Issued: 08/21/19; Agency: DBHDS; AHO: John V. Robinson, Esq.; Case No. 11245; Outcome: No Relief - Agency Upheld; Administrative Review Ruling request received 09/05/18; EDR Ruling No. 2019-4778 issued 09/28/18; Outcome: AHO's decision affirmed.

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

DIVISION OF HEARINGS

In the matter of: Case No. 10299

Hearing Officer Appointment: July 19, 2018

Hearing Date: August 15, 2018

Decision Issued: August 21, 2018

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

The Grievant requested an administrative due process hearing to challenge the termination of her employment pursuant to a Group III Written Notice issued by Management of the Department of Behavioral Health and Developmental Services as described in the Grievance Form A.

The Grievant is asserting the issues and seeking the relief requested in her Grievance Form A including reinstatement.

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

At the hearing, the Grievant was represented by her advocate and the Agency was represented by its advocate. Both 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
Grievant
Witnesses for Agency
Witnesses for Grievant

FINDINGS OF FACT

1. The Grievant was employed by the Agency as a Human Services Care Specialist at a secure facility (the "Facility").
2. On Sunday, May 20, 2018, the Grievant was in Building 39 of the Facility, a maximum security forensic unit, long-term treatment area, housing dangerous patients who present a severe safety risk to staff and other patients. Accordingly, staff must be extremely vigilant while monitoring the patients for antecedents or triggers which could portend a safety risk.

¹ References to the Agency's exhibits will be designated AE followed by the exhibit number. References to the Grievant's exhibits are to the page numbers of the facsimile transmission.

3. The Grievant was sitting near a table at which 2 patients were playing chess and/or checkers during the 10:00 a.m. to 11:30 a.m. activity period.
4. A recreational therapist found the Grievant for lengthy periods of time to be less than alert, with her eyes closed.
5. The Grievant is a former supervisor.
6. The Grievant's lack of alertness presented a safety risk to the Facility.
7. The Grievant admitted to her supervisor that she was in an activity on Sunday, May 20, 2018 with her eyes closed and patients present. AE 1 at 4.
8. On May 23, 2018, the Grievant signed the due process memorandum provided to her by her supervisor. This informed the Grievant of management's intent to issue the Grievant a correction action in the form of a Group III Written Notice with Termination for the Grievant's lack of alertness and offered the Grievant an opportunity to respond to her supervisor by the end of her shift on May 25, 2018.
9. The Grievant timely submitted a written response to her supervisor. In the Written Statement, the Grievant stated:

I was bored, but mostly I was nauseated and dizzy caused by my medication. I was reluctant to share my personal information, but now I have no other choice. With my condition, affecting my work life, tasks have become a little challenging while in this period of adjustment. On May 20, 2018, I had taken my medication later than usual which caused a little nauseated, however, I still was alert within group. With the constant side effects that comes along with my medication, such as sluggishness, dizziness and nausea I now understand my client's perspective with being non-compliant with my medication side effects. With fighting nausea and dizziness I pushed myself to come to work due to my occurrences.
10. 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 (the

"SOC"). 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 could clearly constitute a Group III terminable offense, as asserted by the Agency. AE 5.

In this instance, the Agency appropriately determined that the Grievant's violations of its alertness policy constituted a Group III Offense subject to termination.

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 advocate that the Grievant's disciplinary infractions 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 offense.

In this case, the Grievant was clearly given by the Agency both pre-discipline and post-discipline constitutional and policy due process rights. The Grievant responded to the proposed discipline.

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 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 herein and all of those listed below in his analysis:

1. the Grievant's good, lengthy service to the Agency;
2. the often difficult and stressful circumstances of the Grievant's work environment;
3. the fact that the Grievant received an overall rating of "Contributor" in the 2018 evaluation cycle (AE 4);
4. the fact that the Grievant received an overall rating of "Contributor" in the 2017 evaluation cycle (AE 4);
5. the Grievant's medical issues; and
6. the fact that the Grievant was extremely well liked.

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 alertness policy is important to the proper functioning, safety and security of the Agency and the Agency issued to the Grievant significant prior discipline concerning infractions, including a Group 1 Written Notice in March 2018 and a Group II Written Notice in September 2015. AE 6. 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 each offense 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

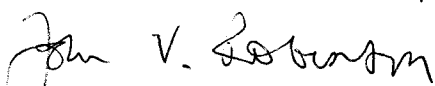
or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

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: 8/21/18



John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail transmission where possible and 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.