

Issues: Group III Written Notice with termination (absent for 3 days without authorization); Hearing Date: 10/17/07; Decision Issued: 10/17/07; Agency: DJJ; AHO: John V. Robinson, Esq.; Case No. 8714; Outcome: No Relief, Agency Upheld in Full.

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

**DIVISION OF HEARINGS**

In the matter of: Case No. 8714

Hearing Officer Appointment: September 14, 2007

Hearing Date: October 17, 2007

Decision Issued: October 17, 2007

PROCEDURAL HISTORY AND ISSUES

In his Grievance Form A concerning this proceeding (the "Form A"), the grievant requested a hearing to challenge the termination of his employment by the Department of Juvenile Justice (the "Department" or the "Agency") and is seeking the relief requested in his Grievance Form A, including reinstatement.

In this proceeding the agency bears the burden of proof and must show by a preponderance of the evidence that the termination was warranted and appropriate under the circumstances.

The agency was represented by an advocate, an Assistant Superintendent at the Department's subject facility. The grievant did not appear at the hearing and hardly participated in the proceeding at all, as shown below and in the record of this proceeding. Following a pre-hearing conference held by telephone on September 21, 2007, in which the grievant did not participate, the hearing officer issued a Scheduling Order entered on September 21, 2007, which is incorporated herein by this reference.

The hearing officer was appointed on September 14, 2007. Under the grievance procedure, a hearing must be conducted and a written decision issued within 35 calendar days of the hearing officer's appointment. Accordingly, the deadline for issuance of the hearing officer's written decision in this administrative proceeding is October 19, 2007.

The hearing officer's legal assistant left a voice mail message for the Grievant on Friday, September 14, 2007 at approximately 10:50 a.m. with just her name, from the hearing officer's office and phone number. The Grievant returned the call between 12:00 p.m. and 12:15 p.m. on Monday, September 17, 2007, sounding somewhat confused because he was not sure who the legal assistant was and why she was contacting him. The legal assistant explained that she worked for the hearing officer and that the hearing officer had been assigned as the hearing officer for his grievance against the Department of Corrections. The Grievant replied "Oh" and after the legal assistant explained that she needed to schedule a pre-hearing conference call, the

Grievant asked if he could call the legal assistant “right, right back”. No call was made right back by the Grievant and the legal assistant called and left another voice mail message for the Grievant on Monday, September 17, 2007 at 3:50 p.m. telling him that it was imperative that the Grievant contact her or the hearing officer or else his input would not be heard and he would not be able to participate in scheduling the hearing.

On Tuesday afternoon, September 18, 2007 after still not hearing anything from the Grievant, the hearing officer mailed a letter to the Grievant informing him that a pre-hearing conference call had been scheduled for 10:15 a.m. on Friday, September 21, 2007.

Upon her arrival at the office on Friday, September 21, 2007 at approximately 9:00 a.m., the legal assistant’s phone showed two missed calls on the caller ID that appeared as “Private Caller” on September 21 at 3:26 a.m. and at 4:00 a.m. The first call at 3:26 a.m. was a hang up on the voice mail system at the hearing officer’s office. With the second call was a new voice mail message left at 4:01 a.m. from the Grievant. The following is a verbatim transcription of that voice mail message.

Hey, how ya doing, this is [the Grievant]. I don’t mean to call so late. I’ve been going back and forth from Richmond to um, Atlanta, because my aunt was sick and she just passed away and tomorrow is going to be the funeral so um I won’t be able to do the conference going to have to reschedule. After the funeral I’ll give you guys a call and see what we can do.

Obviously, from this voice mail message, the Grievant had received the letter mailed to him by the hearing officer informing him of the conference call.

Because the deadline for the hearing officer’s written decision was still October 19, 2007, because of the lapse of time since the hearing officer’s appointment and because of severe difficulty in communicating with the Grievant, the hearing officer proceeded to schedule items concerning the hearing in the scheduled pre-hearing conference call. However, the Scheduling Order was emphatic that if at any time before October 17, 2007 the Grievant decided he wanted to participate in the process which he initiated, he could contact the hearing officer to schedule another pre-hearing conference call with the hearing officer and the agency representative(s). The hearing officer stated in the Scheduling Order that he could, in the exercise of his discretion, adjust deadlines specified in the Scheduling Order concerning exchange of exhibits and witness lists, the hearing date, etc. subject to applicable rules and regulations.

Neither the hearing officer or the Agency heard from the Grievant again.

The hearing officer received various documentary exhibits of the Agency into evidence at the hearing, namely Agency Exhibits A through H.<sup>1</sup> The parties did not request from the hearing officer any orders for witnesses or documents.

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<sup>1</sup> References to the agency’s exhibits will be designated AE followed by the exhibit number.

## APPEARANCES

Representative for Agency  
Two Additional Witnesses for Agency

## FINDINGS OF FACT

1. The grievant was a correctional officer, previously employed by the agency at a juvenile correctional facility.
2. The grievant was authorized to go on sick and disability leave from the Agency from March 19, 2007 until April 1, 2007. AE A and C.
3. To date, the Agency and its third party administrator still have not received from the grievant or his treating physician any medical documentation to substantiate the grievant's claim that he was disabled past April 1, 2007.
4. The grievant did supply to the Agency a copy of a note on a page from a prescription pad, ostensibly from a New York physician, simply stating that such physician had examined the grievant on March 19, 2007, April 9, 2007 and May 7, 2007.
5. When the grievant met on July 10, 2007 with the Superintendent of the subject facility at the second resolution step of his grievance proceeding, the grievant acknowledged that he needed to supply the Agency with more medical information to substantiate his claims but, again, never did so.
6. The grievant was on leave from the Agency without authorization or a satisfactory reason, as asserted by the Agency, for considerably in excess of three (3) days. Such unauthorized leave by the grievant continued until the effective date of the termination of his employment by the Agency without the Agency receiving any substantive justification for the grievant's absence.
7. The grievant has made little or no effort to justify his unauthorized leave and has utterly failed to communicate with the Agency or the hearing officer concerning his assertions regarding his grievance.
8. The grievant has totally failed to provide any explanation of why he could not work.
9. The agency terminated the grievant's employment effective May 18, 2007, pursuant to a Group III Written Notice because: "You have been absent from work since 4/1/07 without approval or authorization." AE E.

10. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.
11. The Department's actions concerning this grievance were reasonable and consistent with law and policy.
12. The testimony of the Agency witnesses was both credible and consistent on the material issues before the hearing officer. The demeanor of the Agency witnesses at the hearing was candid and forthright.

#### APPLICABLE LAW AND OPINION

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 Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards 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. Section V.B.3 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group III

offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the termination of the grievant's employment was warranted and appropriate under the circumstances.

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 (4<sup>th</sup> Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, 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 Department's actions were clearly consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer. *Id.*

As the agency argued in this proceeding, the policy requires dismissal. The Department, exercising its professional judgment through the appropriate personnel, and applying the Commonwealth's policy of progressive discipline, decided that termination of the grievant's employment was warranted and appropriate under the circumstances. Such a decision was entirely appropriate and justified. The agency argues that the action taken by Management was entirely appropriate and that it has, in essence, already taken full account of any mitigating factors. The gravity of the violation and the inexplicable lack of communication and cooperation from the grievant in the context of a juvenile correctional facility precludes a lesser sanction. The hearing officer agrees.

#### DECISION

The agency has sustained its burden of proof in this proceeding and the action of the agency in removing the grievant from his employment 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 in this proceeding 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

As the *Grievance Procedure Manual* sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

**Administrative Review:** This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14<sup>th</sup> Street, 12<sup>th</sup> Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, One Capitol Square, 830 East Main, Suite 400, Richmond, Virginia 23219 or faxed to (804) 786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days.) A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or

2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

**Judicial Review of Final Hearing Decision:** Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

ENTER:

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John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by Certified Mail, Return Receipt Requested, U.S. Mail, e-mail transmission and facsimile transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).